Australian Human Rights Commission

Ms QD v Commonwealth of Australia (Department of Home Affairs)

[2025] AusHRC 177

June 2025

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The Hon Michelle Rowland MP
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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 Ms QD against the Department of Home Affairs (the Department).

Ms QD arrived in Australia by boat at Christmas Island in November 2013 and was recognised as a refugee in January 2017. In 2019, she was transferred to Melbourne Immigration Transit Accommodation (MITA) where she remained for 2 years until she was eventually released from held detention.

Ms QD raised a number of issues in her human rights complaint. The first was that her detention was arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) from January 2017, the point at which she was found to be a refugee, until her release. She also complained that, while in detention, she was subjected to frequent body and room searches by Serco which she alleged breached her right to be treated with humanity and dignity contrary to article 10(1) of the ICCPR. Finally, Ms QD complained that the Department's proposal to return her to Nauru would be tantamount to a breach of article 7 of the ICCPR, in that she faced the prospect of torture or cruel, inhuman treatment if returned there.

As a result of this inquiry, Professor Croucher found that the failure of the Department to refer Ms QD's case to the Minister for consideration under section 195A or section 197AB until 11 August 2021 caused her detention to become arbitrary, contrary to article 9(1) of the ICCPR.

Professor Croucher also found that the pat searches conducted on Ms QD by Serco officers were inconsistent with article 10(1) of the ICCPR when considering Ms QD's particular vulnerabilities and sensitivities.

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 29 August 2024. I have set out the response of the Department in its entirety in part 9 of the report.

I enclose a copy of my report.

Hugh de Kretser
President
Australian Human Rights Commission
June 2025

Contents

1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Ms QD against the Commonwealth of Australia, Department of Home Affairs (the Department), alleging a breach of her 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. Ms QD has made a number of complaints which relate to her time in detention while in Australia. Broadly speaking, the complaints relate to the length of her detention and her treatment while in detention. The complaints raise possible breaches of articles 7, 9(1) and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR).[1]

3. 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.[2]

4. 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.

5. 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'.

6. People deprived of their liberty are wholly reliant on the authority managing their detention to provide for their basic needs and safety. The right for detained people to be treated with humanity and respect for their dignity is not protected by the Australian Constitution. The relevant authority is subject to a duty of care and positive obligations under article 10(1) of the ICCPR to take action to ensure that detained persons are treated with humanity and dignity, including an obligation to ensure that

they are provided with a minimum of services to satisfy their basic needs. This includes by ensuring that relevant policies and procedures are followed according to the limits on powers set out in the authorising legislation and that, when those powers involve the exercise of discretion, their exercise is carried out reasonably and not arbitrarily.

7. This document comprises a report of the Commission's findings in relation to this inquiry and recommendations to the Commonwealth.

8. Ms QD has been accepted as a refugee and this inquiry has considered sensitive information about her. Professor Croucher considered it necessary for the protection of Ms QD's privacy and human rights to make a direction under section 14(2) of the AHRC Act prohibiting the disclosure of her identity in relation to this inquiry.

2 Summary of findings and recommendations

9. As a result of this inquiry, the previous President of the Commission, Emeritus Professor Rosalind Croucher found that the failure of the Department to refer Ms QD's case to the Minister for consideration under section 195A or section 197AB until 11 August 2021 caused her detention to become arbitrary, contrary to article 9(1) of the ICCPR.

10. Professor Croucher also found that the pat searches conducted on Ms QD by Serco officers were conducted inconsistently with article 10(1) of the ICCPR in the circumstances, and when considering Ms QD's particular vulnerabilities and sensitivities.

11. Professor Croucher made the following recommendations:

Recommendation 1

The Commission recommends that the Commonwealth pay to Ms QD an appropriate amount of compensation to reflect the loss and damage she has suffered as a result of the breach of her human rights under article 10(1) of the ICCPR identified in the course of this inquiry.

Recommendation 2

The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that all transitory persons in closed immigration detention are eligible for referral under ss 195A and 197AB.

Recommendation 3

The Commission recommends that policy and procedures at the Melbourne Immigration Detention Centre and Broadmeadows Residential Precinct detention facilities be updated to make clear that a pat search of a detainee is not required for detainees transferring between those two facilities, unless a particular risk is identified or exists in a particular case.

Recommendation 4

The Commission recommends that the Procedural Instruction be updated to provide guidance to officers regarding the factors to be considered in deciding whether to exercise their discretion to conduct pat searches in certain circumstances, and examples listed of circumstances in which they might elect not to do so. The Commission also recommends that officers receive training in line with the updated procedures.

Recommendation 5

The Commission recommends the Department to continue efforts to find a durable solution for Ms QD in light of her protection needs.

3 Background

12. Ms QD is a citizen of the Islamic Republic of Iran.

13. She arrived in Australia by boat at Christmas Island on 11 November 2013 and was detained under section 189(3) of the *Migration Act 1958* (Cth) (Migration Act).

14. On 5 September 2014, Ms QD was transferred to the regional processing centre on Nauru pursuant to section 198AD of the Migration Act. Accordingly, she became a 'transitory person' as defined in section 5(1) of the Migration Act.

15. The Nauru government recognised Ms QD as a refugee on 20 January 2017.

16. While in Nauru, Ms QD commenced a de facto relationship with another refugee. That relationship is ongoing, but her partner is not a complainant in this inquiry.

17. Ms QD was transferred to Australia on 6 August 2019 under section 198B(1) of the Migration Act for the temporary purpose of medical

treatment and was detained initially at an Alternative Place of Detention (APOD) in Brisbane.

18. On 13 August 2019, Ms QD was transferred to the Melbourne Immigration Transit Accommodation (MITA) (now Melbourne Immigration Detention Centre) where she remained for 2 years. At MITA, she was detained within the Broadmeadows Residential Precinct – a residential style APOD adjacent to MITA.

19. On 24 August 2021, the Minister for Home Affairs (Minister) made a residence determination under section 197AB of the Migration Act, allowing Ms QD to be detained in community detention. She was released from held detention the following day.

3.1 Complaint to the Commission

20. Ms QD raises a number of issues in her human rights complaint to the Commission.

21. Ms QD complains that she was subjected to arbitrary detention contrary to article 9(1) of the ICCPR from 2017, when she was found to be a refugee.

22. She complains that, while in detention, she was subjected to frequent and unnecessary body and room searches by Serco, which amounted to a breach of her right to be treated with humanity and respect for her inherent dignity, contrary to article 10(1) of the ICCPR.

23. She also complains that a proposal by the Department to return her to Nauru would amount to a breach of article 7 of the ICCPR, in that she would face a real prospect of being tortured or otherwise subjected to cruel, inhuman or degrading treatment there.

24. On 14 November 2023, Professor Croucher wrote to the Department setting out her preliminary view of each of Ms QD's complaints. The Department responded on 31 May 2024 noting that it had no additional information to provide the Commission in response. The Department 'considers that it has adequately demonstrated it adhered to its legislative, policy and procedural requirements'.

3.2 Detention in Nauru

25. In her complaint, Ms QD alleges that her detention following the 2017 decision of the Government of Nauru's refugee status determination process that she was a refugee, was arbitrary.

26. For the reasons set out in *Ms BK, Ms CO and Mr DE v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128, Professor Croucher noted that Ms QD was not detained in Nauru at the relevant time (20 January 2017 to 6 August 2019). This was due to open centre arrangements effected by the removal of regulations 9(6)(b) and (c) of the Immigration Regulations 2014 (Nauru), which meant that from 5 October 2015, those residing at the regional processing centre were not 'detained'.[3] Even if she was detained during that time, the detention was, at the time of writing the notice in relation to this complaint, not considered by the Commission to be an act done by or on behalf of the Commonwealth. Accordingly, Professor Croucher expressed no view on Ms QD's allegations of arbitrary detention during the period of time she was in Nauru.

27. However, some of the events which Ms QD alleges took place while in Nauru are relevant to her complaints about the conditions of her detention in Australia and so are outlined for the purpose of background information.

28. While in Nauru, Ms QD was twice taken to Taiwan for medical treatment. For Ms QD's privacy, details of the specific nature of the treatment need not be included in this report.

29. On 8 July 2018, a urologist recommended further inquiry with respect to several medical issues faced by Ms QD, as all measures in Nauru had been exhausted.

30. Medicins Sans Frontieres (MSF) assessed Ms QD on 7 August 2018 as suffering from PTSD, panic disorder, generalised anxiety disorder and dissociative disorder.

31. In June 2019, Ms QD complained that she had been on a bus when another refugee who was intoxicated attempted to touch her.

32. She also complained that, on or around 8 July 2019, the driver on another bus asked her to kiss him.

33. On 11 July 2019, IHMS requested that Ms QD be transferred to Australia for a specialist urological review.

3.3 Detention in Australia

(a) Risk assessments

34. After her entry into immigration detention in Australia, the Department assessed Ms QD against their Community Protection Assessment Tool (CPAT). The CPAT is a risk-based placement tool used by the Department to help make assessments of the suitability of detainees for release into the community.[4] The CPAT results in a risk category or 'tier' that corresponds to a recommended placement for a detainee.

35. In the CPAT completed on 26 August 2019, Ms QD was noted to have no national security concerns, no criminality concerns, no identity concerns, and no behavioural concerns. It was noted that she had 'nil further immigration options', and that she engaged well with status resolution.

36. The CPAT recommendation was 'Tier 1 – Bridging Visa with conditions [1.2]', however this was substituted manually by the Department for 'Tier 1 – Residence Determination [1.3]' with the reasons for the substitution being 'RPC transferee. Not eligible for BVE consideration'.

37. The CPAT completed immediately prior to Ms QD's release from held detention also recommended a bridging visa with conditions.

38. The Security Risk Assessment Tool (SRAT) is a document produced by Serco which uses a series of risk indicators which then affect the placement of a detainee within the immigration detention network and, for example, whether or not restraints are used by Serco for transfers within and outside of immigration detention.

39. The Department provided a series of SRATs conducted with respect to Ms QD while she was in held detention. All indicators on Ms QD's profile are deemed as 'low risk'.

(b) Health and wellbeing

40. Ms QD disclosed a history of domestic violence to an IHMS GP which she thought may have been linked to the ongoing lower back pain and urological issues that she complained of.

41. On 12 February 2020, an IHMS psychologist referred Ms QD to Foundation House. The referral sheet identified the basis of the referral as trauma-related, and for reasons of rumination and sleep disturbance.

42. On 1 June 2020, the IHMS psychiatrist noted that Ms QD was upset that guards were conducting checks four times per day and waking her by

opening the door in the morning without warning. This was reported to be traumatic for her.

43. On 27 July 2020, Ms QD complained to an IHMS GP that her recent move within MITA had caused issues because it had restricted her access to a toilet, where she had previously had a toilet in her room but now was required to share one between three units. This impacted Ms QD's urological issues. The GP spoke to a team leader who explained the reason for the move, and the GP noted that the issue would be followed up with welfare.

44. Ms QD's counsellor at Foundation House wrote to IHMS on 23 September 2020:

> [QD]'s confidence and morale is being severely eroded in detention. Her continued pain and suffering is in part directly attributable to the lack of freedom and detention environment.
>
> I strongly recommend that this option to be released into the community together with her partner be urgently considered to prevent further impairment to her vulnerable functioning.

45. A note appears on Ms QD's case reviews from the Department on 6 October 2020 that the status resolution officer identified a 'notable wellbeing decline' in Ms QD due to 'lack of movement'.

46. On 20 April 2021, IHMS records reflect their receipt of a report from Foundation House, which states:

> Symptoms of depression and anxiety have continued to worsen since the last report an [sic] ongoing physical health issues originating from her time in the regional processing centre, persist. [QD] is experiencing no will to engage in activities and feels fundamentally uncared for and a deep sense of rejection. She feels her life is a failure and has lost hope of a future. She is experiencing an ever-increasing sense of injustice in not being released with many others from Nauru and Manus Island. Her sense of control over her life has eroded further, and recently her capacity to engage with any meaning in life has been completely undermined by persistent despair.
>
> I strongly recommend that the option to be released into the community together with her partner be urgently considered to prevent further impairment to her vulnerable mental functioning and that counselling continue to be offered.

47. The IHMS records provided to the Commission also show Ms QD frequently suffering from headaches that were managed with analgesia.

4 Legal framework

4.1 Functions of the Commission

48. 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.

49. 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.

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

4.2 Scope of 'act' and 'practice'

51. 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.

52. 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.

53. 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, its officers or those acting on its behalf.[5]

4.3 What is a human right?

54. The rights and freedoms recognised by the ICCPR are 'human rights' within the meaning of the AHRC Act.[6]

5 Arbitrary detention

5.1 Law on article 9 of the ICCPR

55. 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.

56. 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[7]
    - 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[8]
    - 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[9]
    - detention should not continue beyond the period for which a State party can provide appropriate justification.[10]

57. 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.[11] Similarly, the Human Rights Committee considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was 'considerably in excess of what is necessary'.[12]

58. The UN HR Committee has held in several cases 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.[13]

59. 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, 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.[14]

60. 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'.[15]

61. It will be necessary to consider whether the detention of Ms QD in closed detention facilities could 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 'arbitrary' under article 9 of the ICCPR.

5.2 Act or practice of the Commonwealth

62. At the time of her detention, Ms QD was an unlawful non-citizen within the meaning of the Migration Act, which required that she be detained.

63. There are a number of powers that the Minister could have exercised either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.

64. Section 197AB of the Migration Act permits the Minister, where they think 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.

65. 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.

66. Professor Croucher considered that the failure of the Department to refer Ms QD's case to the Minister for consideration under section 195A or section 197AB until 11 August 2021, was the act of the Commonwealth relevant to this complaint.

5.3 Assessment

(a) Alternatives to held detention

67. Ms QD was transferred to Australia and detained on 6 August 2019.

68. On 26 August 2019, Ms QD was referred within the Department for a residence determination consideration.

69. The Department progressed this referral for a submission to be made to the Minister on 3 January 2020. However, the submission was not finalised, and it was closed without any referral being made to the Minister.

70. A note on Ms QD's case reviews from the Department states that on 19 March 2020, network advice was received that the Minister had directed that all section 197AB requests be finalised without referral to the Minister, and that they instead be referred for a final departure Bridging E visa under section 195A.

71. A further note appears on Ms QD's case reviews on 19 or 20 August 2020, that transitory persons who were already engaged in the US resettlement process would continue to be progressed under section 197AB. Ms QD was engaged in the US resettlement process.

72. The Department reported to the Commonwealth Ombudsman on 16 October 2020 that Ms QD had been assessed as meeting the section 197AB guidelines, but that 'MI processing slowed between March and June 2020 due to diversion of resources for COVID. Department is preparing a submission for the Minister'.

73. Further notes appear on the case reviews in November 2020 and March 2021 that status resolution officers had requested updates from the ministerial intervention team but that there had either been no update, or no response was received.

74. On 22 April 2021, according to the Department's response to the complaint, a request was initiated under both sections 195A and 197AB for the Minister's consideration, but the Department provided no information about this process.

75. The Asylum Seeker Resource Centre (ASRC) wrote to the Minister on 19 May 2021 requesting intervention on behalf of Ms QD under either section 195A or section 197AB.

76. On 29 June 2021, the ministerial intervention unit indicated to status resolution that Ms QD and her partner were being considered for inclusion in a transitory person group submission. This information was updated further on 12 July to the effect that the section 197AB request had been finalised on the basis that Ms QD had been included on the section 195A transitory persons submission. This submission was received by the Minister's office on 11 August 2021.

77. On 24 August 2021 the Minister made a residence determination for Ms QD and she was transferred to community detention on 25 August 2021.

(b) Failure of the Department to refer Ms QD for consideration by the Minister

78. The Department did not commence the formal process of referring Ms QD's case for consideration by the Minister for consideration of less restrictive alternatives to held detention until April 2021 – after she had been detained for 18 months.

79. No explanation has been given as to why the initial referral, commenced just 4 months after her arrival in Australia, was not progressed.

80. Professor Croucher recognised that the ministerial guidelines on sections 195A and 197AB both exclude referrals of transitory persons to the Minister. However, there are exceptions contained within both sets of guidelines – the section 195A guidelines suggest this only applied 'generally', and the section 197AB guidelines allow a referral to be made in exceptional circumstances.

81. On two occasions, advice was received by the Department from the Minister's office regarding the appropriate intervention power to be utilised with respect to the referral of transitory persons – first on 3 March 2020 for consideration under section 195A and secondly on 19 or 20 August for consideration under section 197AB. Both of these directives from the Minister applied to Ms QD, and yet it does not appear that the Department acted upon them in a timely fashion.

82. Concerningly, the Department reported to the Commonwealth Ombudsman on 16 October 2020 that a submission was being prepared for the Minister, however the Department has not provided any documents to the Commission to indicate that this was the case.

83. In Professor Croucher's view, there were a number of factors unique to Ms QD that would have constituted exceptional circumstances for consideration by the Minister. These included:

- her various and complicated health issues
- her deteriorating mental health (which was the subject of specific recommendations by an external provider that she should be considered for release from detention)
- the exacerbation that the detention practices of pat searches, room searches and headcount were having on her mental health due to her history of domestic violence and sexual harassment, which was well known to the Department
- the impracticality of returning her to Nauru, which meant that her detention was inevitably prolonged
- the lack of any prospect of returning her to Iran in light of her refugee status.

84. The submission from the Department which ultimately led to the Minister's intervention is stamped 'received' by the Minister's office on 11 August 2021. However, this submission relates to a group of transitory persons and makes no mention of Ms QD's particular circumstances.

85. Ms QD had no profile of risk on the various assessment tools utilised by the Department. The CPATs conducted recommended that she be considered for either a Bridging E visa or residence determination as early as late August 2019.

86. The Department has not demonstrated that Ms QD's detention for a period of 2 years was necessary or proportionate to any aim of the Commonwealth.

87. Professor Croucher found the Department's failure to refer Ms QD to the Minister for consideration under section 195A or section 197AB prior to 11 August 2021 to be an act which is contrary to article 9(1) of the ICCPR.

6 Right of detainees to be treated with humanity and dignity

6.1 Law on article 10 of the ICCPR

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 Committee,[17] 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.

> The content of article 10(1) has been developed through a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty,[20] including:
>
> the *Nelson Mandela Rules*,[21] and
>
> the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).[22]

93. In 2015, the Mandela Rules were adopted by the United Nations. They provide a restatement of a number of United Nations instruments that set out the standards and norms for the treatment of prisoners.[23] At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed regardless of a State Party's level of development.

94. Several of the Mandela Rules are relevant to the conduct of searches of prisoners and cells. Rule 50 provides:

> The laws and regulations governing searches of prisoners and cells shall be in accordance with obligations under international law and shall take into account international standards and norms, keeping in mind the need to ensure security in the prison. Searches shall be conducted in a manner that is respectful of the inherent human dignity and privacy of the individual being searched, as well as the principles of proportionality, legality and necessity.

95. Rule 51 provides:

> Searches shall not be used to harass, intimidate or unnecessarily intrude upon a prisoner's privacy. For the purpose of accountability, the prison administration shall keep appropriate records of searches, in particular strip and body cavity searches and searches of cells, as well as the reason for the searches, the identities of those who conducted them and any results of the searches.

96. While many of the cases brought under article 10(1) involve physical mistreatment or poor conditions in prison, the decisions of the UN HR Committee in *Angel Estrella v Uruguay*[24] (*Estrella*) and *Zheludkov v Ukraine*[25] (*Zheludkov*) demonstrate that article 10(1) can be breached by actions that do not involve physical mistreatment or poor prison conditions.

97. In *Estrella*, the UN HR Committee held that the conduct the subject of the complaint constituted a breach of both articles 10(1) and 17. In this case, the breach involved censorship and restriction of Mr Estrella's correspondence with his family and friends to such an extent that the UN HR Committee considered it to be incompatible with article 17 read in conjunction with article 10(1).

98. In *Zheludkov*, the UN HR Committee held that the State's consistent and unexplained refusal to provide Mr Zheludkov with access to his medical records constituted a breach of article 10(1). The Committee reached this conclusion even though it was not in a position to determine the relevance of the medical records to an assessment of Mr Zheludkov's health or to the medical treatment afforded to him. In a separate concurring opinion, Ms Cecilia Medina expressed the view that the actions of the State constituted a breach of article 10(1) regardless of whether the refusal to provide access had any consequences for the medical treatment of Mr Zheludkov. In reaching this conclusion, Ms Medina made the following comments:

> Article 10, paragraph 1, requires States to treat all persons deprived of their liberty 'with humanity and with respect for the inherent dignity of the human person'. This, in my opinion, means that States have the obligation to respect and safeguard all the human rights of individuals, as they reflect the various aspects of human dignity protected by the Covenant, even in the case of persons deprived of their liberty. Thus, the provision implies an obligation of respect that includes all the human rights recognized in the Covenant. This obligation does not extend to affecting any right or rights other than the right to personal liberty when they are the absolutely necessary consequence of the deprivation of that liberty, something which it is for the State to justify.
>
> A person's right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them. The State has not given any reason to justify its refusal to permit such access, and the mere denial of the victim's request for access to his medical records thus constitutes a violation of the State's obligation to respect the right of all persons to be 'treated with humanity and with respect for the inherent dignity of the human person', regardless of whether or not this refusal may have had consequences for the medical treatment of the victim.[26]

99. It is not possible to identify comprehensively all situations that will constitute a breach of article 10(1). Ultimately, whether there has been a breach of this article will require consideration of the facts of each case. The question to ask is whether the facts demonstrate a failure by the State to treat detainees humanely and with respect for their inherent dignity as a human being.[27]

6.2 Conducting searches in immigration detention

100. The power to conduct searches in immigration detention facilities is granted pursuant to section 252 of the Migration Act. The section reads:

> Searches of persons
>
> For the purposes set out in subsection (2), a person, and the person's clothing and any property under the immediate control of the person, may, without warrant, be searched if:
>
> the person is detained in Australia
>
> …
>
> The purposes for which a person, and the person's clothing and any property under the immediate control of the person, may be searched under this section are as follows:
>
> to find out whether there is hidden on the person, in the clothing or in the property, a weapon or other thing capable of being used to inflict bodily injury or to help the person to escape from immigration detention;
>
> …
>
> (8) An authorised officer or other person who conducts a search under this section shall not use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.

101. This power was discussed by the Full Court of the Federal Court of Australia in the case of *ARJ17 v Minister for Immigration and Border Protection* (2018) 257 FCR 1. Justice Rangiah described the discretion imparted on an officer (which can include an employee of Serco)[28] as follows:

> Further, s 252 of the *Migration Act* is drafted in terms which indicate that the powers are to be exercised by authorised officers personally and independently making discretionary judgements based upon the particular circumstances that they face. The word 'may' in s 252(1) of the

> *Migration Act* indicates that an authorised officer has a discretion as to whether to carry out a search for the purposes specified in s 252(2): see s 33(2A) of the *Acts Interpretation Act 1901* (Cth)
>
> ...
>
> A search may only be carried out for limited purposes and for a limited range of items ... An authorised officer is required to exercise judgement as to whether the conditions for searching the person or property exist and whether a search ought to be carried out.[29]

102. The Migration Act does not specifically grant a power to conduct room searches or searches of property not within the immediate control of a detainee. Instead, the Department requires Serco to conduct random searches of accommodation within immigration detention facilities in order to fulfil their duty of care to detainees.[30]

103. Serco's contract (Contract) with the Department to run immigration detention facilities, and the Department's Detention Services Manual (DSM), are the primary documents that set out the obligations of Serco and departmental staff in this respect.

104. The Contract contains the following provisions relevant to searches:

> 2.3 Detection of Excluded and Controlled Items and Illegal Items
>
> (a) The Service Provider must:
>
> (i) use its best endeavours to detect Excluded and Controlled Items, Illegal Items and any other items that may pose a risk to the security of the Facility; and
>
> (ii) screen all persons, personal belongings, vehicles and goods entering the Facility in accordance with the Department-specific Policies and Law.
>
> ...
>
> (d) Screens and searches conducted by the Service Provider may include:
>
> (i) pat searches; and
>
> (ii) strip searches.
>
> 3.7 Searches and Fabric Checks
>
> (a) The Service Provider must conduct a Fabric Check of all Accommodation at all Facilities at least monthly.

(b) The Service Provider must conduct regular searches throughout the Facility to detect and control the presence within the Facility of Illegal, Excluded and Controlled items;

(c) The Service Provider must:

(i) in Facilities accommodating less than 200 Detainees, conduct a random security check of all Accommodation in the presence of a Detainee who occupies a room, at least once each month;

…

(iv) conduct searches within the Facility in accordance with:

the Migration Act 1958 (Cth)

Department-specific Policies; and any other applicable Laws.

6.4 Screening and Search

(a) The Service Provider must:

(i) ensure that Detainees understand the screening and searching process, and that at all stages of the process there are clear explanations given to Detainees about why any screening or searching procedure is being carried out;

(ii) …

(iii) conduct screening and searches with sensitivity; and

(iv) ensure that whenever Detainees are searched by any method they are only searched by a member of the same sex (where practicable), with two (2) Service Provider Personnel present at all times for any search beyond a pat-down search.

105. The DSM contains guidance to Serco officers searching detainees and their property within an immigration detention facility within *DSM – Procedural Instruction – Safety and security management – Screening and search of detainees and their property* (Procedural Instruction) and *DSM – Standard Operating Procedure – Safety and security management – Screening and search of detainees and their property*.

106. Serco is referred to in the Procedural Instruction as the Facilities and Detainee Service Provider (FDSP).

107. The FDSP is to conduct regular searches throughout the IDF to detect and control the presence of illegal, excluded and controlled items and conduct

random security checks of accommodation, with the detainee who occupies the room present, if possible.[31]

108. In saying this, however, the Procedural Instruction contains the following warning:

> Although there is a capacity to conduct searches of detention premises on the basis that an occupier (the Department or its contracted FDSP) of premises has the right to search those premises, there is no immediate common law right to search a detainee's personal effects. Doing so without the detainee's consent or other lawful justification may constitute an unlawful act of trespass and give cause for legal action by the owner of the property.[32] (emphasis in original)

109. Rules for conducting such searches are set out in detail in the Procedural Instruction:

> The officer conducting the search must:
>
> - if the search is targeted or a random search of accommodation:
>   - identify themselves, and those who will conduct the search, to any detainees in the area
>   - explain the reason/s and the legal basis for the search
> - explain to whom any information collected will be provided and how it will be stored
> - allow detainees a reasonable timeframe within which to comply with each search request
> - search property in a way that will not be offensive or damage goods
> - be mindful of potential sensitivities of detainees, particular [sic] with regard to sex. For example, where possible, male officers should avoid searching females' sleeping quarters
> - video record a search of any property; and
> - if a detainee cannot be present to witness the search (they have been hospitalised or have escaped from immigration detention), notify them, if possible, that their property has been searched and the search has been video recorded.[33]

6.3 Act or practice of the Commonwealth

110. Serco conducted each of the searches the subject of Ms QD's complaint. In doing so, Serco was acting pursuant to the Contract. Each act or practice performed by Serco is therefore an act or practice by or on behalf of the Commonwealth.

111. Based on the material before me, the acts or practices to be considered in Ms QD's complaint are:

- the failure by the Department to issue a direction to Serco to cease conducting pat searches on Ms QD before 8 June 2021
- the failure by Serco officers to appropriately exercise their discretion when considering the need to pat search Ms QD in particular circumstances
- the Department's requirement for Serco to search Ms QD's room when conducting random accommodation searches
- the Department's requirement for Serco to conduct regular headcounts at the Broadmeadows Residential Precinct.

6.4 Assessment

(a) Complaints to Serco

112. Ms QD made several complaints to Serco about her treatment while in held detention. The first was made on 16 September 2019. Ms QD complained about body searches, stating:

> I have a lot of appointment all the time and every time I have been [body] search, it's made me feel uncomfortable – please stop this role for us. Some officers searching us very badly and we don't know their face … I would like they stop searching our [body] (No [touch]).
>
> [errors in original]

113. Serco responded to the complaint on 27 September 2019. Their response included the following explanation:

> it is Serco policy that every detainee, when entering and exiting an immigration facility, must be screened and pat-searched. This is regardless of the number of times they enter and leave the facility. You stated that you have observed other detainees attended [sic] the medical

> centre and the gym and noticed that they were not searched. The manager explained that they were already in the Centre and had been screened and searched previously, mentioning that you had entered from an area outside the boundaries of the facility, mainly the BRP.

114. On 3, 4, 5 and 18 February 2020, Ms QD described having a panic attack to an IHMS psychologist and several nurses when woken in shock by a Serco officer doing a head count during the evening.

115. An IHMS psychiatrist noted on 1 June 2020 that the frequent head counts conducted by Serco were traumatic for Ms QD, especially when they woke her from sleeping.

116. Ms QD made a second complaint to Serco on 26 October 2020 regarding the behaviour of Serco officers. She stated that officers were bothering her and failing to respect her privacy. She requested that only female officers be permitted to attend her room during headcount, and that officers be directed to stop gossiping and laughing about her.

117. Serco responded to this complaint on 6 November 2020, stating that it had investigated the officer's behaviour, noting that the officer had denied the allegations, and confirming that it would continue to use female officers for head counts whenever possible.

118. Ms QD made a third complaint on 12 April 2021 about body and room searches. Ms QD requested that the response be provided by the ABF rather than Serco due to a perceived lack of response from Serco to her previous complaints.

119. In this written complaint, Ms QD explained the impact of the frequent searches on her:

> I had bad experiences of sexual harassment in Nauru, it hurt me a lot and affected me badly. Even here. This form of abrupt inspection that violate my privacy causes me [severe] anxiety and increases a sense of insecurity in me and also is very degrading that dehumanizing me.
>
> [errors in original]

120. Ms QD asked four questions of the ABF to identify the particular laws that allowed Serco officers to touch and inspect her body without her consent; to deduct points from her for refusing to comply; to enter her room without notice and without consent; and to do so without covering their shoes.

121. This complaint was repeated on the same day to her counsellor at Foundation House, who wrote in their report to IHMS:

> [QD] continues to be troubled by the constant presence of guards, the felt surveillance and lack of privacy incurred by the headcounts and room searches. She is increasingly resentful of the frequent body and machine searches, stating that if she has an appointment internally at IHMS she is searched.
>
> …
>
> [QD] is experiencing increasing frustration and an escalating sense of injustice at the restrictions on her liberty. She has been expressing resentment at the rules and regulations that make her feel like a criminal and erode any remaining sense of control. She has been increasingly offended by the necessity to have unexpected house searches and body searches, which she finds particularly uncomfortable due to past traumatic experiences in her country of origin and Nauru.

122. On 22 April 2021, the ASRC wrote on Ms QD's behalf to the Manager of ABF requesting an explanation for the searches of Ms QD, and asking for their cessation. In particular, the ASRC wrote:

> Jurisprudence confirms that searches conducted pursuant to s 252 must be initiated by an authorised officer in their discretion for the limited purpose of determining if the person has 'intentionally concealed' a relevant item. It follows that where there is no capacity for Ms [QD] to conceal a weapon or other relevant thing – for example, due to the physical constraints on her liberty and therefore limited ability to obtain any such items, or the clothing that she is wearing – then searches of her body or property in her immediate possession is not authorised by s 252. Further, it is apparent that s 252 only authorises the search of property in Ms [QD]'s *immediate* possession and does not purport to permit searches of all rooms or compounds.

123. The ABF acknowledged Ms QD's complaint on 27 April 2021.

124. The ABF closed Ms QD's third complaint on the basis that Serco had conducted the searches with authority for the purpose of ensuring order and safety in detention.

125. Ms QD made a fourth complaint on 28 April 2021 in relation to officers knocking loudly on her door during head count, ignoring her particular sensitivities to this issue, and not covering their shoes when entering her room.

126. On 24 May 2021, she made a fifth complaint that Serco had deducted 10 points from her Individual Allowance Programme (IAP) due to her refusal to be pat searched. On the same day, she consulted with the IHMS

psychiatrist. She expressed to the psychiatrist that the ABF and the residential manager had advised her that if IHMS wrote 'a letter to say she is affected psychologically by the searches they will reconsider her plan'. The notes made by the IHMS psychiatrist appear to suggest that they agreed to this request.

127. Serco responded to this fifth complaint on 28 May 2021 stating that Ms QD had been appropriately advised in advance that if she refused a pat search then she would not be eligible to receive 10 IAP points.

128. On 8 June 2021, the Department instructed Serco to cease conducting pat searches on Ms QD without the approval of the ABF Superintendent.

(b) Pat searches

129. With respect to the body searches complained of by Ms QD, the Department stated in response to this complaint:

> Under section 252(1) of the Migration [Act], the search of a person (a pat down search) is the act of passing open hands over the body of a clothed person. It is not permitted to search under the surface of a person's clothes during a pat down search to find out whether the person has concealed weapons or other items that are capable of being used to inflict bodily injury or to help a person to escape from immigration detention. A search under section 252(1) may also include the inspection of a person's possessions under their immediate control.
>
> Under section 252(6)(a) of the Migration Act the authorised officer conducting the search under section 252(1) must be of the same sex. Under section 252(6)(b) of the Migration Act, in a case where an authorised officer of the same sex as the person is not available to conduct the search, the search can be undertaken by any other person who is of the same sex and is requested by an authorised officer, and agrees, to conduct the search.
>
> To comply with section 252(8) of the Migration Act a person must not be subjected to greater indignity than is reasonably necessary when conducting a search. Under policy, all reasonable efforts must be made to ensure that the search is conducted in private and away from the view of the public and other persons not involved in the search.
>
> Pat searches are conducted when a detainee leaves and re-enters an immigration detention facility. While accommodated at the Broadmeadows Residential Precinct (BRP), which is adjacent but external to MITA, Mrs [QD] was subject to a pat search upon leaving/re-entering the BRP. Pat searches are conducted under CCTV and in accordance with departmental and Serco policy, procedure and training. Pat searches are

> conducted by an officer of the same sex as the detainee, as was the case with Mrs [QD].

130. On 24 May 2021, Ms QD requested assistance from an IHMS psychiatrist to write a letter for consideration by the ABF to cease pat searches. She complained that she was required to be pat searched in order to attend IHMS appointments.

131. This was not the first time that Ms QD communicated her concerns in relation to pat searches, as outlined above.

132. On 8 June 2021, the ABF communicated by email the decision that Serco was not to conduct any further pat searches on Ms QD without prior approval from the ABF Superintendent. Permission to do so would require a written request from Serco. The email does not contain any reasons for the decision, however the Department stated the following to the Commission by way of explanation:

> The Department can advise that the decision to cease conducting pat searches on Ms [QD], without prior approval by the ABF Superintendent, was made based on various considerations, including Ms [QD]'s history both prior to and while in immigration detention, advice from the Detention Health Service Provider and Ms [QD]'s risk assessment.

133. While pleasing to note that the ABF did give this direction, it is noted that it took 1 year and 9 months to do so, from the first time that Ms QD made a complaint about submitting to body searches.

134. One concerning aspect of the requirement for Ms QD to undergo pat searches is that she was required to have them in order to attend the IHMS clinic. The Broadmeadows Residential Precinct has been described as being 'adjacent' to MITA and, due to its size, it is understood that it does not have its own IHMS clinic. Ms QD therefore would have been pat searched on entering MITA and returning to the Broadmeadows Residential Precinct. This was particularly distressing for Ms QD, who raised it several times with various IHMS practitioners and Serco. Ms QD had a number of health concerns that required her to attend the clinic regularly.

135. Comments made by Justice Rangiah in *ARJ17 v Minister for Immigration and Border Protection* refer to the discretion imparted by section 252 on officers to assess the appropriateness of conducting a search on each occasion. Professor Croucher considered that it would have been reasonable to reassess the need to pat search Ms QD when attending the

IHMS clinic in light of the limited opportunity she would have between leaving Broadmeadows Residential Precinct and entering MITA, to obtain any item capable of being used to inflict bodily injury or to help her escape from immigration detention. Ms QD would have been subject to a screening procedure (either by walking through screening equipment or submitting to a hand-held screening device) simultaneously, which would have further minimised any risk. It is also noted that it may have been reasonable for Serco officers to consider Ms QD's consistently low risk rating in assessing the need for a pat search.

136. The Procedural Instruction uses the term 'may' when discussing the conducting of a search, but does not make explicit the discretionary element imparted by the legislation on authorised officers. In order for the power to be used as intended by the legislation, it is important that authorised officers consider the necessity of conducting a search on each occasion. No guidance is provided in the Procedural Instruction as to the factors Serco officers might weigh in deciding whether to exercise their discretion to conduct pat searches in certain circumstances, or examples listed of circumstances in which they might elect not to do so.

137. The Department has acknowledged that Ms QD made her particular vulnerabilities and sensitivities towards pat searches known to IHMS. These were documented clearly on the documents released to the Commission by the Department.

138. Professor Croucher w considered that the Department had sufficient basis to issue a direction of the nature made in June 2021 sooner than it did. Ms QD made her first complaint about the pat searches to Serco in September 2019, and raised concerns with IHMS in February 2020. Ms QD had a 'low risk' rating across all of the Department's risk assessment tools for the entire period of her detention. By failing to issue a direction to Serco to cease conducting pat searches on Ms QD before 8 June 2021, particularly when Serco was requiring Ms QD to submit to these searches in order to attend the IHMS clinic at MITA, Professor Croucher found that the Department did not treat Ms QD with humanity and inherent respect for her dignity as required by article 10(1) of the ICCPR.

139. In addition, Professor Croucher found that Serco officers did not appropriately exercise their discretion to assess the need for pat searches on Ms QD in certain circumstances, and specifically when attending the IHMS clinic at MITA. Professor Croucher considered that in continuing to search her in those circumstances in full knowledge of her 'low risk' rating and personal vulnerabilities Serco failed to treat her with humanity and inherent respect for her dignity, contrary to article 10(1) of the ICCPR.

(c) Room searches

140. In response to Ms QD's complaint, the Department provided the Commission with the following response:

> Officers have a legislative authority under section 252 of the Migration Act and common law authority to search detainees and immigration detention facilities, including detainee accommodation areas. This authority does not require a detainee's consent.
>
> A search conducted for the purposes specified in the Migration Act can be conducted at any time. The legislative purposes that screening and search procedures are conducted for are to identify weapons, or other items capable of inflicting bodily injury or that could be used by a detainee, or (in certain circumstances) other detainees, to escape from immigration detention.
>
> In addition to the legislative provisions, the Detention Services Manual (DSM) provides guidance for screening and searching detainees and their property that enter, depart or are accommodated within an immigration detention facility
>
> …
>
> Despite the fact that the Migration Act does not place restrictions on the frequency of searches, detention operational policy articulates that it would be unreasonable to repeatedly search a detainee within a short timeframe.

141. In response to her complaint about frequent room searches, the Department wrote:

> To give effect to the Department's common law rights, regular searches of common areas and detainees accommodation in immigration detention facilities are undertaken. As per contractual requirements with the Department, Serco officers are required to conduct these routine room searches once a month. Rooms are randomly selected to be searched as per a matrix, which is generated on a daily basis.

142. The Department's response at paragraph 1404 is not strictly correct, in that section 252 of the Migration Act does not impart a specific power to conduct accommodation searches. Instead, as the DSM at paragraph 108 112 outlines, the Department instead relies upon its duty of care to require Serco to conduct random accommodation searches to ensure that no items which might cause harm to detainees are kept on the premises.

143. Serco is required to conduct room searches as part of the Contract.

144. Four video recordings were provided by the Department at the request of the Commission. These were dated 26 December 2019, 15 February 2020, 31 March 2021 and 11 May 2021.

145. During the footage taken on 31 March 2021, Ms QD verbally expresses her unhappiness with being pat searched (as detailed above) and with having her belongings searched.

146. Each of the four videos shows Serco officers as they search the room. They are respectful with the items touched and make clear attempts to leave everything as it was found.

147. The need to conduct searches within an immigration detention facility was recognised within the Mandela Rules, and in Professor Croucher's opinion, is based upon a genuine need to ensure the safety of all detainees. Professor Croucher did not consider that random accommodation searches as required by the Contract are in breach of Ms QD's human rights.

148. Nothing in the material provided by the Department or Ms QD led Professor Croucher to form the view that the room searches conducted by Serco with respect to Ms QD's accommodation were carried out contrary to article 10(1) of the ICCPR. Professor Croucher recognised that Ms QD became increasingly frustrated the longer that she remained in immigration detention and that room searches were among the many aspects of life in a detention facility that added to her deteriorating wellbeing. However, Professor Croucher considered this more appropriately falls within her arbitrary detention complaint, and dealt with it accordingly.

(d) Head count

149. Ms QD complained about the frequency of head counts conducted while in immigration detention, and suggested that pat searches were occasionally conducted at morning head count.

150. The Department refuted this suggestion, and provided the Commission with the relevant procedural instruction on occupancy headcount.

151. Serco is made responsible for conducting four headcounts of all detainees per day. The times at which these occur are:

- before breakfast
- during lunch
- during the evening meal

- before 11pm.

152. The Department says that as well as ensuring the number of detainees present at the centre, the headcount serves the purpose of checking the wellbeing of detainees and reporting any concerns about detainees to the relevant manager.

153. Officers are directed to conduct the headcount in a manner which must 'respect the cultural, religious, gender and privacy needs of all detainees'.

154. It is understood that there is a need to ensure that all persons within a detention facility are accounted for, and to check for any issues in relation to wellbeing.

155. Professor Croucher accepted that morning and evening searches, if carried out when an individual is asleep, would feel intrusive. The officers involved in the headcount may not have respected Ms QD's particular wishes communicated by her at all times, although it was difficult for Professor Croucher to make any findings on this without evidence.

156. Professor Croucher was not satisfied that Serco conducted pat searches on Ms QD during morning head count. It may be that she was referring to pat searches during room searches, which did occur.

157. Professor Croucher could not be satisfied that any conduct of Serco or the Department during headcount procedures constituted a breach of article 10(1) of the ICCPR. She did however acknowledge that this practice was distressing for Ms QD, and did consider it in respect of her arbitrary detention complaint.

7 Prohibition against torture or cruel, inhuman or degrading treatment

158. At the time of Ms QD's complaint to the Commission, she lived with the uncertainty of not knowing if she would be returned to Nauru.

159. On 10 or 15 April 2021, a medical officer of the Commonwealth reviewed Ms QD's medical records and provided the Department with the opinion that Ms QD no longer needed to remain in Australia for the specific medical purpose for which she was transferred.

160. Further, on 28 April 2021, the medical officer found that as Ms QD's medical treatment was completed, she was obliged to return to Nauru.

161. Ms QD was provided with an acknowledgement form for transitory persons to be returned to Nauru. Ms QD and her partner refused to sign the form, and advised the Department that they did not wish to return to Nauru.

162. ASRC wrote to the Australian Government Solicitor (AGS) on 28 May 2021 indicating Ms QD's intention to seek an injunction preventing her removal to Nauru if the Department did not indicate that no such transfer was intended.

163. AGS responded to ASRC on 30 May 2021 stating that as Ms QD and her partner were unwilling to submit to COVID-19 testing, there could be no plans for their removal according to the Nauruan government's policy on incoming travellers.

164. Professor Croucher drew attention to an email forwarded by Ms QD to the Commission from a status resolution officer to her dated 23 June 2021. Ms QD had emailed the officer expressing her frustration at the lack of movement by the Minister in considering her for intervention. The officer's reply is in the following terms:

> As you know, because you came to Australia without a visa, the Government policy is that you will not be settled in Australia.
>
> You currently do not hold a visa, so you are in immigration detention.
>
> Your medical treatment is completed and you are subject to return to Nauru.
>
> It's is [sic] my understanding that you and [redacted] refused to sign the documents regarding Nauru, when my colleague provided you with them.
>
> …
>
> You have an ongoing Ministerial Intervention process. You have a pathway open to you to return to Nauru. You have a pathway to return to your country of Citizenship.
>
> These are your options and remaining in immigration detention in Australia is also a choice you are making.

165. The language used by the officer in this correspondence appears to lack understanding of the difficult situation Ms QD was in, including her experiences of sexual harassment in Nauru and her refugee status and inability to return to Iran.

166. Ms QD alleges that returning her to Nauru would constitute a breach of article 7 of the ICCPR on the basis that she would be subjected to torture or to cruel, inhuman or degrading treatment there.

167. The Department, in its response to Ms QD's complaint, on 24 November 2021, wrote that it was 'not reasonably practicable to take her to Nauru and no further action will be taken'.

168. Based on this, Professor Croucher was satisfied that Ms QD is not at risk of being returned to Nauru, and that no breach of her human rights would result. It was therefore not necessary for Professor Croucher to determine whether such return would constitute a breach of article 7.

8 Recommendations

169. 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.[34] The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.[35] The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.[36]

8.1 Compensation

170. Professor Croucher considered that it is appropriate to make a recommendation for the payment of compensation to Ms QD, in order to reduce the loss and damage suffered by her as a result of the failure to treat her with humanity and inherent respect for her dignity as required by article 10(1) of the ICCPR. Such recommendations for compensation are expressly contemplated in the AHRC Act.[37]

171. Professor Croucher made this recommendation on the basis that:

- Ms QD made her objections to being pat searched known to Serco
- her particular vulnerabilities as having previously experienced gender-based violence were also known to Serco
- there was no need to search her when she transferred between the Broadmeadows Residential Precinct and MITA due to the low risk of her obtaining any weapon or instrument to assist in her escape during such transfer
- Ms QD's risk rating was assessed by the Department as low

- the reason for her transfer between facilities for the most part was in order for her to attend MITA for medical treatment.

172. While the humiliation suffered by Ms QD will not be able to be fully addressed by the payment of money, Professor Croucher considered that it is important that she be provided compensation to acknowledge the impact the treatment by the Commonwealth had on her.

173. In considering the assessment of a recommendation for compensation under section 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.[38] Professor Croucher was 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.[39]

174. 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.[40] Those matters are not repeated here.

Recommendation 1

The Commission recommends that the Commonwealth pay to Ms QD an appropriate amount of compensation to reflect the loss and damage she has suffered as a result of the breach of her human rights under article 10(1) of the ICCPR identified in the course of this inquiry.

8.2 Ministerial guidelines

175. The Commission has made previous recommendations that the ministerial guidelines for referral to the Minister be amended.[41] Currently, the guidelines under section 197AB exclude for referral transitory persons, unless there are exceptional reasons or on the Minister's request, and those under section 195A exclude them without exception.

176. The Department indicated that it would include the Commission's recommendations when briefing the Minister on options to review the sections 195A and 197AB instructions.

177. The ministerial guidelines should be amended to remove these exclusions. A transitory person should not be detained merely for the fact of them falling within that definition, unless there are other factors relevant to

their individual circumstances that justify their detention as necessary, proportionate and reasonable. Otherwise, their detention may be considered arbitrary and contrary to article 9(1) of the ICCPR.

Recommendation 2

The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that all transitory persons in closed immigration detention are eligible for referral under ss 195A and 197AB.

8.3 Conducting pat searches

178. The Department's response to Ms QD's complaint is set out at paragraph 132129, and indicates that, at that time, it was routine for detainees held at the Broadmeadows Residential Precinct to be pat searched each time they attended at the MITA complex.

179. It seems highly unlikely that any real risk exists for a detainee to acquire any weapon or instrument to assist in their escape while being transferred between the two facilities. Accordingly, the Commission considers that this routine practice may not be necessary.

Recommendation 3

The Commission recommends that policy and procedures at the Melbourne Immigration Detention Centre and Broadmeadows Residential Precinct detention facilities be updated to make clear that a pat search of a detainee is not required for detainees transferring between those two facilities, unless a particular risk is identified or exists in a particular case.

Recommendation 4

The Commission recommends that the Procedural Instruction be updated to provide guidance to officers regarding the factors to be considered in deciding whether to exercise their discretion to conduct pat searches in certain circumstances, and examples listed of circumstances in which they might elect not to do so. The Commission also recommends that officers receive training in line with the updated procedures.

8.4 Durable solution

180. As with other transitory persons in Australia, Ms QD remains on a BVE for an uncertain period. As long as the Commonwealth's policy remains that

transitory persons will not be permanently settled in Australia, then Ms QD's options for her future remain limited.

181. Ms QD has been found to be in need of protection, and cannot be returned to her country of origin, Iran. The Commission does not have any information before it as to the efforts being made to resettle Ms QD in any third country, and so cannot make any specific recommendations in this respect. However, the Commission remains concerned about the risk of Ms QD being redetained in future in light of her visa status, or returned to Nauru, and the negative impact on her by the ongoing uncertainty of her future.

Recommendation 5

The Commission recommends the Department to continue efforts to find a durable solution for Ms QD in light of her protection needs.

9 The Department's response to the Commission's findings and recommendations

182. On 7 June 2024, Professor Croucher provided the Department with a notice of her findings and recommendations.

183. On 29 August 2024, the Department provided the following response to her 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, Articles 9 (1) and 10 (1) of the *International Covenant on Civil and Political Rights* (ICCPR).
>
> **Recommendation 1** - **Disagree**
>
> *The Commission recommends that the Commonwealth pay to Ms QD an appropriate amount of compensation to reflect the loss and damage she has suffered as a result of the breach of her human rights under article 10(1) of the ICCPR identified in the course of this inquiry.*
>
> The Department disagrees with recommendation one. The Commonwealth can only pay compensation to settle a monetary claim against the Department if there is a meaningful prospect of legal liability within the meaning of the *Legal Services Directions 2017* and it would be within legal

principle and practice to resolve this matter on those terms. Based on the current evidence, the Department is not in a position to pay compensation.

Recommendation 2 - **Partially agree**

The Commission recommends that the Minister's section 195A and section 197AB guidelines should be amended to provide that all transitory persons in closed immigration detention are eligible for referral under subsection 195A and 197AB.

The Department partially agrees to recommendation two.

The Department is preparing new ministerial instructions for the Minister following the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs [2023] HCA 10.* Further information about the Department's approach will be made available in due course.

The Department will provide the Commission's recommendations for the Minister's consideration when briefing the Minister on options to review the sections 195A and 197AB Ministerial Intervention guidelines.

Recommendation 3 - **Disagree**

The Commission recommends that policy and procedures at the Melbourne Immigration Detention Centre and Broadmeadows Residential Precinct detention facilities be updated to make clear that a pat search of a detainee is not required for detainees transferring between those two facilities, unless a particular risk is identified or exists in a particular case.

Recommendation 4 - **Disagree**

The Commission recommends that the Procedural Instruction be updated to provide guidance to officers regarding the factors to be considered in deciding whether to exercise their discretion to conduct pat searches in certain circumstances, and examples listed of circumstances in which they might elect not to do so. The Commission also recommends that officers receive training in line with the updated procedures.

The Department disagrees with recommendations three and four.

The Department and the Facilities and Detainee Services Provider (FDSP) use screening and searching procedures to maintain the safety and well-being of all detainees, staff and visitors within an immigration detention facility (IDF) (or if applicable, outside an IDF) and to maintain the security and good order of the IDF.

All IDFs operate under a nationally consistent framework of operational policies and procedures as stipulated in the Detention Services Manual (DSM).

As such, there are no policies or procedures specific to the Melbourne Immigration Detention Centre (MIDC) or the Broadmeadows Residential Precinct (BRP) in respect of the screening and searching of detainees that the Department could update.

Section 252AA, section 252 and section 252A of the *Migration Act 1958* (the Act) provide the relevant legislative framework for the screening and searching of detainees while in immigration detention. This is complemented by s499 *Ministerial Direction No. 60 - Screening procedures in relation to immigration detainees* and detention operational policy *DSM - Procedural Instruction - Safety and Security Management - Screening and Searching of Detainees and their Property* (DM-619). The latter is subject to the Department's Policy and Procedure Control Framework, which includes mandatory review points to ensure accurate and current policy. Procedural advice guides officers on performing their functions, delegations and authorisations in a lawful and confident manner, within defined and approved policy settings.

Under the current policy settings, it is already stipulated that the searching of detainees must be conducted in a lawful and reasonable manner. Searches can be conducted at any time without warrant provided that the search is conducted for the purposes specified in the Act, noting it would be unreasonable to repeatedly search a detainee within a short timeframe. Further, the existing operational Policy Instruction provides guidance as to when a screen and search procedure can be conducted. However, due to the operational nature of detention, specifying explicit examples to the extent recommended within operational Policy Instructions may create safety and security risks.

The Department can confirm that screening and searching of detainees between the MIDC and the BRP is only conducted where a particular risk is identified. As such, detainees moving between the MIDC and the BRP are not routinely searched when attending the medical clinic or canteen. However, there may be circumstances, such as following a personal visit (and where a particular risk is identified), where a detainee may be searched during a movement between the MIDC and BRP.

The Department can also confirm that FDSP officers are authorised officers under section 5(1), section 252 and section 252AA of the Act and receive ongoing training to ensure they maintain the necessary training and skills to undertake screening and searching of detainees safely, effectively and lawfully in circumstances where such actions are required to maintain safety and security of the IDC.

Recommendation 5 - Partially agree

The Commission recommends the Department to continue efforts to find a durable solution for Ms QD in light of her protection needs.

The Department partially agrees with recommendation *five.* The Department will continue its efforts to find a durable resettlement solution for Ms QD. Ms QD engaged with the United States (US) resettlement process and received support from the Department to attend various appointments. Ms QD disengaged from US resettlement in January 2023, before an outcome in her case. Ms QD subsequently lodged an expression of interest for permanent resettlement in New Zealand under the Australia-New Zealand resettlement arrangement. The United Nations High Commissioner for Refugees referred Ms QD's case to New Zealand for resettlement assessment and Ms QD attended an interview in November 2023. As at 17 June 2024, New Zealand is yet to reach a decision on Ms QD's case. Support is available to Ms QD through the Department's Status Resolution Support Services (SRSS) Program to continue to engage in the New Zealand resettlement process, and to prepare for departure following resettlement approval.

184. I report accordingly to the Attorney-General.

Hugh de Kretser
President
Australian Human Rights Commission
June 2025

Endnotes

[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] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154.
[3] *Ms BK, Ms CO and Mr DE v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128, p 179 (Annexure C: Findings on jurisdiction).
[4] Department of Immigration and Border Protection, *Detention Capability Review: Final Report,* August 2016, p 52, at https://www.homeaffairs.gov.au/reports-and-pubs/files/dcr-final-report.pdf.
[5] See Secretary, Department of Defence v HREOC, Burgess & Ors (1997) 78 FCR 208.
[6] The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
[7] Human Rights Committee, General Comment 8 (1982) Right to liberty and security of persons (Article 9). Human Rights Committee, General Comment 8 (1982) Right to liberty and security of persons (Article 9). See also Human Rights Committee, *Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*'); Human Rights Committee, Communication No 1014/2001, 78th sess, CCPR/C/78/D/1014/2001 (2003) ('*Baban v Australia*').
[8] Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
[9] *Manga v Attorney-General* [2000] 2 NZLR 65 at [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*').
[10] *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
[11] United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
[12] United Nations Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
[13] United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams & Ors v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007); *Baban v Australia*, Communication No. 1014/2001, CCPR/C/78/D/1014/2001 (2003); *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006).
[14] Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
[15] 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].
[16] UN 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 (10 April 1992) at [3].
[17] UN Human Rights Committee, *Views: Communication No 529/1993*, 60th sess, UN Doc CCPR/C/60/D/639/1995 (2001), ('*Walker and Richards v Jamaica')*; UN 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')*; UN 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] *Christopher Hapimana Ben Mark Taunoa v The Attorney General* [2007] NZSC 70.

[19] *Christopher Hapimana Ben Mark Taunoa v The Attorney General* [2007] NZSC 70, [79].

[20] Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/ Rev.1 at 33 (10 April 1992) [5].

[21] UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by 'the Nelson Mandela Rules', UN Doc A/RES/70/175 (17 December 2015).

[22] The Body of Principles were adopted by the UN General Assembly in *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 6th Comm, 43rd sess, 76th plen mtg, Agenda Item 138, UN Doc A/43/49 (9 December 1988) Annex.

[23] UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by 'the Nelson Mandela Rules', UN Doc A/RES/70/175 (17 December 2015), preliminary observation 2(1), 7.

[24] UN Human Rights Committee, *Views: Communication No 74/1980*, 18th sess, UN Doc CCPR/C/18/D/74/1980, (29 March 1983), ('*Estrella v Uruguay')*.

[25] UN Human Rights Committee, *Views: Communication No 726/1996*, 76th sess, UN Doc CCPR/C/76/D/726/1996, (29 October 2002) ('*Zheludkova v Ukraine').*

[26] *Zheludkova v Ukraine',* UN Doc CCPR/C/76/D/726/1996 (Ibid). Mr Rivas Posada, with whom Messrs Bhagwati and Ando agreed, dissented in the case and found that mere obstruction of access to medical records per se did not breach article 10(1).

[27] See discussion on the meaning of the word 'dignity' in a different context in *A, R (on the application of) v East Sussex County Council* [2003] EWHC 167 [86]-[89].

[28] *ARJ17 v Minister for Immigration and Border Protection* (2018) 257 FCR 1, [118].

[29] *ARJ17 v Minister for Immigration and Border Protection* (2018) 257 FCR 1, [124]-[125].

[30] Department of Home Affairs, *Detention Services Manual – Safety and security management – Screening and searching of detainees and their property* (27 November 2018) p17 [4.12.3]

[31] Department of Home Affairs, *Detention Services Manual – Safety and security management – Screening and searching of detainees and their property* (27 November 2018) p17 [4.12.4]

[32] Department of Home Affairs, *Detention Services Manual – Safety and security management – Screening and searching of detainees and their property* (27 November 2018) p18 [4.12.10]

[33] Department of Home Affairs, *Detention Services Manual – Safety and security management – Screening and searching of detainees and their property* (27 November 2018) p18 [4.12.8]-[4.12.9].

[34] *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(a) ('AHRC Act').

[35] AHRC Act, s 29(2)(b).

[36] AHRC Act, s 29(2)(c).

[37] AHRC Act, s 29(2)(c).

[38] *Peacock v The Commonwealth* (2000) 104 FCR 464 at 483 (Wilcox J).

[39] *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).

[40] 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].

[41] *Mr KJ v Commonwealth of Australia (Department of Home Affairs)* [2024] AusHRC 158.