Mr Belmont v Commonwealth of Australia

(Department of Home Affairs)

**[2025] AusHRC 178**

June 2025

The Hon Michelle Rowland MP

Attorney-General

Parliament House

Canberra ACT 2600

Dear Attorney

Pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), I attach a report of the inquiry by the former President of the Australian Human Rights Commission, Emeritus Professor Rosalind Croucher AM, into a complaint by Mr John Rudolph Dansel Belmont against the Department of Home Affairs (the Department).

Mr Belmont is a New Zealand citizen who established that his usual place of residence was Australia, where he became father to three children.

In 2020, Mr Belmont was sentenced to imprisonment for domestic violence related charges, and his visa was subsequently cancelled. In January 2022, upon completion of his sentence, Mr Belmont was transferred into closed immigration detention at Brisbane Immigration Transit Accommodation (BITA), where he remains in ongoing detention. Mr Belmont has complained that his detention was arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). He has also complained that his protracted detention caused arbitrary interference with his family life, contrary to articles 17(1) and 23(1) of the ICCPR.

Mr Belmont’s ongoing detention was notwithstanding his ‘exemplary’ behaviour in detention, his protracted detention to date and the impracticability of his removal, and his family’s circumstances. Professor Croucher found that the Department’s failure to consider a referral of Mr Belmont’s case to the Minister for consideration under section 195A and/or section 197AB contributed to his detention becoming arbitrary, contrary to article 9(1) of the ICCPR. While she was not satisfied that his detention was tantamount to arbitrary interference with family, such that it constituted breaches of articles 17 and 23 of the ICCPR, she nonetheless noted that if his detention was further prolonged, and his ability to maintain an effective connection with his family was further compromised, then his immigration detention may amount to interference with his family in the future.

The factual details contained in this report were current at the time the notice containing the Commission’s findings and recommendations was provided to the Department. Since that time, in June 2024, the Federal Court set aside the Administrative Appeals Tribunal’s (AAT) decision affirming the delegate’s decision not to revoke the Minister’s cancellation decision, and remitted the matter to the Tribunal for reconsideration. Mr Belmont has advised the Commission that the Department has provided him with papers regarding his removal to New Zealand. Mr Belmont is still awaiting proceedings at the Administrative Review Tribunal (ART), which has replaced the AAT.

In the time between the issuing of the notice making findings in this matter, and the preparation of this report, I assumed the role of President at the Australian Human Rights Commission. As a result, I received the Department’s response to Professor Croucher’s findings and recommendations in this matter by letter dated 9 September 2024. I have set out the response of the Department in its entirety in part 7 of the report.

I enclose a copy of my report.

Yours sincerely,



Hugh de Kretser

**President**

Australian Human Rights Commission

June 2025

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# Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr John Rudolph Dansel Belmont against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of human rights. The inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr Belmont has been detained since 21 January 2022, and remains in immigration detention while he is pursuing legal challenges to the decision of the Department not to revoke the cancellation of his visa. He complains that his detention is arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
3. He also complains that this constitutes arbitrary interference with family, contrary to articles 17(1) and 23(1) of the ICCPR. Mr Belmont’s three children are currently under the care of the Queensland Department of Child Safety, Seniors and Disability Services (Child Safety).
4. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention, outside seeking a writ of *habeas corpus*, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.[[1]](#endnote-1)
5. 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. Detention may be lawful under domestic law but still arbitrary and contrary to international human rights law.
6. 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. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed 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’.
7. This document comprises a report of the Commission’s findings in relation to this inquiry and recommendations to the Commonwealth.

# Summary of findings and recommendations

1. As a result of this inquiry, the previous President of the Commission, Emeritus Professor Rosalind Croucher found that the Department’s failure to consider a referral of Mr Belmont’s case to the Minister for consideration under section 195A and/or section 197AB contributed to his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.
2. Professor Croucher made the following recommendations:

**Recommendation 1**

The Commission recommends that the Department prepare a submission for referral of Mr Belmont’s case to the Minister, for the Minister to consider whether to use his personal, discretionary powers to intervene in Mr Belmont’s case.

The submission should include details of any conditions that could be placed on Mr Belmont’s release so as to ameliorate any risk to the community.

**Recommendation 2**

The Commission recommends that the Department engage with the Queensland Department of Child Safety, Seniors and Disability Services to discuss ways that they may be able to facilitate Mr Belmont’s connection with his children.

# Background

1. Mr Belmont is a citizen of New Zealand.
2. He first arrived in Australia on 10 January 1998 and was granted a Special Category visa on entry. He departed Australia on 22 January 1998.
3. Mr Belmont travelled to Australia multiple times between July 1998 and December 2018, with his most recent arrival being on 7 January 2019.
4. At some point in this timeline, Australia became Mr Belmont’s usual place of residence, and he established a home for himself. It is difficult to pinpoint exactly when this was, but it is not necessary for any finding to be made on this point for the purpose of this inquiry.
5. Mr Belmont is the father of three children, born December 2017, August 2019 and May 2021. Mr Belmont was in a relationship with their mother for approximately 5 years, ending sometime in 2021.
6. On 12 June 2020, Mr Belmont was sentenced to 65 days imprisonment and 18 months probation for two counts of contravening a domestic violence order.
7. On 23 September 2021, Mr Belmont was sentenced to 12 months imprisonment for three counts of contravening a domestic violence order, and 3 months imprisonment for breaching a probation order.
8. Mr Belmont’s visa was cancelled pursuant to section 501(3A) of the *Migration Act 1958* (Cth) (Migration Act). This section provides for the mandatory cancellation of a visa when the holder is sentenced to 12 months imprisonment and is serving a sentence of imprisonment at the time of cancellation.
9. Mr Belmont submitted a request for revocation of the visa cancellation on 26 November 2021, within the statutory timeframe for him to do so.
10. At the completion of his sentence, Mr Belmont was detained pursuant to section 189(1) of the Migration Act. Between 21 and 29 January 2022, his place of detention was a hotel in Brisbane. On 29 January 2022 he was transferred to the Brisbane Immigration Transit Accommodation (BITA).
11. Mr Belmont’s three children have been under the guardianship of Child Safety since late 2021. They are currently residing together in a foster care placement.
12. The children have visited him once in detention in December 2022.

## Functions of the Commission

1. 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.
2. 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.
3. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

## What is an ‘act’ or ‘practice’

1. The terms ‘act’ and ‘practice’ are defined in section 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.
2. 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.
3. The functions of the Commission identified in section 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.[[2]](#endnote-2)

## What is a human right?

1. The phrase ‘human rights’ is defined in section 3(1) of the AHRC Act to include, among others, the rights and freedoms recognised in the ICCPR.

# Arbitrary detention

1. Mr Belmont complains about his ongoing detention from 21 January 2022 when he was detained in closed immigration detention. This requires consideration to be given to whether his detention was ‘arbitrary’ contrary to article 9(1) of the ICCPR.

## Law on article 9 of the ICCPR

1. Article 9(1) of the ICCPR 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.

1. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
   * ‘detention’ includes immigration detention[[3]](#endnote-3)
   * lawful detention may become arbitrary when a person’s deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of Australia’s migration system[[4]](#endnote-4)
   * 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 predictability[[5]](#endnote-5)
   * detention should not continue beyond the period for which a State party can provide appropriate justification.[[6]](#endnote-6)
2. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of 2 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.[[7]](#endnote-7)
3. 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 closed 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.[[8]](#endnote-8)
4. 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 UN HR 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.[[9]](#endnote-9)

1. The United Nations Working Group on Arbitrary Detention expressed the view in 2004 that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.[[10]](#endnote-10) A similar view has been expressed by the UN HR Committee, which has said:

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law … information of the reasons must be given … and court control of the detention must be available … as well as compensation in the case of a breach.[[11]](#endnote-11)

1. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.[[12]](#endnote-12)
2. A short period of administrative detention for the purposes of developing a more durable solution to a person’s immigration status may be a reasonable and appropriate response by the Commonwealth. However, closed detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.[[13]](#endnote-13)
3. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, closed immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth) in order to avoid being arbitrary.[[14]](#endnote-14)
4. Accordingly, where alternative places or modes of detention that impose a lesser restriction on a person’s liberty are reasonably available, and in the absence of particular reasons specific to the individual, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of Australia’s migration system.
5. It is therefore necessary to consider whether the detention of Mr Belmont in a closed immigration facility can be justified as reasonable, necessary, and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his 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.

## Act or practice of the Commonwealth

1. At the time of his detention, Mr Belmont was an unlawful non-citizen within the meaning of the Migration Act, which required that he be detained.
2. Mr Belmont is unable to make a visa application due to the legislative bar imposed by section 501E of the Migration Act.
3. There are a number of powers that the Minister could exercise either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.
4. Section 197AB of the Migration Act permits the Minister, where the Minister 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.
5. In addition to the power to make a residence determination under section 197AB, the Minister also has a discretionary non-compellable power under section 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
6. The act or practice of the Commonwealth relevant to this inquiry therefore is the failure of the Department to refer Mr Belmont to the Minister in order to assess whether to exercise the Minister’s discretionary powers under section 195A or section 197AB of the Migration Act.

## Consideration

1. The Department has informed the Commission that no referrals have been made of Mr Belmont’s case for consideration by the Minister against the Minister’s intervention powers, for an alternative to held detention.
2. The reason provided by the Department for this is that:

Current ministerial intervention guidelines for powers (under section 195A and section 197AB of the Act) state that individuals who have had a visa cancelled or refused under section 501 of the Act, or who fail the character test under section 501 of the Act, should generally not be referred for ministerial consideration.

1. It is correct that the guidelines for both sets of intervention powers state that people who have failed the character test should not be referred to the Minister, however the residence determination guidelines do allow for referrals outside of the guidelines where there are exceptional circumstances. In any event, the use of the word ‘generally’ denotes the existence of circumstances which may fall outside the general rule.
2. Furthermore, both sets of guidelines on their face require officers of the Department to make an assessment of whether cases exhibit ‘compelling or compassionate circumstances’ (195A guidelines) or ‘unique or exceptional circumstances’ (197AB guidelines) which may fall within the public interest for the Minister to intervene. Such a direction may arguably go beyond the scope of the powers vested personally in the Minister, and the current guidelines need to be revised in light of the decision of the High Court in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10.
3. Considering the individual circumstances of Mr Belmont, Professor Croucher found there may be grounds on which his case could be brought within the Ministerial intervention guidelines as ‘exceptional’ or ‘compelling or compassionate’ circumstances and referred to the Minister so that consideration may be given to alternatives to held detention.
4. The first consideration relevant to Mr Belmont is that he has been in detention for over 2 years and his removal from Australia is not reasonably practicable at the present time. Mr Belmont has elected not to be removed from Australia while he is pursuing legal appeals. The timeframe for these appeals to be determined may be of a long duration.
5. His appeal in the Federal Court was heard on 30 October 2023 before a single judge. It is difficult to predict how long a decision from the Court might take. Beyond that, Mr Belmont if successful would face further potential delay from a remitted AAT hearing, or if unsuccessful, may appeal to the Full Court of the Federal Court.
6. The second consideration is that Mr Belmont’s history while in detention has demonstrated efforts by him to make improvements to himself and his circumstances. It appears from Departmental records that he is highly motivated in doing so by a desire to be reunited with his children.
7. Mr Belmont has a history of some mental illness. Soon after his admission to BITA, Mr Belmont was seen by an IHMS psychiatrist on 4 February 2022. The psychiatrist diagnosed him with an adjustment disorder with anxiety. The psychiatrist noted a history of alcohol and amphetamine dependence but identified no signs of depression or psychotic symptoms. The notes outline multiple sources of stressors and trauma from Mr Belmont’s history, but recognise the efforts being made by him to improve himself and his prospects for recovering his children.
8. Similar notes appear throughout the IHMS records provided by Mr Belmont. For example, an IHMS mental health nurse noted on 1 January 2023:

45 year old NZ male in defacto relationship which eventual [sic] experienced a number of Psychosocial stressors. The relationship involved the heavy use of THC and ETOH in the context of 3 young children and unemployment. Client was convicted of domestic violence offences and has endured custody issues. Currently the client has a heavy political focus on the rights of 501’s in detention and has become an example for his fellow detainees by being involved in all courses available to assist in him winning his appeal. Past mental and behavioral [sic] disturbances. ETOH, resulting in domestic violence and jail; client is very proactive with therapy and courses with a strong forward focus on appeal. Client has ceased all MH Medication.

1. Mr Belmont provided to the Commission a series of Individual Management Plans prepared by Serco between January and April 2023. In the most recent of 8 April 2023, it is written that:

Mr Belmont is a motivated participant in scheduled programs activities, primarily non-physical activities like: men’s health, art, music, re integration and coffee club but he also attends physical activities such as walking. Moreover, Mr Belmont attends provided religious services and activities held by the Religious Liaison Officer (RLO).

…

Mr Belmont is one of the two Moreton spokespeople at the Detainee Consultative Committee (DCC) addressing issues on behalf of all accommodated people in his compound. Furthermore, Mr Belmont is always happy to assist others who need help with different processes.

Mr Belmont is respectful towards staff and approaches them on a needs basis. Mr Belmont is very versed with the request and complaint system in place and helps other detainees request relevant information pertinent to their cases.

1. The Department did not suggest in any of the material before Professor Croucher that Mr Belmont is considered a flight risk, were he permitted to remain in the community during his ongoing appeals. His determination to be reunited with his children, noted in Departmental records, may be considered a positive indicator that he is likely to comply with any monitoring conditions the Department might seek to impose upon his release.
2. In the Community Protection Assessment Tool (CPAT) conducted most recently by the Department, Mr Belmont is described as being ‘co-operative with [Status Resolution Officers], ABF and SERCO’, and is assessed as being of low risk of not engaging with the Department. Mr Belmont is assessed as a high risk of harm to the community, based on his criminal convictions.
3. Similarly, Serco’s Security Risk Assessment Tool (SRAT) assigns him a high-risk profile based on his criminal profile. However, during the one year and 7 months in detention (at the time the SRAT was prepared), he has not been involved in any incidents of concern which indicate that he may continue to pose a risk to the Australian community.
4. Both tools, the CPAT and the SRAT, have been the subject of recommendations by the Commission in previous reporting, due to their inflexibility.[[15]](#endnote-15) Regardless of the length of time in detention that Mr Belmont might demonstrate good behaviour, it would seem there is no way for him to reduce his risk rating.
5. The Department responded to the Commission’s preliminary view regarding Mr Belmont’s CPAT and SRAT ratings:

While Mr Belmont’s CPAT assessed him as high risk of harm to the community based on his criminal convictions, the Department notes that when completing a CPAT, it is the Status Resolution Officers (SROs) discretion to consider a substituted placement. The SRO considers additional factors which might support a substituted placement (for example, community placement), notwithstanding an individual’s criminal history. This includes potential vulnerabilities and strength based factors, such as their age, health, education history, community support and employable skills.

The Security Risk Assessment Tool (SRAT) is designed to assess the potential risk of an individual within the Immigration Detention Network and is conducted from a risk-based approach. The SRAT provides a consistent and agreed set of principles around risk assessment and subsequent mitigation strategies. The SRAT considers each detainee’s individual circumstances, including considerations of an individual’s capability (e.g. age, fragility, medical condition), and intent (e.g. immigration pathway, behaviour and prevalence of incidents). A detainee’s SRAT is reviewed every 28 days, and upon a major or critical incident, or if there is information obtained that may impact the risk rating of the detainee. The assessment uses quantitative and qualitative methods to assess and calculate risk based on known criteria for each detainee.

1. The third consideration relevant to Mr Belmont is the exceptional circumstance of his three children, currently residing in foster care.
2. The section 195A guidelines allow for referral of a case where ‘there is an impact on the best interests of a child in Australia’.
3. Although it appeared unlikely on the information before Professor Croucher that if Mr Belmont were released from detention, the children would be permitted to reside with him (for the reasons outlined below) – Mr Belmont’s detention remained an obstacle to him maintaining an effective connection with his children and from improving his prospects of satisfying Child Safety of his suitability as a carer for the children.
4. Based on the circumstances of Mr Belmont and his children, his exemplary behaviour while in detention, the protracted nature of his detention to date and the fact that removal is not practicable at this time, Professor Croucher considered there was scope for his case to fall within the Ministerial intervention guidelines for referral to the Minister to consider alternatives to held detention. These factors are not outweighed by any individualised risk assessment which demonstrates that Mr Belmont may be a risk to the Australian community. These risk ratings are based solely on his criminal convictions. At the time of Professor Croucher’s findings, Mr Belmont had spent longer in immigration detention than in criminal custody.
5. In response to the Commission’s preliminary view that Mr Belmont’s detention may have become arbitrary, the Department responded by referencing the fact that Mr Belmont’s detention remained lawful, due to his being an unlawful non-citizen. The Department reminded the Commission of its formal monthly reviews of each detention case, which included the potential for status resolution officers to identify suitable cases for ministerial intervention. The Department also referred to the fact that Mr Belmont has not requested ministerial intervention at any point during his detention.
6. The Department’s response is lacking in detail about the specific factors raised in this inquiry in favour of Mr Belmont being considered for an alternative to held detention.
7. Professor Croucher found that the Department’s failure to consider a referral of Mr Belmont’s case to the Minister for consideration under section 195A and/or section 197AB contributed to his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.

# Interference with family

## Law on arbitrary interference with family

1. 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.

1. 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.

1. Article 17(1) of the ICCPR is replicated in article 16(1) of the CRC.
2. For the reasons set out in the Australian Human Rights Commission report, *Nguyen and Okoye v Commonwealth*,[[16]](#endnote-16) the Commission is of the view that in cases alleging a State’s arbitrary interference with a person’s family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person’s family, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).
3. To make out a breach of article 17 of the ICCPR, the complainant and his children must be identifiable as a ‘family’.
4. In its General Comment 16, the UN HR Committee states:

Regarding the term ‘family’, the objectives of the Covenant require that for the purpose of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.[[17]](#endnote-17)

1. The UN HR Committee has confirmed on a number of occasions that ‘family’ is to be interpreted broadly.[[18]](#endnote-18) Where a nation’s laws and practice recognise a group of persons as a family, they are entitled to the protections in articles 17 and 23.[[19]](#endnote-19) However, more than a formal familial relationship is required to demonstrate a family for the purposes of article 17(1). Some degree of effective family life or family connection must also be shown to exist.[[20]](#endnote-20) For example, in *Balaguer Santacana v Spain,*[[21]](#endnote-21)after acknowledging that the term ‘family’ must be interpreted broadly, the UN HR Committee went on to say:

Some minimal requirements for the existence of a family are, however, necessary, such as life together, economic ties, a regular and intense relationship, etc.[[22]](#endnote-22)

1. There is no clear guidance in the jurisprudence of the UN HR Committee as to whether a particular threshold is required in establishing that an act or practice constitutes an ‘interference’ with a person’s family. However, in relation to one communication, the UN HR Committee appeared to accept that a ‘considerable inconvenience’ could suffice.[[23]](#endnote-23)
2. In its General Comment on article 17, the UN HR Committee confirmed that a lawful interference with a person’s family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the Covenant and is reasonable in the particular circumstances.[[24]](#endnote-24)
3. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness.[[25]](#endnote-25) In relation to the meaning of reasonableness, the UN HR Committee stated in *Toonen v Australia*:

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.[[26]](#endnote-26)

1. Whilst the *Toonen* case concerned a breach of article 17(1) in relation to the right of privacy, these comments would apply equally to an arbitrary interference with the family.

## Act or practice of the Commonwealth

1. Mr Belmont’s complaint of arbitrary interference with his family directly stems from his complaint of arbitrary detention. The act identified at paragraph 46 above is therefore also the act relevant to this inquiry.

## Consideration

### *Family*

1. Mr Belmont is the biological father of three children. Their birth certificates were produced to the Commission as evidence of this.
2. A biological or familial connection is however insufficient to establish the existence of a ‘family’ for the purposes of article 17(1) and 23(1) of the ICCPR.
3. This complaint is complicated by the fact that Mr Belmont’s three children are currently under the guardianship of Child Safety and reside with a foster carer.
4. Mr Belmont informed the Commission that he lived with his children and their mother up until the time that he was sentenced, in September 2021, to a term of imprisonment. He had previously served 65 days imprisonment in June 2020, but resumed cohabitation upon release. Mr Belmont explained that he worked and provided financially for the children, and provided care for them.
5. However, materials provided by Mr Belmont show that a restraining order was applied for in or around June or July 2021 against Mr Belmont protecting 2 of the children and their mother. Professor Croucher was not persuaded on the material before her that Mr Belmont lived with the children up until the date of his incarceration in September 2021 as claimed.
6. The Department accepted in February 2023 that Mr Belmont had had primary care of the children in the past and intended ‘to have a strong caring relationship with them in the future’.
7. The AAT, in determining whether there were reasons to revoke the cancellation of Mr Belmont’s visa, made certain findings about Mr Belmont’s relationship with his children. Those findings are that:
   * Mr Belmont’s relationship with the children can be described as a ‘non-parental’ one, with ‘long periods of absence by him from their lives’
   * court orders exist restricting Mr Belmont’s contact with his children
   * Mr Belmont’s ability to play a parental role in the children’s lives in future is governed by the state of Queensland
   * Mr Belmont had in the past exposed his children to domestic violence conduct, which was accepted by him
   * Mr Belmont would be able to maintain contact with his children if removed from Australia
   * the foster carers are currently fulfilling a parental role in relation to the children.
8. The AAT’s findings, while useful, are not determinative for the Commission, and were made with a view to applying a different legal test to the one before Professor Croucher.
9. The AAT also states ‘the relevant department that deals with child safety saw fit to lawfully remove the three children from the care of their biological parents’. The materials provided by Mr Belmont to the Commission suggest that this may not be the case. These documents suggest that after Mr Belmont’s incarceration, the children were removed from their mother’s care. However, it is clear from materials provided by Mr Belmont that Child Safety had significant concerns at the time about his ability to care for the children.
10. Mr Belmont has demonstrated significant efforts while in detention to improve himself personally and as a parent, by undertaking courses and engaging with professionals.
11. Mr Belmont also provided emails that demonstrate him attempting to arrange a visit from his children, and to find ways to communicate with them. Professor Croucher also saw that they stayed with his parents when they visited BITA from Perth in December 2022.
12. Professor Croucher found it difficult to make this finding on the materials before her. It was noted that Mr Belmont is the biological father of the three children and has had primary care of the children in the past. It was also noted that Mr Belmont is motivated to have a caring relationship with them in the future. Mr Belmont has attempted to maintain a connection with his children during his period of detention. It was Professor Croucher’s view, that Mr Belmont and his children are a family within the meaning of article 17(1) and 23(1) of the ICCPR.

### *Interference*

1. Professor Croucher turned to whether Mr Belmont’s immigration detention has interfered with his family. Mr Belmont is of the view that his detention is contributing to his separation from his children, and that this constitutes an interference with his family.
2. It appeared on the information before Professor Croucher that Mr Belmont was not residing with his children in September 2021 when he entered criminal custody.
3. In November 2021, while Mr Belmont was in criminal custody, Child Safety sought orders removing the three children from their mother’s care. The children were placed in foster care where they remain. These orders appear to have been made initially for a period of 2 years.
4. Materials provided by Mr Belmont to the Commission indicate that Child Safety has also held concerns about the safety of the children in Mr Belmont’s care. These concerns predominantly relate to the potential for them to witness further domestic violence, or be caught in the ‘crossfire’ of any domestic altercations. Care concerns have been raised with Child Safety in relation to Mr Belmont dating back to 2018, although they did not lead to any further action.
5. Furthermore, materials provided by Mr Belmont from Child Safety indicate that contact between Mr Belmont and the children can only happen with their mother’s permission due to the existence of a restraining order, and would only occur under supervision. A Child Safety case plan from April 2022 shows that certain capabilities would need to be demonstrated by Mr Belmont before Child Safety would consider him to be a suitable parent to the children.
6. It appeared from the material before Professor Croucher that it was the actions of Child Safety, responding to their concerns in relation to the safety of the children, that resulted in Mr Belmont’s separation from his children.
7. As to whether Mr Belmont’s immigration detention also amounts to an interference with his family, in all the circumstances, was a difficult decision to make on the material before Professor Croucher.
8. There is no clear guidance in the jurisprudence of the UN HR Committee as to whether a particular threshold is required in establishing that an act constitutes an ‘interference’ with a person’s family. However, in relation to one communication, the UN HR Committee appeared to accept that a ‘considerable inconvenience’ could suffice. The UN HR Committee has taken the view that ‘common residence … has to be considered as the normal behaviour of a family’. In this case, that assumption is clearly displaced by the existence of the orders obtained by Child Safety.
9. Although Mr Belmont’s immigration detention has presented obstacles to him rebuilding his relationship with his children, Professor Croucher was not persuaded in all the circumstances, that it rises to a sufficient threshold to result in an interference with his family.
10. It was put by Mr Belmont to the Commission that the Department was further interfering with his ability to have access to the children because of its policy of requiring COVID-19 vaccinations for all visitors to immigration detention. Mr Belmont claims that the children’s carers are unvaccinated and so unable to escort them on visitations. The only time the children visited was with his parents, who are vaccinated.
11. The Department responded to this aspect of Mr Belmont’s complaint by informing the Commission that ‘ABF has not denied any requests from any visitor to visit Mr Belmont’. While it may be the case that the carers have not made a request because they do not meet the requirement of vaccinations, Mr Belmont has not supplied any supporting material regarding this aspect to his complaint to the Commission, and Professor Croucher was unable to make any findings on it. In any event, Mr Belmont informed the Commission on 3 November 2023 that the restrictions on vaccinations had been lifted, and he was hopeful that this might enable the children to visit in the near future.
12. No submissions were received by either of the parties in response to Professor Croucher’s preliminary view on this aspect of Mr Belmont’s complaint.
13. For these reasons, Professor Croucher was not satisfied that the detention of Mr Belmont has caused an interference with his family and family life contrary to articles 17(1) and 23(1) of the ICCPR.
14. Professor Croucher noted, however, that if Mr Belmont’s detention is further prolonged, and his ability to maintain an effective connection with his family further compromised, then Mr Belmont’s immigration detention may amount to an interference with his family in the future.

# Recommendations

1. 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.[[27]](#endnote-27) The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.[[28]](#endnote-28) The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.[[29]](#endnote-29)
2. Mr Belmont remains in detention. He continues to face difficulties communicating with his children. Mr Belmont has informed the Commission that he seeks release and is willing to abide by any conditions which could be imposed upon him.

**Recommendation 1**

The Commission recommends that the Department prepare a submission for referral of Mr Belmont’s case to the Minister, for the Minister to consider whether to use his personal, discretionary powers to intervene in Mr Belmont’s case.

The submission should include details of any conditions that could be placed on Mr Belmont’s release so as to ameliorate any risk to the community.

**Recommendation 2**

The Commission recommends that the Department engage with the Queensland Department of Child Safety, Seniors and Disability Services to discuss ways that they may be able to facilitate Mr Belmont’s connection with his children.

The Department’s response to the Commission’s findings and recommendations

1. On 4 April 2024, Professor Croucher provided the Department with a notice of her findings and recommendations.
2. On 9 September 2024, the Department provided the following response to Professor Croucher’s findings and recommendations:

The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings identified in this report and the recommendations made by the President of the Commission.

The Department does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, Article 9 of the *International Covenant on Civil and Political Rights.*

**Recommendation 1 – Agree**

*The Commission recommends that the Department prepare a submission for referral of Mr Belmont's case to the Minister, for the Minister to consider whether to use his personal, discretionary powers to intervene in Mr Belmont's case.*

*The submission should include details of any conditions that could be placed on Mr Belmont's release so as to ameliorate any risk to the community.*

The Department will refer Mr Belmont's case to the Minister under sections 195A and 197AB of the Migration Act 1958 (the Act). The Department will include conditions in the submission that would be imposed should the Minister consider intervening under sections 195A or 197AB of the Act.

**Recommendation 2 - Accepted - already addressed**

*The Commission recommends that the Department engage with the Queensland Department of Child Safety, Seniors and Disability Services to discuss ways that they may be able to facilitate Mr Belmont's connection with his children.*

The Department has been advised by the Queensland Department of Child Safety, Seniors and Disability Services (DCSSDS) that it no longer holds statutory authority for Mr Belmont's children as of 10 May 2024.

The Department can confirm that prior to DCSSDS notifying the Department it no longer holds statutory authority for Mr Belmont's children, direct communication between Mr Belmont and DCSSDS had been established with the assistance of Mr Belmont's sister. Direct communication between Mr Belmont and DCSSDS was made through Mr Belmont's mobile phone and email and resulted in an in-person visit to the Brisbane Immigration Detention Centre (BIDC) by Mr Belmont's children on Saturday 4 May 2024. A further visit was arranged privately on Saturday 1 June 2024.

All visits have taken place at BIDC. No requests made by Mr Belmont for visits with his children have been refused. Bookings are made in accordance with the requirements included online and available on the Department's website.

1. I report accordingly to the Attorney-General.

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Hugh de Kretser

**President**

Australian Human Rights Commission

June 2025

**Endnotes**

1. *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37. [↑](#endnote-ref-1)
2. 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. [↑](#endnote-ref-2)
3. UN Human Rights Committee, *General Comment No 35:* *Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35(2014)*.* See also UN Human Rights Committee, *Communication No. 560/1993*, 59th sess,UN Doc CCPR/C/59/D/560/1993 (1997) (‘*A v Australia*’); UN Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002)(‘*C v Australia*’); UN Human Rights Committee, Communication No 1014/2001, 78th sess, CCPR/C/78/D/1014/2001 (2003) (‘*Baban v Australia*’). [↑](#endnote-ref-3)
4. UN Human Rights Committee, *General Comment No 35:* *Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35(2014) [18]; UN Human Rights Committee, *General Comment 31:* *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004). [↑](#endnote-ref-4)
5. *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee, *Communication No. 305/1988,* 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) (‘*Van Alphen v The Netherlands*’); *A v Australia*,UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No. 631/1995,* 67th sess,UN Doc CCPR/C/67/D/631/1995 (1999)(‘*Spakmo v Norway*’). [↑](#endnote-ref-5)
6. Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]; UN Human Rights Committee, *General Comment No 35:* *Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35(2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (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); *C v Australia*, UN Doc CCPR/C/76/D/900/1999. [↑](#endnote-ref-6)
7. *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988. [↑](#endnote-ref-7)
8. *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (2007) (‘*Shams & Ors v Australia*’); *Baban v Australia*, CCPR/C/78/D/1014/2001;UN Human Rights Committee, Communication No 1050/2002, 87th sess, CCPR/C/87/D/1050/2002 (2006)(‘*D and E and their two children v Australia*’). [↑](#endnote-ref-8)
9. Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].  [↑](#endnote-ref-9)
10. Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77]. [↑](#endnote-ref-10)
11. UN Human Rights Committee, *General Comment No 8:* *Article 9 (Right to Liberty and Security of Persons),* 60th sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc E/CN.4/826/Rev.1 (1962) [783]–[787]. [↑](#endnote-ref-11)
12. UN Human Rights Committee, *Communication No 1051/2002*, 80th sess,UN Doc CCPR/C/80/D/1051/2002 (2004) (‘Mansour Ahani v Canada’) [10.2]. [↑](#endnote-ref-12)
13. *Jalloh v The Netherlands*,UN Doc CCPR/C/74/D/794/1998 (2002) (‘*Jalloh v the Netherlands*’); Baban v Australia, UN Doc CCPR/C/78/D/1014/2001. [↑](#endnote-ref-13)
14. UN Human Rights Committee, *General Comment No 31:* *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*,UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999. [↑](#endnote-ref-14)
15. For example, see the discussion of the SRAT contained within Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130, pp 34-41. [↑](#endnote-ref-15)
16. [2007] AusHRC 39 at [80]-[88]. [↑](#endnote-ref-16)
17. UN Human Rights Committee, *General Comment 16* (Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) [↑](#endnote-ref-17)
18. See, e.g., UN Human Rights Committee, *General Comment 16* (Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation), [5]; UN Human Rights Committee, *General Comment 19* (Article 23: Protection of the Family, the Right to Marriage and Equality of the Spouses), [2]. [↑](#endnote-ref-18)
19. UN Human Rights Committee, *General Comment 19* (Article 23: Protection of the Family, the Right to Marriage and Equality of the Spouses), [2]. [↑](#endnote-ref-19)
20. Sarah Joseph, Jennifer Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd Ed, 2004) 589. [↑](#endnote-ref-20)
21. *Communication No 417/1990*, UN Doc CCPR/C/51/D/417/1990(1994). [↑](#endnote-ref-21)
22. Ibid [10.2]. See also *AS v Canada, Communication No 68/1980*, UN Doc CCPR/C/OP/1, 27 (1985), where the UN Human Rights Committee did not accept that the author and her adopted daughter met the definition of ‘family’ because they had not lived together as a family except for a period of 2 years approximately 17 years prior. [↑](#endnote-ref-22)
23. *Mauritian Women v Mauritius,* Communication No 35 of 1978, UN Doc CCPR/C/OP/1 at 67 (1985), [9.2(b)]. [↑](#endnote-ref-23)
24. UN Human Rights Committee, *General Comment 16* (1988), [4]. [↑](#endnote-ref-24)
25. Sarah Joseph, Jennifer Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd Ed, 2004) 482-3. [↑](#endnote-ref-25)
26. Communication No 488 of 1992, UN Doc CCPR/C/D/488/1992, [8.3]. [↑](#endnote-ref-26)
27. *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(a) (‘AHRC Act’). [↑](#endnote-ref-27)
28. AHRC Act, s 29(2)(b). [↑](#endnote-ref-28)
29. AHRC Act, s 29(2)(c). [↑](#endnote-ref-29)