



Australian
Human Rights
Commission

**PD v Commonwealth
of Australia (Department of
Home Affairs)**

[2020] AusHRC 138

28 October 2020

PD v Commonwealth (Department of Home Affairs)

[2020] AusHRC 138

Report into arbitrary detention and use of handcuffs

Australian Human Rights Commission 2020

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) into the human rights complaint of Ms PD, alleging a breach of her human rights by the Department of Home Affairs (Department).

Ms PD was detained in an immigration detention centre in Australia between 2 November 2017 and 9 February 2018. She complains that her detention was arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

Ms PD also alleges that her treatment by Serco in being unnecessarily handcuffed for 13 hours, while being transported to Villawood Immigration Detention Centre (VIDC) was inconsistent with or contrary to article 10(1) of the ICCPR.

As a result of this inquiry, I have found that the Department's decision not to invite the Minister to consider exercising his discretion under s 195A and s 197AB contributed to the continued detention of Ms PD, without consideration of whether that detention was justified in the particular circumstances of Ms PD's case, was inconsistent with or contrary to article 9(1) of the ICCPR.

I also found that the prolonged use of handcuffs for 13 hours, may have been contrary to Ms PD's rights under article 10 of the ICCPR to be treated with humanity and with respect for her inherent dignity.

On 14 August 2020, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 21 September 2020. That response can be found in Part 11 of this report. The notice below largely concerns information relevant as at 14 August 2020 when it was issued.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, reading "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

Emeritus Professor Rosalind Croucher AM

President

Australian Human Rights Commission

October 2020

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1 Introduction to this inquiry

1. This is a notice setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Ms PD against the Commonwealth of Australia, Department of Home Affairs (Department) alleging a breach of her human rights.
2. This is a complaint of arbitrary detention contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).¹ The right to liberty and freedom from arbitrary detention is not protected in the Australian Constitution. The High Court has upheld the legality of indefinite detention under the Migration Act.² As a result, there are limited avenues for an individual to challenge their detention.
3. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights.
4. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary and proportionate on the basis of the individual's particular circumstances. Furthermore, there is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than detention to achieve the ends of the immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'.
5. The approach under current government policy is contrary to what is required under human rights obligations Australia has committed to by ratifying the ICCPR. The Department conducts monthly case reviews that consider if a person's placement in detention is justified. However, these reviews focus on whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual for reasons specific to them, such as a risk of absconding or a threat to national security.
6. In this case. Ms PD arrived in Australia on a Student visa on 24 November 1999. Ms PD has a complex immigration history. Relevantly, on 18 October 2017, the Minister for Immigration and Border Protection personally refused Ms PD's application for a Partner visa under s 501(1) of the *Migration Act 1958* (Cth) (Migration Act).

7. Ms PD was detained under s 189(1) of the Migration Act between 2 November 2017 and 9 February 2018.
8. Ms PD complains that her detention was arbitrary, and therefore inconsistent with or contrary to article 9(1) of the ICCPR.³
9. Ms PD also alleges that her treatment by Serco while being transported to Villawood Immigration Detention Centre (VIDC) was inconsistent with or contrary to article 10(1) of the ICCPR.
10. This inquiry is being undertaken pursuant to s 11(1)(f) of the AHRC Act.
11. This notice is issued pursuant to s 29(2) of the AHRC Act setting out the findings of the Commission in relation to Ms PD's complaint.
12. Ms PD has requested that her name not be published in connection with this inquiry. I consider that the preservation of her anonymity is necessary to protect her human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and refer to the complainant as Ms 'PD' in this document.

2 Summary of findings and recommendations

13. As a result of this inquiry, I find that the decision of the Department not to invite the Minister to consider exercising his discretion under s 195A and s 197AB contributed to the continued detention of Ms PD, without consideration of whether that detention was justified in the particular circumstances of Ms PD's case, was inconsistent with or contrary to article 9(1) of the ICCPR.
14. I find that at the time of her detention, Ms PD was an unlawful non-citizen and her subsequent detention was not unlawful.
15. I find that the prolonged use of restraints for 13 hours, may have been contrary to Ms PD's rights under article 10 of the ICCPR to be treated with humanity and with respect for her inherent dignity.
16. I make the following recommendations:

Recommendation 1

The Department should regularly conduct open periodic reviews of the necessity of detention for people in immigration detention centres. The reviews should focus on whether detention in an immigration detention centre is necessary in the specific case and if detention is not considered

necessary, the identification of alternate means of detention or the grant of a visa should be considered.

Recommendation 2

I recommend that the Commonwealth pay to Ms PD an appropriate amount of compensation to reflect the distress she suffered as a result of being placed in restraints for 13 hours.

3 Background

17. Ms PD is a national of Japan. She arrived in Australia on 24 November 1999 on a Student visa.
18. Ms PD's Student visa was cancelled on 29 September 2003 pursuant to s 116(1)(b) of the Migration Act. Following a long and complex history of litigation, after her High Court proceedings were dismissed, her associated Bridging visa expired. As a result, Ms PD was detained in immigration detention between 19 May 2006 and 26 July 2006 for a period of 68 days.
19. In 2011, she lodged a complaint with the Commission alleging that her detention was arbitrary. The Commission conducted an inquiry and found that the failure to place Ms PD in a less restrictive form of detention was arbitrary contrary to article 9 of the ICCPR.⁴
20. On 27 March 2009, Ms PD was convicted of the following offences:
 - Using a carriage service to harass (two charges) – six months imprisonment on each charge
 - Using a carriage service to make a threat (two charges) – six months imprisonment on each charge
 - Contempt – four months imprisonment.
21. Ms PD was released on parole on 4 December 2009.
22. On 12 April 2013, Ms PD lodged a Partner visa application.
23. On 18 October 2017, the application was refused by the Minister for Immigration and Border Protection under s 501(1) of the Migration Act. Her associated Bridging visa was cancelled the same day and she became an unlawful non-citizen.
24. On 2 November 2017, Ms PD was detained under s 189(1) of the Migration Act for a period of 100 days.

25. On 9 November 2017, Ms PD sought judicial review of the Minister's decision to refuse her a Partner visa.
26. On 9 February 2018, Ms PD was released from immigration detention after the Federal Court set aside the Minister's decision to refuse her a Partner visa.

4 Conciliation

27. The Commonwealth indicated that it did not want to participate in conciliation of the matter.

5 Procedural history of this inquiry

28. On 6 December 2019, I issued a preliminary view in this matter and gave Ms PD, the Department and the Minister the opportunity to respond to my preliminary findings.
29. On 22 February 2020, the Department responded to my preliminary view.
30. On 16 March 2020, I issued a second preliminary view in relation to a further complaint made by Ms PD that the entire period of her detention was unlawful in light of the decision in [REDACTED].
31. On 6 April 2020, the Department responded to my preliminary view.

6 Legislative framework

6.1 Functions of the Commission

32. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with, or contrary to, any human right.
33. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
34. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

6.2 What is an 'act' or 'practice'?

- 35. The terms 'act' and 'practice' are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
- 36. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
- 37. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.⁵

6.3 What is a human right?

- 38. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
- 39. Article 9(1) of the ICCPR relevantly provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- 40. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- 41. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- 42. Article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

7 Arbitrary detention

- 43. Ms PD complains about her detention in an immigration detention centre. This requires consideration to be given to whether her detention was 'arbitrary' contrary to article 9(1) of the ICCPR.

7.1 Law on article 9 of the ICCPR

44. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:

- (a) 'detention' includes immigration detention⁶
- (b) lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances⁷
- (c) 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability⁸
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁹

45. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be 'arbitrary' because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.¹⁰

46. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'.¹¹

47. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations,

sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.¹²

48. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, continuing immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth of Australia) in order to avoid being 'arbitrary'.¹³
49. It is therefore necessary to consider whether the detention of Ms PD in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to her, and in light of the available alternatives to closed detention. If her detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

7.2 Act or practice of the Commonwealth

50. Ms PD was an unlawful non-citizen, meaning the Migration Act required that she be detained.
51. However, there are a number of powers that the Minister could have exercised either to grant a visa, or to allow detention in a less restrictive manner than in a closed immigration detention centre.
52. Section 197AB of the Migration Act permits the Minister, where he thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.
53. In addition to the power to make a residence determination under s 197AB, the Minister also has a discretionary non-compellable power under s 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
54. I consider the following act of the Commonwealth as relevant to this inquiry:
 - The decision of the Department not to refer the case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under s 195A or s 197AB of the Migration Act.

7.3 Findings

55. Ms PD was held in immigration detention for a period of 100 days between 2 November 2017 and 9 February 2018.
56. On 21 October 2017, the Hon Peter Dutton MP, Minister for Home Affairs, re-issued guidelines to explain the circumstances in which he may wish to consider exercising his residence determination power under s 197AB of the Migration Act.¹⁴
57. These guidelines provide that the Minister would not expect referral of cases where a person does not meet the character test under s 501 of the Migration Act, unless there were exceptional circumstances.
58. The guidelines also state that the Minister will consider cases where there are 'unique or exceptional circumstances'.
59. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.¹⁵ In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
 - circumstances that may bring Australia's obligations as a party to the ICCPR into consideration
 - the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community
 - compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person.
60. Similarly, guidelines have been published in relation to the exercise of the Minister's power under s 195A of the Migration Act to grant a visa to a person in immigration detention.
61. In April 2016, Minister Dutton re-issued s 195A guidelines, which are the current guidelines in use by the Department. These guidelines provide that the Minister would not expect referral of cases where a person does not meet the character test under s 501 of the Migration Act. Although there is no exception for unique or exceptional circumstances—unlike the other ministerial intervention guidelines referred to above—under these guidelines the Minister will consider cases where there are compelling or compassionate circumstances.

62. The Department did not refer Ms PD to the Minister for consideration of his Ministerial Intervention powers. It is my view that Ms PD's case should have been referred to the Minister. In my view the existence of the following factors are relevant to an assessment as to whether Ms PD's case presented 'unique or exceptional circumstances':
- She was resident in Australia for 18 years prior to her detention and has significant ties to the community evidenced by numerous letters of support that accompanied her Partner visa application.
 - Ms PD's offences occurred almost 11 years ago and she has not offended since.
 - Her husband is an Australian permanent resident since 1965.
63. In response to the Commission's question regarding whether alternative, less restrictive detention options had been considered, on 20 December 2017 the Department advised it had not:
- [Ms PD] does not present with any significant health or welfare issues or vulnerabilities that cannot be addressed in a detention environment. As such her case has not been identified by her case manager as one that should be referred as priority for consideration of placement under residence determination.
64. On 7 November 2017, a Detention Review Manager conducted a review of Ms PD's detention. In response to the question, 'have alternatives to detention, including the grant of a bridging visa been considered', it is noted:
- Yes. [Ms PD] is not able to apply for a bridging visa because of the provisions of section 501E.
65. However, the Department did not refer Ms PD to the Minister for a residence determination order or grant of a bridging visa. In response to my preliminary view, the Department providing the following reasons for this decision:
- As for all cases, [Ms PD]'s case was considered through the Community Protection Assessment Tool (CPAT), monthly case reviews and Detention Review Committee meetings as to whether there were any circumstances that indicated [Ms PD] could not be appropriately managed within a detention centre environment. During her time in immigration detention, [Ms PD] did not present with any significant health or welfare issues or vulnerabilities. Furthermore, no issues were identified through the Detention Review Committee as it was expected that [Ms PD]'s immigration status would be resolved within a reasonable timeframe either by release from detention if she was successful in her review of the refusal decision, or removal from Australia if the Federal Court did not find in her favour.

Given the Minister's refusal decision under section 501 of the Act, and as the evidence before the Department indicated [Ms PD] could be appropriately managed in a detention centre environment, [Ms PD]'s Status Resolution Officer did not identify her case as one that should be referred for Ministerial Intervention consideration under either section 195A or 197AB.

66. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary and proportionate on the basis of the individual's particular circumstances. Furthermore, there is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than detention to achieve the ends of the immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'.
67. To comply with these obligations the Department would need to conduct an individualised risk assessment to determine whether any risks an individual may pose to the community could be mitigated, and ongoing reviews to determine whether detention continues to be necessary.
68. The Department conducts monthly case reviews that consider if a person's placement in detention is justified. However, these reviews as highlighted in the Department's response focus on whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual. The reviews of Ms PD's detention did not consider the necessity of her detention.
69. I acknowledge that in 2009 Ms PD was convicted of crimes of sufficient seriousness to attract a sentence of imprisonment. The District Court of Queensland found that Ms PD sent 83 emails over a period of 18 hours to administrators in the Federal Court, some of these emails contained threatening language. Ms PD made 176 phone calls to Federal Court registries between 13 April and 19 May 2006. The District Court also found that during a telephone call Ms PD threatened to kill two Federal Court registry officers.
70. However, in the Minister's statement of reasons for refusing Ms PD a Partner visa, dated 18 October 2017, he accepted that Ms PD was at a low risk of reoffending:

I find that [Ms PD] remains an ongoing risk of reoffending, albeit low in light of her subsequent lawful conduct.

71. In his reasons the Minister also accepted that [Ms PD] had significant ties to the community and 'remained conviction free for some 11 years and that her behaviour in the community since her release from prison has been disciplined'.

72. It is my view that the decision of the Department not to invite the Minister to consider exercising his discretion under s 195A and s 197AB contributed to the continued detention of Ms PD, without consideration of whether that detention was justified in the particular circumstances of Ms PD's case. In my view, that has the result that her detention was arbitrary for the purposes of article 9(1) of the ICCPR.

8 Unlawful detention

73. Ms PD made a further complaint that her entire period of detention was unlawful in light of the decision in [REDACTED] and therefore in breach of article 9(1) of the *ICCPR*.
74. On 18 October 2017, Ms PD's Partner visa application was refused by the Minister for Immigration and Border Protection under s 501(1) of the Migration Act. Her associated Bridging visa was cancelled the same day and she became an unlawful non-citizen. This decision was later quashed by the Federal Court and will be discussed below.
75. On 2 November 2017, Ms PD was detained under s 189(1) of the Migration Act for a period of 100 days.
76. Under Australian law, the lawfulness of the decision to refuse Ms PD's visa is a separate issue from that of the lawfulness of Ms PD's detention. The power to detain an individual until a visa is granted or they are removed from Australia under the Migration Act is contained in s 189 and s 196 of the Migration Act.
77. Section 189(1) of the Migration Act provides:
- (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
78. Accordingly, in order to detain a person under s 189 of the Migration Act, a departmental officer must either know or 'reasonably suspect' that the person is an unlawful non-citizen. Once an officer of the Department has the requisite knowledge or reasonable suspicion, detention under s 189(1) is mandatory.
79. In *Ruddock v Taylor*,¹ the High Court discussed the meaning of 'reasonably suspects' under s 189 of the Migration Act. The majority found that 'what constitutes reasonable grounds for suspicion should be judged against what was known or reasonably capable of being known at the relevant time'.²

¹ *Ruddock v Taylor* (2005) CLR 612, 622.

² *Ruddock v Taylor* (2005) CLR 612, 622.

Consequently, a 'suspicion' under s 189 of the Migration Act can still be 'reasonable' where it is based on an opinion that is later found to be legally flawed.

80. The majority observed in *Ruddock v Taylor*, that each officer had been provided with what, on its face, appeared to be a regular and effective decision of the Minister to cancel the respondent's visa. Each officer checked whether the respondent held any other visa and only detained the respondent upon finding that he did not hold another visa.³ It had not been suggested that the officers had acted in bad faith. The majority concluded that the suspicion held by each officer was reasonable in the circumstances.⁴
81. Ms PD alleges that the Department officers had no power or authority to detain her under s 189(1) because she was not an unlawful non-citizen.
82. As discussed, the lawfulness of the decision to refuse Ms PD's visa is a separate issue from that of the lawfulness of Ms PD's detention.
83. On 9 February 2018 Logan J quashed the decision of the Minister to refuse Ms PD's Partner visa application. His Honour found that the Minister failed to accord Ms PD procedural fairness when considering 'Risk to the Australian Community'. He found that the Minister failed to have regard to two pieces of relevant information submitted by Ms PD in support of her application.
84. It is necessary for me to assess whether the facts the detaining officer was 'reasonably capable of knowing at the relevant time' were compatible with a 'reasonable suspicion' that Ms PD was an unlawful citizen.
85. What is relevant to my consideration is whether the error in the Minister's decision to refuse the Partner visa was 'reasonably capable' of being known at the time the decision to detain Ms PD was made.
86. The items of information the Minister failed to consider in his statement of reasons were a certificate of completion of a course, 'Emotional Intelligence', and a letter by Ms PD's psychiatrist, Dr Mark Whittington, dated 20 September 2017. It is my view, that it is not apparent on the face of the Minister's statement of reasons that he did not consider these two documents which amounted to a jurisdictional error. I consider the statement of reasons appeared to be a regular and effective decision of the Minister to refuse Ms PD a Partner visa. I do not consider that any further search or inquiries on the part of the detaining officer would have made this error apparent.

³ *Ruddock v Taylor* (2005) CLR 612, 628.

⁴ *Ruddock v Taylor* (2005) CLR 612, 628.

87. Accordingly, I find that it was reasonable for the detaining officer to suspect that Ms PD was an unlawful non-citizen and her subsequent detention was not unlawful.

9 Right of detainees to be treated with humanity and dignity

88. Article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

89. General Comment 21 on article 10(1) of the ICCPR by the UN HR Committee states:

Article 10, paragraph 1, imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons.¹⁶

90. The above comment supports the conclusions that:

- Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons.
- The threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of art 7 of the ICCPR.
- The article may be breached if the detainees' rights, protected by one of the other articles in the ICCPR, are breached unless that breach is necessitated by the deprivation of liberty.

91. The above conclusions about the application of article 10(1) are also supported by the jurisprudence of the UN HR Committee¹⁷ which emphasises that there is a difference between the obligation imposed by article 7(1) not to engage in 'inhuman' treatment and the obligation imposed by article 10(1) to treat detainees with humanity and respect for their dignity. In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,¹⁸ the Supreme Court of New Zealand explained the difference between these two concepts as follows:

A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment ... the words 'with humanity' are I think properly to be contrasted with the concept of 'inhuman treatment' ... The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts 'inhuman' with 'inhumane'.¹⁹

92. The decision considered provisions of the New Zealand Bill of Rights, which are worded in identical terms to articles 10(1) and 7(1) of the ICCPR.

9.1 Transfer to VIDC

93. Ms PD alleges that her human rights were breached during her transfer by van to VIDC. She alleges that she was unnecessarily handcuffed, was not provided any meals or a blanket.

Use of handcuffs

94. Ms PD complains that she was handcuffed for 13 hours when she was transferred to VIDC by van on 2 November 2017.
95. The Department confirms that Ms PD was restrained using a SureLock body belt restraint for the duration of the transfer from Southport Police station in Queensland to VIDC totalling approximately 13 hours.
96. The Department conducted an initial risk assessment and considered Ms PD to be 'high risk' for escort purposes because of her past criminal history of violence, being a single adult and because she had been detained for less than 30 days. The Department authorised the use of restraints during the transfer to VIDC based on the risk assessment.
97. The risk assessment document notes Ms PD's 2009 offences and previous disruptive behaviour in court:

[Ms PD] previously stated on numerous times she was suicidal – one attempt to hang herself. Spits, screams and makes false accusations. Subject is irrational behaviours [sic] during court trials and exposed herself to the jury. Threatening to soil herself and screaming non-stop. Wrestled with Corrective Service Officers screaming that the officers were trying to rape and kill her. She spat in the face of a Corrective Service Officer. Volatile and unpredictable.

98. Ms PD disputes the assessment of her as 'high risk' and submits that the decision to use handcuffs was unreasonable:

In the present case, the Minister acknowledged in his reasons my impeccable track record for 11 years after the conviction. Furthermore, I was taken into

detention at home without the use of handcuffs four hours prior to the time of the use of the handcuffs, was transported to the Southport Police State in a police van without handcuffs and went through all the interviews without handcuffs. Those facts should have been taken into account. Furthermore, since the assessment of my fitness to travel was undertaken through the interviews at the Police Station, the risk assessment should also have been undertaken. The failure of these [sic] makes the decision to use handcuffs unreasonable.

99. While the conduct the Department relies upon in assessing Ms PD as high risk occurred ten years ago, I accept it was of sufficient seriousness to render the assessment reasonable.
100. I accept that it may have been necessary to initially restrain Ms PD to transfer her from the police station to the van until the journey had embarked and potentially during toilet breaks. However, I am of the view that it may not have been justified to have required Ms PD to be in restraints for the entire journey.
101. In response to my preliminary view, the Department submitted that restraints were necessary for the duration of the transfer:

While there were considerable concerns about the likelihood of [Ms PD] to undertake violent or aggressive behaviour during the transport operation, it should be noted that she was, by far and large, cooperative and non-violent during the journey. This allowed Serco to ensure that the maximum range of movement was afforded for [Ms PD] during the vehicle transport and at the frequent stops made along the way for personal ablutions and drinks/meals. The range of movement was extended to its maximum length for the duration of the trip.

As noted in the Escort Operational Order (EEO) restraints were checked frequently and showed no signs of rubbing or chafing. Furthermore at no time did [Ms PD] comment on the restraints being too tight or uncomfortable. It is also noted in the EEO that [Ms PD] was socialising with staff and appeared in good spirits, which is a further indication that [Ms PD] was comfortable during the journey.

[Ms PD]'s compliant behaviour in the early part of the journey however cannot, and should not be relied upon as the basis to remove the risk mitigation, because she was inherently unpredictable as indicated on previous occasions. It would not have been correct to deduce that her behaviour displayed in the early part of the journey was an accurate indication of her likely behaviour in the near future.

It should not be discounted that the SureLock Body Belt in itself provides a deterrent for dangerous behaviour in the first instance. Prevention of the behaviour commencing in the first instance is a far better outcome than use of force in response to violent or aggressive behaviour, during which injury

could occur. As noted above there was insufficient certainty, due to her history of behavioural issues and criminal charges, as to how [Ms PD] would behave while unrestrained. Therefore premature removal of the SureLock Body Belt Restraint would have unacceptably increased the risk profile of the operation.

102. The Department's Detention Services Manual provides that mechanical restraints such as handcuffs may be approved by the Secretary of the Department for use in immigration detention facilities. In relation to travel to and from detention, the Manual says:

Restraint during escorted visits and scheduled travels only applies to detainees who have a serious or violent criminal history, those who have a history of escape, and those for whom the risk assessment indicates that they potentially pose a high risk. In practice this means that reasonable force and/or restraint will be determined following risk-management procedures.

103. The Manual further provides that instruments of restraint must be removed once the threat has diminished and the officer believes that the detainee is no longer a threat to themselves, others or property.
104. In my recent report on Use of Force in Immigration Detention [2019] AusHRC 130, I considered in detail the use of handcuffs in immigration detention facilities. I recommended that the Detention Services Manual and the manuals for private detention service providers engaged by the Department make clear that:
- (a) there is a presumption against the use of restraints, including handcuffs, during transfers between detention centres and during escorts to appointments
 - (b) the use of restraints, including handcuffs, should be a measure of last resort
 - (c) prior to each occasion when the use of restraints is proposed in relation to a detainee, there should be a new individualised risk assessment for that detainee in the context of the particular operation that takes into account:
 - (i) any general risk assessment prepared by the detention operator based on the relevant incidents that a detainee has been involved in while in immigration detention
 - (ii) the particular requirements of the operation, for example, a transfer between detention centres
 - (iii) whether that operation can be conducted safely without the need for restraints to be applied
 - (d) the risk assessment should consider whether restraints should be applied during transit and, if so, at which point in the journey it may be appropriate to remove them

- (e) restraints should not be routinely applied to a particular class of detainees, including detainees generally assessed as being 'high' risk, without an individualised risk assessment of the kind described above being carried out
- (f) restraints should be used only for the shortest period of time necessary in the circumstances
- (g) the necessity for the continued use of restraints should be regularly re-evaluated during the course of an operation.

105. The Commission asked the Department whether the necessity for the use of restraints was periodically assessed. In response, the Department confirmed it was not:

The direction to Serco was that [Ms PD] be mechanically restrained for the transfer between Southport Police Station and the VIDC. Serco did not seek to remove the restraints prematurely to the completion of the transfer. Serco is not aware of any change in the circumstances during the journey which would give reason for the escorting team to doubt the potential for [Ms PD] to engage in refractory behaviour, or for the team to challenge the necessity of the restraints.

106. I have reviewed the escort log report prepared by Serco that is a contemporaneous record of the transfer of [Ms PD] to VIDC. From this report it appears that [Ms PD] was compliant, and the transfer was conducted without incident. The Serco officer notes on four occasions that [Ms PD] presented 'nil issues' during the transfer.
107. On the material before me, it does not appear that [Ms PD] posed a threat during the transfer that was sufficient to justify the use of restraints for the entire journey. Accordingly, it is my view that the prolonged use of restraints for 13 hours, may have been contrary to [Ms PD]'s rights under article 10 of the ICCPR to be treated with humanity and with respect for her inherent dignity.

Conditions during transfer

108. Ms PD states that during the transfer to VIDC by van she was:

- not provided any meals
- not provided a blanket.

109. The Department provides a different version of events, stating that Ms PD was offered food and drink at regular intervals throughout the journey and is documented to have eaten at least two meals during the transfer.

110. The escort log report provided by the Department records Ms PD leaving the vehicle to use the bathroom and being provided with food. There is no record of Ms PD being provided a blanket.
111. It is my view, based on contemporaneous material, that a breach of article 10 has not been established.

10 Recommendations

112. As a result of this inquiry, I find that the decision of the Department not to invite the Minister to consider exercising his discretion under s 195A and s 197AB contributed to the continued detention of Ms PD, without consideration of whether that detention was justified in the particular circumstances of Ms PD's case was inconsistent with or contrary to article 9(1) of the ICCPR.
113. I also find that the prolonged use of restraints for 13 hours, may have been contrary to Ms PD's rights under article 10 of the ICCPR to be treated with humanity and with respect for her inherent dignity.
114. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with, or contrary to, any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.²⁰ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²¹ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.²²
115. The detention review processes conducted by the Department consider whether there are any circumstances that indicate a detainee cannot be appropriately managed within a detention centre environment. Reviews do not consider whether detention is necessary or proportionate. They focus on whether there is any need for an individual to be released from detention, rather than if there is necessity in continuing to detain the individual. Accordingly, the current review process does not adequately safeguard against arbitrary detention.

Recommendation 1

The Department should regularly conduct open periodic reviews of the necessity of detention for people in immigration detention centres. The reviews should focus on whether detention in an immigration detention centre is necessary in the specific case and if detention is not considered necessary, the identification of alternate means of detention or the grant of a visa should be considered.

116. Ms PD has not identified any medical issues that arose as a result of the use of handcuffs on her, however, I accept that the requirement that she wear handcuffs for 13 hours was distressing for her and consider a recommendation for compensation is appropriate.
117. In considering the assessment of a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.²³ I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.²⁴
118. The Commission has set out in other inquiries the jurisdictional basis for the Commission to make recommendations for the payment of compensation and the available administrative avenues for the payment of such compensation by the Commonwealth.²⁵ I do not repeat those matters again here.

Recommendation 2

I recommend that the Commonwealth pay to Ms PD an appropriate amount of compensation to reflect the distress she suffered as a result of being placed in restraints for 13 hours.

11 The Department's response to my findings and recommendations

119. On 14 August 2020, I provided the Department with a notice of my findings and recommendations.
120. On 21 September 2020, the Department provided the following response to my findings and recommendations:

Arbitrary Detention

The Department notes recommendation one, and does not agree that detention review processes conducted by the Department do not consider whether detention is necessary or proportionate.

The Department has a framework in place of regular reviews, escalations and referral points to ensure that people are detained in the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department also maintains that review

mechanisms regularly consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa are considered.

Detention Review Managers conduct an initial review of the exercise of powers to detain under section 189 of the Migration Act 1958 (the Act), providing independent assurance regarding the lawfulness and reasonableness of the decision to detain.

Each detainee's case is reviewed monthly by a Status Resolution Officer to ensure that emerging vulnerabilities or barriers to case progression are identified and referred for action. In addition, the Status Resolution Officer also considers whether ongoing detention remains appropriate and refers relevant cases for further action. Monthly detention review committees also provide formal executive level oversight of the placement and status resolution progress of each immigration detainee.

The Department proactively continues to identify and utilise alternatives to held detention. Status Resolution Officers use the Community Protection Assessment Tool to assess the most appropriate placement for an unlawful non-citizen while status resolution processes are being undertaken. Placement includes looking at alternatives to an immigration detention centre, such as in the community on a bridging visa or under a residence determination placement. The tool also assesses the types of support or conditions that may be appropriate and is generally reviewed every three to six months and/or when there is a significant change in an individual's circumstances.

Using the Community Protection Assessment Tool, Status Resolution Officers assess and determine whether the detainee meets the legislative requirements and criteria for a bridging visa to allow the non-citizen to temporarily reside lawfully in the community while they resolve their immigration status. Status Resolution Officers identify cases where the Minister is the only person with the power to grant the non-citizen a visa or to make a residence determination in order to allow an unlawful non-citizen to reside in community detention. Where the case is determined to meet the Ministerial Intervention Guidelines, the case is referred to the Minister for consideration under section 195A of the Act to grant a visa to a person in immigration detention, or under section 197AB of the Act, allowing a detainee to reside in the community. The Department notes that the Minister's powers under sections 195A and 197AB of the Act cannot be delegated and are non-compellable. The Minister is under no obligation to consider a case or to make a decision on a case. The Minister is also not required to provide an explanation for the decision and is not bound by any timeframes.

Unlawful Detention

The Department welcomes your assessment that it was reasonable for the detaining officer to suspect that Ms PD was an unlawful non-citizen and her

subsequent detention was not unlawful. The Department accepts your finding that at the time of her detention, Ms PD was an unlawful non-citizen and her subsequent detention was not unlawful.

Transfer to Villawood Immigration Detention Centre

The Department disagrees that the use of restraints may have been contrary to Ms PD's rights under article 10 of the International Covenant on Civil and Political Rights, and notes your assessment that the conduct the Department relied upon in assessing Ms PD as high risk, was of sufficient seriousness to render the initial assessment reasonable.

The Department reiterates its response to your preliminary view, that due to her history of behavioural issues and criminal charges, premature removal of the SureLock Body Belt Restraint would have unacceptably increased the risk profile of the operation.

The range of restraint movement was extended to its maximum length for the duration of the trip, and at the frequent stops made along the way for personal ablutions and drinks/meals. Restraints were checked frequently and showed no signs of rubbing or chafing.

Compensation

The Department notes recommendation two regarding payment of compensation to Ms PD.

The Department is required to manage claims for compensation in accordance with Appendix C of the Legal Services Directions 2017. Appendix C stipulates that claims can only be resolved in accordance with legal practice and principle, which requires at least the existence of a meaningful prospect of liability. It would not be within legal principle and practice to resolve this matter on the basis of the information currently available.

In cases where there is no legal liability to pay compensation, the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme is a discretionary compensation scheme, which provides a mechanism for the Commonwealth to compensate persons who have experienced financial detriment as a result of the defective administration of certain Commonwealth entities, as outlined in Resource Management Guide 409 (the guide). The CDDA Scheme is generally an avenue of last resort and is not used where there is another viable avenue available to provide redress.

Ms PD has made a claim for discretionary compensation and her claim will be assessed in accordance with the guide. Making a claim does not guarantee that compensation will be paid.

Further information on claiming compensation from the Department can be found on the Department's website.

A handwritten signature in black ink that reads "Rosalind Croucher". The script is fluid and cursive, with the first name and last name clearly distinguishable.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

28 October 2020

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- ¹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), [1980] ATS 23 (entered into force for Australia 13 November 1980).
- ² *Al-Kateb v Goodwin* (2004) 219 CLR 562.
- ³ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), [1980] ATS 23 (entered into force for Australia 13 November 1980).
- ⁴ [REDACTED].
- ⁵ See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- ⁶ Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014). See also Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (2003) (*Baban v Australia*).
- ⁷ Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) [18]; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6].
- ⁸ *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the Human Rights Committee in *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); Human Rights Committee, *Views: Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- ⁹ Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]; Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014); Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*) (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); Human Rights Committee, *Views: Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*).
- ¹⁰ Human Rights Committee *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*).
- ¹¹ Human Rights Committee, *Views: Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*); Human Rights Committee, *Views: Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (20 July 2007) (*Shams & Ors v Australia*); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (18 September 2003) (*Baban v Australia*); Human Rights Committee, *Views: Communication No. 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (9 August 2006) (*D and E and their two children v Australia*).
- ¹² Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (16 December 2014) [18], footnotes omitted.
- ¹³ Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]; Human Rights Committee, *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*); Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); Human Rights

Committee, *Views Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*').

- ¹⁴ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 21 October 2017. The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁵ The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s345, s 351, s 417 and s 501J)*, 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁶ Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
- ¹⁷ Human Rights Committee, *Views: Communication No. 639/1995*, 60th sess, UN Doc CCPR/C/60/D/639/1995 (28 July 1997) ('*Walker and Richards v Jamaica*'); Human Rights Committee, *Views: Communication No 845/1998*, 74th sess, UN Doc CCPR/C/74/D/845/1998 (26 March 2002) ('*Kennedy v Trinidad and Tobago*'); Human Rights Committee, *Views: Communication No 684/1996*, 74th sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) ('*R.S. v Trinidad and Tobago*').
- ¹⁸ [2007] NZSC 70.
- ¹⁹ [2007] NZSC 70 [79].
- ²⁰ *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(a)*.
- ²¹ *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(b)*.
- ²² *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(c)*.
- ²³ *Peacock v The Commonwealth* (2000) 104 FCR 464 at 483 (Wilcox J).
- ²⁴ *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- ²⁵ For example, see *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth of Australia (DIBP)* [2016] AusHRC 110 at [196]-[205]. At <https://www.humanrights.gov.au/our-work/legal/publications/ms-ar-behalf-mr-master-and-miss-au-v-commonwealth-dibp> (viewed 19 September 2018).