



Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS23-001606

Date of Clearance: 10/08/2023

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Ministerial response letter to the President of the Australian Human Rights Commission – in relation to s. 47F(1)

Timing For consideration by no later than 25 August 2023.

Recommendations

That you:

1. note the preliminary views of the President of the Australian Human Rights Commission (AHRC) relating to complaints made by s. 47F(1) at Attachment A;
2. note the Department of Home Affairs' response to the AHRC preliminary view in relation to complaints from s. 47F(1) at Attachment B; and
3. sign the letter to the President of the AHRC at Attachment C.

noted / please discuss

noted / please discuss

signed / not signed

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date: 6/9/2023

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under the Freedom of Information Act 1982

Minister's Comments

Key Issues

1. On 31 March 2023, the President of the Australian Human Rights Commission (AHRC) wrote to you to in relation to complaints made by s. 47F(1) against the Commonwealth of Australia (the Department of Home Affairs) alleging a breach of their human rights. A copy of the letter is at Attachment A.
2. The AHRC President has provided you with the opportunity to make submissions, should you choose, in relation to her preliminary views of the complaints made by s. 47F(1), as the complaints relate in part to acts done by former Ministers in the exercise of their powers under the *Migration Act 1958* (Cth) (the Act).
3. The AHRC President made reference in her preliminary view to the decisions of former Ministers:

My preliminary view is that the continued detention of s. 47F(1) in closed detention facilities cannot be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. As a result, my preliminary view is that their continued detention is arbitrary, contrary to article 9 of the International Covenant on Civil and Political Rights (ICCPR). In this preliminary view, I have focused on the following acts which appear to be the most determinative in relation to their continued detention:

- *the decision by Minister Coleman on 4 October 2019 not to consider exercising his power under s195A of the Migration Act to grant s. 47F(1) a visa – this was the first occasion on which a Minister was asked to consider s. 47F(1) particular circumstances (his case was later also considered by Minister Hawke who decided not to exercise his power under s 195A on 22 November 2021).*
 - *the decision by Minister Hawke on 7 February 2022 not to consider exercising his power under s195A of the Migration Act to grant s. 47F(1) a visa – this was the first occasion on which a Minister was asked to consider s. 47F(1) particular circumstances.*
4. Whilst the Ministerial decisions referenced in the AHRC President's preliminary view were made by former Ministers, you may wish to respond to the AHRC President advising of new processes you introduced in late 2022. These changes relate to considering the use of your ministerial intervention powers for identified cohorts including those who have been in held immigration detention for more than five years, for consideration under sections 195A or 197AB of the Act (MS22-002407 refers). A proposed response to the AHRC President is at Attachment C for your consideration.

5. The AHRC President also wrote to the Secretary, providing the opportunity to make submissions in relation to her preliminary views of the complaints made by s. 47F(1). The Department of Home Affairs (the Department) sent its response to the AHRC on 18 July 2023 indicating that it disagrees with the preliminary views. A copy of the Department's response is at Attachment B.

Background

6. On 31 March 2023, the AHRC President provided a notice to you, and to the Secretary of the Department, under section 27 of the AHRC Act, of her preliminary views in relation to a complaint made by s. 47F(1) against the Department alleging they were subject to arbitrary detention.
7. The complaint alleges that the Department has engaged in acts and omissions that were inconsistent with or contrary to, article 9(1) of the ICCPR *'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'*.
8. As s. 47F(1) have been in held immigration detention for more than five years, they were referred to you for consideration under sections 195A or 197AB of the Act. On 1 March 2023, you declined to consider intervening under either section of the Act.
9. On 7 August 2023, your office requested the Department prepare a new Ministerial intervention submission for your consideration under sections 195A or 197AB of the Act for s. 47F(1). The Department is currently progressing this submission and it is expected to be provided to you in the week commencing 21 August 2023.

Consultation – internal/external

10. Status Resolution Branch.

Consultation – Secretary / Associate Secretary / ABF Commissioner

11. The Secretary was not consulted on the approach in the submission.
12. The Associate Secretary was not consulted on the approach in the submission.
13. The ABF Commissioner was not consulted on the approach in the submission.

Client service implications

14. Nil.

Risks and Sensitivities

15. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

16. The AHRC has previously raised concerns with the time it takes to receive responses from the Department for matters that go to reporting, specifically responses to preliminary views and responses to notices of finding and recommendation. The Department has been actively working with internal stakeholders to improve the quality and timeliness of responses to the AHRC and to manage the AHRC's expectations.
17. The AHRC does not ordinarily provide its views directly to you as the Minister, to comment on, should you choose to. However, the AHRC has recently engaged two new lawyers to reduce their backlog of complaints, including those directed towards the Department. As a consequence, the Department anticipates an increase of correspondence to you from the AHRC in relation to complaints.

Financial/systems/legal/deregulation/media implications

18. Legal were consulted in the preparation of the Department's response to the AHRC, which is attached to the submission, but were not consulted on the content of the proposed letter from the Minister to the AHRC President.

19. Attachments

Attachment A Letter from AHRC President to Minister Giles with preliminary views in relation to complaints from s. 47F(1)

Attachment B Home Affairs response to s27 preliminary view, s. 47F(1)

Attachment C Letter from Minister Giles to the AHRC President

Authorising Officer

Cleared by:

Robyn Miller
Assistant Secretary, Audit and Assurance
Integrity Security and Assurance

Date: 10 August 2023

s. 22(1)(a)(ii)

Contact Officer: Robyn Miller, Assistant Secretary Audit and Assurance Branch, s. 22(1)(a)(ii)

CC Secretary
Associate Secretary Immigration
Chief Operating Officer
ABF Commissioner
Assistant Commissioner Detention and National Removals



Australian
Human Rights
Commission

President
Emeritus Professor Rosalind Croucher AM

Our Ref: AHRCA-2021/0615155401
Your Ref: OHR-21-00041 and OHR-21-00345

31 March 2023

The Hon Andrew Giles MP
Minister for Immigration, Citizenship and Multicultural Affairs
Parliament House
Canberra ACT 2600

By email: andrew.giles.mp@aph.gov.au

Dear Minister,

**Complaints by s. 47F(1) against the Commonwealth
of Australia (Department of Home Affairs)**

I refer to the complaints lodged under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) by s. 47F(1) against the Commonwealth of Australia (Department of Home Affairs) alleging a breach of their human rights.

Enclosed with this letter is my preliminary view in relation to this complaint.

It is my preliminary view that the Commonwealth engaged in acts and omissions that were inconsistent with or contrary to s. 47F(1) rights under article 9(1) of the *International Covenant on Civil and Political Rights*.

I have written to your department about these complaints. As these complaints relate in part to acts done by former Ministers in the exercise of their powers under the *Migration Act 1958* (Cth), I am writing separately to you to provide you with the opportunity to also make submissions if you so choose.

Under s 27 of the AHRC Act, the Commonwealth may elect to make either oral or written submissions in relation to my preliminary view of the acts raised by the complainant that appear to be inconsistent with, or contrary to, human rights.

Australian
Human Rights
Commission
ABN 47 996 232 602

Level 3
175 Pitt Street
Sydney NSW 2000

GPO Box 5218
Sydney NSW 2001

General enquiries
Complaints infoline
TTY
www.humanrights.gov.au

1300 369 711
1300 656 419
1800 620 241

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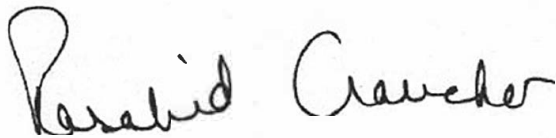
Please advise within 7 days of the date of this letter if you wish to make oral submissions.

If you wish to make written submissions, please provide these submissions to the Commission within 28 days of the date of this letter.

I note that the Commission has the power under s 14(2) of the AHRC Act to give directions prohibiting the disclosure of the identities of s. 47F(1) in relation to this inquiry and I am considering making such a direction because of findings by the Department that Australia has protection obligations to each of them. I have sought submissions from the Department on this issue.

The lawyer assisting me is Deputy General Counsel Graeme Edgerton. Mr Edgerton can be contacted on s. 47F(1) or by email to s. 47F(1)

Yours sincerely,



Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

T s. 47F(1)
E s. 47F(1)

Cc: Attorney-General, attorney@ag.gov.au
Civil Law Unit, Attorney-General's Department, humanrights@ag.gov.au

Preliminary view under s 27 *Australian Human Rights Commission Act 1986 (Cth)*

.....

Complainants: Mr s. 47F(1)



Respondent: Commonwealth of Australia
(Department of Home Affairs)

Date: 31 March 2023

Contents

1	Introduction to this inquiry	3
2	Background	4
2.1	<i>Entry into Australia</i>	<i>4</i>
2.2	<i>Resettlement of refugees from Sudan</i>	<i>5</i>
2.3	<i>Criminal record</i>	<i>10</i>
3	Legal framework	12
3.1	<i>Functions of the Commission</i>	<i>12</i>
3.2	<i>Scope of 'act' and 'practice'</i>	<i>12</i>
3.3	<i>Arbitrary detention</i>	<i>12</i>
4	Preliminary view	14
4.1	Visa cancellation	14
(a)	<i>s. 47F(1) visa cancellation process</i>	<i>14</i>
(b)	<i>s. 47F(1) visa cancellation process</i>	<i>20</i>
4.2	Consideration of less restrictive alternatives	23
(a)	<i>Available alternatives</i>	<i>23</i>
(b)	<i>Consideration of less restrictive alternatives for s. 47F(1)</i>	<i>24</i>
(c)	<i>Consideration of less restrictive alternatives for s. 47F(1)</i>	<i>28</i>
4.3	Findings	29
(a)	<i>Australia's obligations towards humanitarian entrants</i>	<i>30</i>
(b)	<i>The differences between judicially imposed imprisonment and administrative detention</i>	<i>32</i>
(c)	<i>Prospect of indefinite detention</i>	<i>36</i>
5	Next steps	38

1 Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) is conducting an inquiry into a complaint made by s. 47F(1) against the Commonwealth of Australia, specifically the Department of Home Affairs (Department). The complainants allege that the Department is breaching their human rights by detaining them arbitrarily.
2. It is the function of the Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right, pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. s. 47F(1) are brothers. They were both born in Sudan in 1986 and 1990 respectively. In 2003 they were granted Refugee Humanitarian visas and brought to Australia from a refugee camp in Egypt along with their mother and three other siblings. At the time, they were 16 and 13 years old.
4. In March 2012, they were convicted in relation to an assault. s. 47F(1) was sentenced to 4 years and 4 weeks imprisonment (with a non-parole period of 3 years and 3 weeks) and s. 47F(1) was sentenced to 2 years and 50 weeks imprisonment (with a non-parole period of 18 months). Before the end of the expiration of their sentences, their Humanitarian visas were cancelled and after their release from prison they were taken immediately into immigration detention.
5. s. 47F(1) applied for protection visas. A delegate of the Minister found that they were both stateless (as they were no longer citizens of Sudan and not recognised as citizens of the newly formed South Sudan). The delegate also found that they were both refugees because they faced a real risk of harm if taken from Australia to South Sudan.
6. s. 47F(1) has been in immigration detention since 23 October 2015. s. 47F(1) has been in immigration detention since 1 July 2015, other than a further period of 8 months imprisonment for an offence committed while in immigration detention. Both s. 47F(1) have been administratively detained for far longer than the original sentence of imprisonment imposed by the court which led to their visas being cancelled. In the case of s. 47F(1), he has spent more than twice as long in immigration detention as his original sentence of imprisonment.
7. While they were in detention, their brother passed away. If, like their mother and their two sisters, they were now Australian citizens, they would be free in the community with no restrictions on their movement.

8. s. 47F(1) cannot be sent to South Sudan because Australia has international non-refoulment obligations not to send refugees to a place where they are at real risk of harm. They can only be released from immigration detention if the Minister exercises a non-compellable power to either grant them a visa or place them into community detention. Unless such a power is exercised, they face the prospect of indefinite administrative detention.
9. For the reasons discussed above, my preliminary view is that the continued detention of s. 47F(1) in closed detention facilities cannot be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. As a result, my preliminary view is that their continued detention is arbitrary, contrary to article 9 of the ICCPR.
10. While this does not form part of my reasons for reaching the preliminary view that there has been a breach of article 9 of the ICCPR, I note that according to figures provided to the Minister by the Department, the continued detention of both s. 47F(1) for more than seven years has likely come at a cost to taxpayers of more than \$5 million, and could be expected to be in excess of \$850,000 per annum on an ongoing basis. By contrast the cost of managing a person on a bridging visa was most recently identified as being less than \$4,000 per annum (see paragraphs 108 and 121 below).
11. Pursuant to s 27 of the AHRC Act, this document sets out my preliminary view in relation to the complaints and provides an opportunity for the Department and the complainants to make submissions in response to my preliminary view.

2 Background

2.1 Entry into Australia

12. s. 47F(1) was born in s. 47F(1), Sudan in s. 47F(1) and s. 47F(1) was born in s. 47F(1), Sudan in s. 47F(1).
13. From 2001 to 2003, s. 47F(1) were living with their mother and three siblings (one brother and two sisters) in a refugee camp in Egypt. In December 2002, the United Nations High Commissioner for Refugees (UNHRC) wrote to the Australian Embassy in Cairo, seeking their resettlement in Australia.
14. According the UNHRC, their s. 47F(1) in what is now South Sudan. s. 47F(1), in what is now Sudan, in 1984 following the death of her father. She claimed to have been persecuted by

the Sudanese authorities on the ground of her political opinion and to fear further persecution if she were to return to Sudan. According to findings by the Department in a 2017 decision on a protection visa application by s. 47F(1), his mother fled from Sudan to Egypt because her Dinka heritage and political activities resulted in her and her family 'being viewed as opposed to the Sudanese government'. UNHRC identified her as a Woman at Risk and asked that her case be treated as a priority.

15. Their mother was granted a Refugee Humanitarian (XB-200) visa. On 26 August 2003 s. 47F(1) and their three siblings were granted the same visa as members of the family unit of their mother, who was the primary applicant. A Refugee Humanitarian (XB-200) visa is a permanent visa that allows the holder to remain in Australian indefinitely. The family arrived in Australia on 22 October 2003. At the time, s. 47F(1) were 16 and 13 years old respectively.
16. One way to qualify for a Refugee Humanitarian (XB-200) visa is by demonstrating that the person is outside their country of origin and subject to persecution should they return.¹
17. Since arriving in Australia, s. 47F(1) mother and their three siblings were each granted Australian citizenship. I understand that s. 47F(1) and s. 47F(1) brother passed away while they were in immigration detention. Of the family of six, only s. 47F(1) are not Australians. As at the date of this preliminary view, the family has lived continuously in Australia for almost 20 years. The majority of s. 47F(1) life has been spent in Australia.

2.2 Resettlement of refugees from Sudan

18. On World Refugee Day in 2002, the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Phillip Ruddock MP issued a press release urging Australians to 'think of those refugees who languish in appalling conditions in refugee camps around the world and who still remain at risk'. He continued:

World Refugee Day was declared by a special UN General Assembly on 20 June 2001 as an expression of solidarity with Africa, which hosts most of the world's refugees.

For many refugees in those camps, there is no prospect of going home, but their lives remain at risk and so resettlement programs such as run by Australia will be their only hope.

With an annual program of 12,000 places, Australia is one of only nine countries that pro-actively seeks out refugees at risk and offers them sanctuary. ...

In the past year, the top four countries of origin of people settled under the refugee and humanitarian program were Iran, Afghanistan, the former Yugoslavia and Sudan.

Regional priority in the 2002-2003 Humanitarian Program will be given to Africa and the Middle East regions.²

19. In March 2003, Minister Ruddock announced 12,000 places in the humanitarian program for 2003-04, including an estimated 4,000 places for refugees settled from offshore. Again, the Minister said that regional priority would 'continue to be given to Africa and the Middle East as recommended by the United Nations High Commissioner for Refugees'.³
20. In the 2002-03 year, 47% of offshore visas were granted to people from Africa and this increased to 70.6% in 2003-04.⁴
21. At the time that s. 47F(1) [REDACTED] were resettled in Australia with their family in October 2003, the Department had in place guidelines that described the operation of the offshore humanitarian program. The guidelines noted that the refugee category of visa (including subclass 200 visas issued to this family):

provides resettlement opportunities for persons who are subject to persecution in their country of usual residence. The Department works closely with the UNHCR in selecting for this category people for whom resettlement in Australia is the most suitable durable solution. ...

The offshore component of the humanitarian program focuses on those in greatest need of the protection that resettlement offers.

It provides resettlement in Australia as a durable solution for refugees and others in humanitarian need overseas who do not have any other solution available to them.

Each financial (program) year, DIMIA CO allocates a number of places to particular posts, reflecting the regional focus identified by the Government. The regional focus of the offshore humanitarian program is determined in consultation with UNHCR.⁵

22. The guidelines identified an 'Africa allocation' for persons whose home country is in Africa, primarily Ethiopia, Sudan and Sierra Leone. The designated program posts included Cairo.
23. In May 2003, shortly before the family arrived in Australia, the Department published a Report on the Review of Settlement Services for Migrants and Humanitarian Entrants. The review examined data from a Longitudinal Survey of Immigrants to Australia (LSIA) and concluded that settlement outcomes for humanitarian entrants were generally poorer than for other groups of migrants. The report said:

This reflects the fact that many current entrants under the Humanitarian Program have experienced profound emotional, physical and psychological distress, along with disruptions to their education and working life.

The LSIA indicates that outcomes for humanitarian entrants have deteriorated in recent years and this appears to be largely as a consequence of changes within source countries for the Humanitarian Program, with the more recent intake appearing to have experienced greater instability and disruption to their lives before migrating to Australia. These entrants are finding it more difficult to establish themselves than their earlier counterparts and, in particular, are experiencing lower levels of employment, lower workforce participation rates, lower levels of income, and more health problems and psychological distress. More needs to be done to target settlement assistance towards this group if they are to achieve full and active participation in Australian society ...⁶

24. The LSIA followed two cohorts: one that arrived in Australia between 1993 and 1995 and another that arrived in Australia between 1999 and 2000. The proportion of people arriving in Australia from Africa in these cohorts (primarily Ethiopia, Eritrea, Somalia and Sudan) increased from around 7% in the first cohort to 14% in the second cohort.⁷
25. The 2001 census recorded just under 5,000 people who had been born in Sudan. This had increased to 19,000 by 2006, making Sudanese Australians the fourth largest group of people resident in Australia who were born in Africa.⁸ Professor Jakubowicz argues that this rate of growth 'put enormous pressures on the fragile community structures established by earlier arrivals' and that, as a result, 'many newly arrived refugees and humanitarian entrants had only limited community support to ease them into their new environment'.⁹
26. In April 2006, an interdepartmental committee of Australian Government agency heads was convened to develop a whole of government strategy to 'improve settlement outcomes for humanitarian entrants'. The fact that such a strategy was required appeared to recognise prior deficiencies in settlement strategies to that point. A discussion paper produced by the Australian Government acknowledged that:

The African caseload generally has greater settlement needs than people from previous source regions, reflecting their experiences and circumstances prior to arriving in Australia. Some of these pre-migration experiences include higher levels of poverty, larger families, lower levels of education and English proficiency, lower levels of literacy in their own languages, higher incidence of health issues, longer periods spent in refugee camps, little experience of urban environments, and higher rates of torture and trauma.¹⁰

27. One of the 'critical areas' identified by the Australian Government as requiring action was 'targeting support to assist at risk youth'.¹¹

28. The unmet settlement needs identified by the Government in its 2006 discussion paper were reflected in an independent study examining the resettlement experience of migrants from the Horn of Africa (and particularly South Sudan) in Australia. That study concluded:

While the participants in the study came from a diverse range of backgrounds and had been in Australia for different lengths of time, the findings from each grouping were remarkably similar. Problems in learning English, finding secure and appropriate housing, and finding employment which paid an adequate wage and afforded a level of dignity were discussed by all participants as the biggest challenges they had to face. ... A deeply felt disappointment expressed by nearly 50 per cent of participants was what they perceived as a lack of acceptance by the Australian community and feeling of not belonging.¹²

29. In 2007, one response of the Australian Government to difficulties experienced with settlement of humanitarian migrants from Africa was simply to take fewer migrants from this region. For the 2007-08 year the component of Australia's offshore humanitarian program that was reserved for people from Africa was reduced from around 50% the previous year to around 30%.¹³ In October 2007, the then Minister for Immigration and Citizenship, the Hon Kevin Andrews MP, reportedly explained the reduction by saying:

I have been concerned that some groups don't seem to be settling and adjusting into the Australian way of life as quickly as we would hope and therefore it makes sense to put the extra money in to provide extra resources but also to slow down the rate of intake from countries such as Sudan.¹⁴

30. In 2008, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) published a report about the experiences of Australian-Sudanese young people. VEOHRC heard from young Australian-Sudanese people that:

the biggest issue facing them is their experience of policing. They reported a general feeling that the police treat them unfairly because of their race. The Multicultural Youth Action Group (MYAG) has also identified the relationship between police and youth people as an issue and has established a working group.

The most commonly reported complaints to the Commission's researchers were:

- young people being regularly stopped and questioned by police in public, sometimes several times in a single day
- police asking young people to 'move on' without citing a legitimate reason
- alleged racist comments made by police

- young people being searched in public
- police allegedly refusing to provide their details if young people requested them – in some cases, these requests acted as a trigger for police aggression
- police allegedly refusing to respect young people's right to silence, beyond submitting name and address –allegations that, in some cases, the assertion of this right acted as a trigger for police aggression.

31. In 2010, the Australian Human Rights Commission published a report dealing with the human rights and social inclusion of African Australians.¹⁵ This report was based on community meetings with over 2,500 African Australians in 50 locations across the country, consultations with over 150 government and non-government stakeholders, and over 100 written and oral submissions. One of the issues dealt with was the relationship between young people and the police:

African Australians, especially young people, raised a number of concerns about their relationship with police and law enforcement agencies, including:

- perceptions of being targeted by police, security guards and transit officers
- feelings of being 'over policed' in public spaces where young African Australians gather
- the extended surveillance on African Australian Muslims by federal police.

Young African Australians gave examples of being regularly stopped and questioned by police in public, police asking them to move on without any legitimate reason and racist comments being made to them by police officers.

Participants in community forums in others states and territories also raised concerns about perceived stereotyping of African Australians by police and law enforcement officials.

There was a widespread view that further efforts were needed to counter what community members viewed as 'entrenched stereotypes' among police – often perpetuated by the media – of young African Australian men belonging to gangs. They believed this had been a significant factor in undermining relations between police and African Australian communities.

Mutual distrust between African Australian communities and law enforcement agencies was identified as a significant barrier by community members, service providers and other stakeholders:

That trust is probably not there for a number of reasons, including the fact that a lot of Africans have come from countries where the legal systems and police were corrupt. But there is also the fact that police haven't always behaved fairly towards many Africans in the community.

Stakeholder consultation, NSW

Community members expressed the view that some law enforcement officials, especially police and sheriffs, lacked cultural awareness.

While acknowledging these concerns, service providers and stakeholders stressed that significant time and effort has recently been invested by police across a range of jurisdictions to address tensions between police and young African Australians.

The Justice for Refugees Program administered through the Victorian Department of Justice, and the appointment of a Sudanese community liaison officer with the NSW Attorney General's Department, were also identified as contributing to more positive and informed interactions between African Australian communities and the justice system as a whole.

Relationship building activities with young people, particularly through sport and arts-based programs, were viewed as positive strategies for improving community understanding and interaction with police.

Participants agreed there was a clear need to bolster training and education initiatives for police and those working in the justice system. Of particular importance was the need to build understanding about the pre-arrival experiences of people coming to Australia as refugees and humanitarian entrants, as well as the need for police to appreciate the key differences between different African Australian communities.¹⁶

2.3 Criminal record

32. As young men, s. 47F(1) were convicted of a significant number of offences. In almost all cases, they were either sentenced to pay a fine or no penalty was imposed.
33. s. 47F(1) offences included driving offences, failure to comply with bail conditions, disorderly behaviour, use of offensive language, refusal to state name and address to police, consume liquor in a public place, carry an offensive weapon, damage property, trespassing, failure to comply with a 'move on' direction from police, loitering, hindering police, assault, fighting, damage a building or vehicle, and resisting police.
34. s. 47F(1) offences included refusal to state name and address to police, throw a missile to cause injury or damage to property, failure to comply with bail conditions, loitering, resist police and disorderly behaviour.
35. It appears from their records that many of their offences arose directly from their interactions with the police.
36. In July 2010, s. 47F(1) was convicted of three counts of 'assaulting' police on 4 October 2009 and five counts of aggravated assault on 17 October 2009.

According to sentencing remarks from the magistrate, the first incident took place when police attended a disturbance at Adelaide Railway Station. s. 47F(1) was arrested and was found to have been verbally abusive and to have acted in a threatening manner towards the police three times during his arrest.

37. The second incident took place during a bus journey on 17 October 2009. s. 47F(1) was 'boisterous and intoxicated'¹⁷ and in the presence of his younger brother and a friend. Two of the passengers spoke angrily to s. 47F(1) and asked him to be quiet. s. 47F(1) responded by punching five passengers. Four of them sustained no serious injuries, but the fifth received a cut to his face and a bloodied nose. The magistrate described the conduct as 'completely unacceptable' and said that it 'must have been terrifying' for the passengers. For all eight offences, s. 47F(1) was sentenced to imprisonment for 12 months and 21 days, with a non-parole period of three months.
38. In March 2012, both s. 47F(1) were convicted of a serious aggravated offence, apparently under s 24 of the *Criminal Law Consolidation Act 1935* (SA) of causing harm to another person, with intention to cause harm. The maximum penalty for this offence is 13 years imprisonment.
39. The sentencing remarks from the trial judge described the offence as follows:
- During the course of the afternoon, a group of you were drinking and became somewhat intoxicated. s. 47F(1) commenced to bully and pester the victim to fight him. When the victim saw that he was not welcome and sought to leave, you and your brother pursued him some several hundred meters to [an] intersection ... and there you assisted your brother to chase and catch him and smash a baseball bat on his head, causing him to suffer a fractured skull.
40. While s. 47F(1) struck the blow, he was 19 at the time of the offending and his brother s. 47F(1) was 25. As a result, the judge said that he did not distinguish between them in relation to the degree of culpability. The judge described the attack as cowardly, because the two brothers were armed and the victim was not. The judge also described the offence as despicable because the victim was a guest and the brothers had abused the duties of a host.
41. s. 47F(1) was sentenced to 4 years imprisonment and a previously suspended sentence of 4 weeks was also applied to him. A non-parole period of three years and three weeks was set. s. 47F(1) was sentenced to two years and 50 weeks imprisonment (a reduction of two weeks on the sentence that would otherwise have been imposed, to account for two weeks spent in custody).
42. While they were in custody for these offences, a Minister for Immigration and Border Protection made a personal decision to cancel their Humanitarian

visas on the basis that they had a 'substantial criminal record' and did not pass the character test in s 501(6) of the Migration Act.

3 Legal framework

3.1 Functions of the Commission

43. 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.
44. 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.
45. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.
46. The rights and freedoms recognised by the ICCPR are 'human rights' within the meaning of the AHRC Act.¹⁸

3.2 Scope of 'act' and 'practice'

47. The terms 'act' and 'practice' are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
48. 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.
49. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or those acting on its behalf.¹⁹

3.3 Arbitrary detention

50. 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.

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

- (a) 'detention' includes immigration detention;²⁰
- (b) 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;²¹
- (c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;²² and
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.²³

52. In *Van Alphen v The Netherlands* the United Nations Human Rights 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.²⁴ 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'.²⁵

53. The Human Rights 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.²⁶

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

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

absconding; and must be subject to periodic re-evaluation and judicial review.²⁷

55. 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'.²⁸
56. It will be necessary to consider whether the detention of s. 47F(1) in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. If their 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.

4 Preliminary view

4.1 Visa cancellation

57. s. 47F(1) each had their Humanitarian visas cancelled while they were in prison serving the sentences imposed on them in March 2012 described in section 2.3 above. The process of visa cancellation and review of relevant visa decisions is set out separately for each of them below.

(a) s. 47F(1) visa cancellation process

58. As noted in paragraph 41 above, in March 2012, s. 47F(1) was sentenced to four years and four weeks imprisonment.
59. In September 2013, the Department issued s. 47F(1) with a Notice of Intention to Consider Cancellation of his Humanitarian visa. In April and June 2014, the Department conducted two International Treaties Obligations Assessments (ITOAs) to determine whether Australia had protection obligations to s. 47F(1) that would prevent it from sending him to South Sudan.
60. The ITOAs found that s. 47F(1) was a Christian of Dinka ethnicity who was born in s. 47F(1) and had never visited or resided in South Sudan. Significantly, the ITOAs made findings about s. 47F(1) citizenship and the risk of harm that he faced if sent to South Sudan. These findings were important integers of the decision to the cancel his visa.²⁹ However, different conclusions on both issues were reached after his visa had already been cancelled.

61. In relation to citizenship, the ITOAs noted that the Republic of South Sudan became an independent country on 9 July 2011. After that date, Sudan announced that people who acquired citizenship of South Sudan 'de jure or de facto' would no longer be citizens of Sudan. Reports from Human Rights Watch suggested that, in practice, people in Sudan with relatives in South Sudan, or from a South Sudanese ethnic group, would lose their Sudanese citizenship irrespective of whether they had acquired South Sudanese citizenship. There were also news reports of people from South Sudan who resided outside of Sudan during the war against Khartoum experiencing difficulties and delays in obtaining citizenship from South Sudan. The two ITOAs concluded that Sudan would no longer accept s. 47F(1) as a citizen. More controversially, they both concluded that South Sudan *would* accept s. 47F(1) as a citizen therefore the delegates were satisfied that he *was* a citizen of South Sudan. The departmental officers do not appear to have considered the possibility that s. 47F(1) may have been stateless.

62. In relation to risk of harm, the first ITOA noted that there was a civil war in South Sudan that commenced in December 2013. It noted that since that time, Dinka people had frequently been the target of ethnic and tribal based violence in the states of Upper Nile, Jonglei and Lakes. The departmental officer concluded that it was 'not feasible for s. 47F(1) to relocate to one of these places, including his s. 47F(1)'. However, the officer found that it *was* reasonable for s. 47F(1) to relocate to Juba, the capital of South Sudan. The officer said that:

I accept that, in common with other Dinka residents of Juba, s. 47F(1) may face a degree of risk of significant harm in relation to possible indiscriminate violence or opportunist crimes, however, I am satisfied that this risk is one faced by the population of Juba generally and is not one which is faced by s. 47F(1) personally.

63. In relation to the risk of harm in Juba, the author of the second ITOA noted again the risk of possible indiscriminate violence, but concluded 'I do not consider that this risk of harm in Juba is of such a density or degree that practically any resident of Juba is exposed to serious personal threat solely on account of his or her presence there'. Both ITOAs concluded that Australia did not have obligations not to send s. 47F(1) to Juba in South Sudan.

64. s. 47F(1) visa was cancelled personally by the Hon Scott Morrison MP, Minister for Immigration and Border Protection, on 23 October 2014. At the time that s. 47F(1) visa was cancelled:

- The Department was of the view that s. 47F(1) was a citizen of South Sudan.

- The Department was of the view that s. 47F(1) was not owed protection obligations and could be returned to South Sudan.
- The Minister did not consider that it was appropriate to afford s. 47F(1) a higher level of tolerance in light of the length of time he had spent in Australia or in recognition of what his advocate described as the strong humanitarian considerations present in his case.

65. Because s. 47F(1) visa was cancelled by the Minister personally, and not by a departmental delegate, the decision could not be reviewed on the merits by the Administrative Appeals Tribunal.³⁰ s. 47F(1) application for judicial review of the cancellation decision was dismissed by the Federal Court³¹ and, on appeal, by the Full Court of the Federal Court.³² In those cases, the courts were limited to assessing whether there were legal errors in the Minister's decision making. Significantly, the Federal Court noted that it was not able to assess for itself whether it was reasonable for s. 47F(1) to relocate to Juba.³³

66. The Full Court ultimately formed the view that there was no legal error in the Minister's decision making:

In our view, it was open to the Minister to rely upon [the ITOA] assessments regarding Australia's protection obligations to the appellant and to reject the appellant's contention that he might remain in immigration detention indefinitely if he could not be returned to South Sudan. We respectfully agree with the primary judge's finding at [46] that the Department's assessments set out a rational basis for the conclusion that the appellant could be returned to Juba in South Sudan.³⁴

67. In October 2016, after judgment by the Full Court of the Federal Court, s. 47F(1) applied for a protection visa. On 9 October 2017, a delegate of the Minister refused the application for a protection visa. However, the delegate who assessed this application came to different conclusions about two of the critical matters that had supported the decision to cancel s. 47F(1) Humanitarian visa.

68. First, in relation to citizenship, the delegate had regard to updated information published by the US Department of State, and concluded that s. 47F(1) was stateless. The delegate said:

Persons of South Sudanese origin who lived for many years in the Republic of Sudan were stripped of their Sudanese nationality by law, irrespective of the strength of their connections to the new state of South Sudan or Sudan and their views on which state to which they wished to belong. Other populations who risked being adversely affected included individuals with one parent from Sudan and one from South Sudan; members of cross-border ethnic groups; and persons separated from their families by war, including unaccompanied children. Some persons of South Sudanese origin living in Sudan risked

ending up stateless, without either a Sudanese or South Sudanese nationality, and losing their basic rights.³⁵

As the applicant has no documents to prove his identity as a South Sudanese citizen, was separated from his extended family during the war and lived his entire life in Sudan prior to his arrival in Australia; I believe he meets the above criteria of being stateless.

69. Secondly, the delegate found that [REDACTED] was a refugee, in that he had a well-founded fear of persecution if he were to be sent to South Sudan on the basis of his ethnicity, an imputed political opinion, and his membership of a particular social group described as 'South Sudanese ethnic Dinka men returning to South Sudan without family support'. The delegate also found that Australia owed [REDACTED] complementary protection obligations as described in s 36(2)(aa) of the Migration Act.
70. These findings of risk of persecution had regard to updated country information including:
- reports that by August 2015, tens of thousands of people had been killed and 1.6 million people displaced, in what was described as 'an all-out ethnic conflict' between Dinka and Nuer groups
 - despite a 'shaky peace agreement' in August 2015, there was subsequent violence in Juba in July 2016 in which more than 300 people were killed, including many civilians
 - DFAT's assessment in October 2016 that 'Dinkas living in conflict-affected areas face a high risk of societal discrimination and violence, given the significant ethnic dimensions of the current conflict as well as their geographic proximity to the conflict'
 - DFAT's assessment that returnees may be regarded with suspicion about their loyalty to the current government or to the Sudan People's Liberation Army.
71. If either of these two findings had been made at the time that the cancellation of [REDACTED] visa was being considered by the Minister, there is a real chance that his Humanitarian visa would not have been cancelled. However, now that his visa had been cancelled, it was not enough that [REDACTED] was a refugee. Section 36(1C) of the Migration Act provided that he would not qualify for the grant of a protection visa if:
- he had been convicted of a 'particularly serious crime' (which included an offence of violence for which the maximum term of imprisonment was at least 3 years); and

- the delegate considered on reasonable grounds that s. 47F(1) was 'a danger to the Australian community'.

72. The crime for which s. 47F(1) was sentenced satisfied the first criterion and the delegate formed the view that s. 47F(1) was a danger to the Australian community. As a result, the delegate held that s. 47F(1) did not satisfy the criteria for the grant of a protection visa. On 25 May 2018, this decision was upheld by the AAT.³⁶

73. The AAT recognised the significant consequences for s. 47F(1) of an adverse decision in relation to the danger he posed to the community. The Member said: 'The gravity of this decision cannot be understated. The applicant has been found to otherwise be a person to whom Australia would owe protection obligations'. While this was not a factor directly relevant to the test to be applied, 'the real risk to the applicant on being sent to South Sudan means that the legislation must be applied with appropriate rigour having regard to the gravity of the outcome for the applicant'.³⁷

74. Ultimately the Member placed a large degree of weight on the fact that s. 47F(1) felt that he was subject to racial discrimination in Australia. In his evidence, s. 47F(1) described having eggs thrown at him from a passing car, and being stopped by police while running for the bus. He said that he felt 'constantly judged' in Australia. The AAT decision records the following evidence from s. 47F(1)

He said he did not know he would be called names in Australia and that it would be hard to fit in, as he thought Australia was a country with opportunities and equality, but he did not see this when he arrived. He did not feel welcome and did not feel comfortable and this resulted in him drinking. He says he has learned to accept this, and that if he takes action he will end up in prison. He said if he has to take whatever people throw at him without responding, he will do that for his own good. ...

The applicant states discrimination was a big factor in his offending, as was alcohol. He said he had a lot of difficulty talking to anyone about his problems, and lost hope for life. It was difficult for him to find a job and these struggles led him to drink and do bad things to other people. He states he has now decided to let go of anger and start a better life.³⁸

75. s. 47F(1) evidence is consistent with the experiences of other Australian-Sudanese youth, particularly their interactions with police, recorded in detailed studies conducted by VEOHRC and the Commission described in paragraphs 30 and 31 above. However, it appears that the Member took the view that s. 47F(1) description of the discrimination he faced in Australian meant that s. 47F(1) had not taken sufficient responsibility for his own actions.

The key reasoning of the Member in relation to s. 47F(1) future risk was as follows:

It would not be realistic to say that this discrimination does not occur in the Australian community, or that the applicant has not experienced discrimination. However it is the applicant's readiness to attribute adverse events as discrimination and his reaction to perceived discrimination that remains a problem. He feels aggrieved by his detention and his treatment by the Australian community. Given in the past he has resorted to carrying weapons, in assisting his brother in assault and seriously injuring another person, **it is his sense of having been aggrieved and discriminated against that results in him being a danger to the Australian community** even in light of his abstinence from alcohol in the latter stages of his imprisonment and in while in detention.³⁹

[emphasis added]

76. With respect to the learned Member, it appears that other conclusions were open on this evidence. It is highly likely that when s. 47F(1) arrived in Australia from Egypt in 2003 at the age of 16 he would have felt like an outsider. This view is reinforced by studies such as the one referred to in paragraph 28 above which found that almost half of the humanitarian entrants that participated in the study felt a lack of acceptance by the Australian community and that they did not belong. These feelings were magnified for young Australian-Sudanese people as a result of their interactions with police.

77. In the sentencing remarks in 2012 in relation to his most serious criminal conviction, the trial judge said:

You migrated to Australia in 2003 without your father. You fell in with the wrong crowd here in Australia and experienced depressive symptoms related to reduced self-esteem, shame and guilt, and you had difficulty coping with the lifestyle.

You became an abuser of alcohol and marijuana. The employment you obtained was in low-skill labouring positions. I am told that you are quick to anger if you feel slighted due to racial vilification you claim you suffered in Sudan, in Egypt and later in Australia. You meet the diagnostic criteria for an Adjustment Disorder with Mixed Depressed Mood and Disturbance of Conduct.

78. The trial judge rightly concluded that '[y]our unfortunate background in Sudan does not give you a right to commit offences with impunity in this country'. At the same time, it appears that the AAT member in 2018 placed too much weight on s. 47F(1) (believable) claims that he was subject to racial discrimination as *demonstrating* that he was a danger to the Australian community. Further, a fair reading of s. 47F(1) evidence also suggests a recognition by him of the need to change his behaviour.

79. s. 47F(1) did not seek judicial review of the 2018 decision of the AAT. As a result, he faced the prospect of indefinite detention. He could not be returned to South Sudan because that would be contrary to Australia's non-refoulement

obligations. The only way he could be released from detention was if a relevant Minister decided to exercise a non-compellable power to grant him a visa or to place him into community detention. The consideration of less restrictive alternatives to detention is considered in more detail in section 4.2 below.

(b) **s. 47F(1)** *visa cancellation process*

80. As noted in paragraph 41 above, in March 2012, **s. 47F(1)** was sentenced to two years and 50 weeks imprisonment.
81. In July 2013, the Department issued **s. 47F(1)** with a Notice of Intention to Consider Cancellation of his Humanitarian visa.
82. In January 2014, **s. 47F(1)** was released on parole and moved back in with his family. A report provided to the Department by the South Australian Department of Correctional Services in November 2014 noted that **s. 47F(1)** was in full time employment. His parole expired in February 2015 and thereafter he lived in the community, subject only to the conditions of his Humanitarian visa. In March 2015 he moved out of home and started living with a friend in shared accommodation.
83. In January 2015, the Department conducted an ITOA to determine whether Australia had protection obligations to **s. 47F(1)** that would prevent it from sending him to South Sudan. As with the earlier ITOAs in relation to **s. 47F(1)** the departmental officer found that South Sudan *would* accept **s. 47F(1)** as a citizen and that he therefore *was* a citizen of South Sudan. The departmental officer also found that that 'while ongoing civil conflict complicates any assessment of the risk of arbitrary or indiscriminate violence' in South Sudan, and while **s. 47F(1)** 'may face a degree of risk of significant harm in relation to possible indiscriminate violence' in Juba, this was a risk that he would face in common with other Dinka residents of Juba and Australia did not have obligations not to send him there.
84. **s. 47F(1)** visa was cancelled personally by the Hon Peter Dutton MP, Minister for Immigration and Border Protection, on 23 June 2015. The findings made in the ITOA referred to above were important integers of the decision to the cancel his visa.⁴⁰ Because the decision was made by the Minister personally, no merits review was available in the AAT.
85. On 1 July 2015, **s. 47F(1)** was taken into immigration detention.
86. **s. 47F(1)** missed the 35 day time limit to seek judicial review of the decision to cancel his visa and was unsuccessful in his application to the Federal Court for an extension of time because the court held that his case did not have

sufficient merit to proceed.⁴¹ In the course of its reasons, the Court held that it was not able to reassess whether or not s. 47F(1) was or would be accepted as a citizen of South Sudan. That was an issue that could only be considered as part of a merits review (which was not available to him) and could not be considered as part of a judicial review.⁴²

87. In November 2017, s. 47F(1) was convicted of participating in a riot that occurred while he was detained in Christmas Island Immigration Detention Centre in October 2015. He was sentenced to 8 months imprisonment which he spent in a Western Australian correctional facility between November 2017 and July 2018 before being returned to immigration detention.
88. s. 47F(1) lodged an application for a protection visa in February 2017. On 9 October 2017, a delegate of the Minister found that s. 47F(1) was a refugee. However, the delegate held that, despite being a refugee, s. 47F(1) was ineligible for a protection visa because he did not satisfy s 36(1C)(b) of the Migration Act.
89. The reasons for decision on s. 47F(1)s application for a protection visa were produced on the same date and were substantially the same as the reasons for decision on s. 47F(1) application for a protection visa referred to in paragraphs 67 to 70 above. s. 47F(1) was found to be stateless and to have a well-founded fear of persecution if he were to be sent to South Sudan, but the delegate of the Minister found that he was ineligible for a protection visa because he had been convicted of a 'particularly serious crime' and was assessed as being 'a danger to the Australian community'.
90. If either of the first two findings had been made at the time that the cancellation of s. 47F(1)s visa was being considered by the Minister, there is a real chance that his Humanitarian visa would not have been cancelled.
91. In considering whether s. 47F(1) was a danger to the Australian community, the delegate found that the applicant's refugee background and the difficulties that this had caused him, along with his alcohol intake had contributed to his past offending. The delegate noted the view of a treating psychologist that he had 'good prospects' of rehabilitation. While in prison and on parole, s. 47F(1) had consistently tested negative for alcohol and on release he was ineligible for a substance abuse program given his long period of abstinence and confidence in his ability to continue to abstain from alcohol. The delegate also noted that s. 47F(1) had expressed remorse for his past offending and stated that he will not reoffend. The delegate noted that s. 47F(1) had a family and a partner in Australia, was involved in the Sudanese community and had aspirations for his future which may assist in his rehabilitation. Ultimately, however, the delegate found that s. 47F(1) poses 'a risk' of reoffending and that if he reoffended in a similar manner to his most

serious offence it 'could cause physical and/or psychological harm to a member of the Australian community'. On this basis, the delegate found that s. 47F(1) constitutes 'a danger to the Australian community'. This reasoning seems to be little more than acknowledgment of past serious offending.

92. Unlike judicial schemes for continuing detention of violent offenders in a number of State jurisdictions, the delegate was not required to have regard to any expert evidence about s. 47F(1) future risk (such as the use of actuarial tools to predict the future risk of violent offenders, or tools assisting in forming a structured professional judgement about future risk). Little weight seems to have been given to the only expert evidence which was to the effect that he had 'good prospects' of rehabilitation.
93. s. 47F(1) sought merits review of this visa refusal decision in the AAT but was unsuccessful.⁴³ s. 47F(1) conceded that he had been convicted of a 'particularly serious crime' as defined in s 5M of the Migration Act. The only issue on review was whether he was a danger to the Australian community. Significantly, the AAT emphasised that its decision did not involve a discretionary balancing of the risk that s. 47F(1) may pose to the Australian community with the risk that s. 47F(1) may face if returned to South Sudan, or the prospect that he may face indefinite detention in Australia. Nor was it necessary for the AAT to be satisfied that there was a 'probability' of harm to the Australian community.⁴⁴ The only question was whether s. 47F(1) constitutes 'a danger to the Australian community'. The kind of balancing exercise unavailable to the AAT could only be done by a Minister exercising non-compellable discretionary powers referred to in section 4.2 below.
94. s. 47F(1) missed the 35 day time limit to file an application for judicial review of the AAT's decision. He filed an application for leave to seek review of the decision out of time and represented himself at the hearing. At the review, the court was limited to considering whether there were any legal errors in the AAT's decision and it could not reconsider the merits of s. 47F(1) protection visa application. The Federal Court refused the application for judicial review on the basis that the review grounds put forward by s. 47F(1) on his own behalf did not have any prospects of success.⁴⁵
95. Following the dismissal of his judicial review application, s. 47F(1) faced the prospect of indefinite detention. He could not be returned to South Sudan because that would be contrary to Australia's non-refoulement obligations. The only way he could be released from detention was if a relevant Minister decided to exercise a non-compellable power to grant him a visa or to place him into community detention. The consideration of less restrictive alternatives to detention is considered in more detail in section 4.2 below.

4.2 Consideration of less restrictive alternatives

(a) Available alternatives

96. Following the cancellation of their visas [REDACTED] became unlawful non-citizens within the meaning of s 14 the Migration Act. As a result, they were required to be detained under s 189 of the Migration Act.
97. s. 47F(1) [REDACTED] are precluded from applying for any visa (including a Bridging visa) due to the operation of s 501E of the Migration Act. Therefore, the only way that they can be granted a visa is through the personal intervention of the Minister.
98. 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.
99. Section 197AB of the Migration Act permits the Minister, where he or she 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.
100. In addition to the power to make a residence determination under s 197AB, the Minister also has a discretionary non-compellable power under s 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
101. These powers in the context of detainees who had visas cancelled or refused, and the legislative framework within the Migration Act regarding the character test, were outlined in the Commission's 2021 report *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.⁴⁶
102. There are a number of steps involved in the Minister considering the exercise of the powers available under ss 195A or 197AB. The first step involves a decision by the Department about whether to refer a case to the Minister for consideration. These Departmental decisions are made having regard to guidelines issued by the Minister. If the Department decides that a detainee's case meets the guidelines and should be referred to the Minister, the case is initially referred as a 'first stage' submission. This submission asks the Minister whether they wish to *consider* the exercise of one of the available Ministerial powers. If the Minister indicates that they wish to consider the exercise of one of those powers, the Department prepares a 'second stage'

submission asking the Minister whether they *will* exercise one of those powers.

103. The application by the Department of the Ministerial guidelines involves an evaluative exercise in determining whether a detainee's case meets the Ministerial guidelines and should be referred to the Minister for consideration. As a result, the decision to refer or not to refer is an 'act' for the purposes of the AHRC Act.
104. Similarly, the decision by the Minister to consider or not to consider exercising a discretionary power (following a 'first stage' submission from the Department), and a decision by the Minister to exercise or not exercise a discretionary power (following a 'second stage' submission from the Department) are also 'acts' for the purposes of the AHRC Act.

(b) *Consideration of less restrictive alternatives for* s. 47F(1)

105. On 4 July 2019, the Department found that s. 47F(1) case met the guidelines for referral to the Minister for consideration of less restrictive alternatives to detention. The Department noted that '[a]s s. 47F(1) has no viable visa pathway and his removal is not reasonably practicable, his detention will result in protracted detention'.
106. In a submission to the Minister dated 25 September 2019, the Department noted that s. 47F(1) case had been referred to the Minister to consider the grant of a bridging visa because:
 - he had been found to be owed protection by Australia
 - he was ineligible for a protection visa because of a finding that he was considered to be a risk to the Australian community
 - he could not be involuntarily removed to Sudan without breaching Australia's non-refoulement obligations.
107. The Department observed that s. 47F(1) 'faces possible indefinite detention' and that 'there is a legal risk the lawfulness of his detention could be challenged in the courts'. The Department put forward three options for future management of s. 47F(1) case:
 - The first option was the grant of a bridging visa E which would enable him to reside lawfully in the community, with work rights.
 - The second option was the grant of return pending bridging visa, also with work rights. He would remain in Australia until his removal was

reasonably practicable. Noting his current circumstances, departure related conditions would not be enforced.

- The third option was to decline to consider exercising Ministerial powers. In relation to this option, the Department noted:

If you decline to consider intervening in s. 47F(1) case, he will remain in immigration detention until he voluntarily departs Australia. As [REDACTED] has been found to be owed protection, it is likely his continued detention would be protracted and may be subject to criticism from external scrutiny bodies.

108. There were significant cost differences between continuing to hold s. 47F(1) in detention and granting him a bridging visa. The Department estimated that the cost of managing a person in held detention was approximately \$360,000 per annum, while the cost of managing a person on a bridging visa was approximately \$10,250 per annum.
109. On 4 October 2019, the Hon David Coleman MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, declined to consider exercising his power under s 195A to grant s. 47F(1) a visa.
110. On 5 June 2020, the Department found that s. 47F(1) case did not meet the guidelines for referral to the Minister. This was based on an assessment by a departmental officer that 'the risk to the community if s. 47F(1) reoffends is greater than any other consideration'. As with previous assessments of risk, there was no attempt to quantify the likelihood of the future risk or its magnitude, nor was any expert evidence about risk relied on such as would have been required in a continuing detention order application under a State based judicial regime.
111. In March 2021, the Department sent a 'first stage' submission to the Hon Alex Hawke MP, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs for him to indicate whether he wished to consider exercising his intervention powers. The context for this referral was that in September 2020 in the case of *AJL20 v Commonwealth* (2020) 279 FCR 549, the Federal Court had ordered that a person in immigration detention be released because the Department had failed to comply with its obligation in s 198 of the Migration Act to remove him from Australia 'as soon as reasonably practicable'. s. 47F(1) had made an application to the Federal Court on similar grounds in the case of *ALT21 v Commonwealth* (proceeding NSD122/2021) and the Commonwealth's defence was due to be filed on 31 March 2021. The Department sought a response from the Minister prior to the filing of that defence.

112. The Department was concerned about taking steps to remove s. 47F(1) from Australia for two reasons. First, the Department noted that s. 47F(1) could not be removed from Australia without breaching Australia's non-refoulement obligations. Secondly, it noted that a necessary preliminary step to removal—applying to South Sudanese officials for a travel document—may give rise to risks to s. 47F(1) family members who remain in South Sudan. It appears that the Department wanted to be able to say to the Court that other alternatives were being considered in s. 47F(1) case: namely, Ministerial consideration of less restrictive forms of detention.
113. The Department also noted in its submission that a Bill had been introduced on 25 March 2021 to amend s 197C of the Migration Act.⁴⁷ If that Bill was passed, the Act would no longer require a non-citizen without a visa to be removed from Australia if there had been a finding that Australia had protection obligations to that person. However, until that Bill was passed, the Department had an obligation to remove s. 47F(1) from Australia 'as soon as reasonably practicable' despite owing him protection obligations. The Department was very clear about the risks involved for s. 47F(1), saying:

If you decline to intervene, the Department will be obliged to remove s. 47F(1) as soon as reasonably practicable irrespective of the fact he engages Australia's protection obligations. This would be a significant step with substantial consequences for Australia, in particular in relation to our international reputation, in addition to the risk of harm to the person if he is returned. The Department is also concerned that the next step which must be undertaken to effect removal—applying to South Sudanese officials for a travel document—may give rise to risks to family members of s. 47F(1) who remain in South Sudan. *Refoulement* is regarded as a serious breach of international law.

The Government's long-standing position, consistent with our commitment to a rules-based international order, is that a person will not be removed where it would breach Australia's *non-refoulement* obligations. ...

Australia has consistently publicly affirmed that it complies with its *non-refoulement* obligations. To our knowledge, Australia has not previously refouled an immigration detainee in breach of *non-refoulement* obligations. Any decision to do so would be unprecedented for Australia. It would likely generate considerable criticism from the Australian community, the media and other countries, given the person would be returned to a place where Australia recognises they would face a real risk of being harmed. It would also likely cause significant damage to Australia's international reputation and ability to 'call out' other countries for breaches of their human rights obligations.

Accordingly, the Attorney-General's Department has indicated that any such decision should involve significant engagement with the Prime Minister, the

Attorney-General, the Minister for Foreign Affairs, and their respective departments.

114. It appears that Mr Hawke took on board the serious warnings from his Department and made a decision on 31 March 2021 to *consider* exercising his powers under s 195A of the Migration Act to grant s. 47F(1) a bridging visa E for a period of three months. The effect of this decision was that a 'second stage' submission would be prepared by the Department and he would be asked to *actually* exercise the relevant power by making a decision to grant s. 47F(1) a visa.
115. However, before a second stage submission was prepared, a number of events occurred.
116. First, I infer that the Commonwealth filed a defence in *ALT21 v Commonwealth* on or about 31 March 2021 indicating to the Federal Court that the Minister was considering exercising his power under s 195A of the Migration Act to grant s. 47F(1) a visa. Such a consideration would provide a lawful basis for s. 47F(1) continued detention.⁴⁸
117. Secondly, on 25 May 2021, the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) commenced. This Act amended s 197C of the Migration Act, to provide that the Department was not required to remove a non-citizen without a visa from Australia if there had been a finding that Australia had protection obligations to that person.
118. Thirdly, on 23 June 2021, the High Court delivered judgment in *Commonwealth v AJL20* (2021) 273 CLR 43, overturning the decision of the Federal Court. By majority, the Court held that ss 189(1) and 196(1) of the Migration Act validly authorise and require the detention of an unlawful non-citizen until they are *actually* removed from Australia or granted a visa.
119. As a result of the second and third events, it was no longer necessary to continue to consider granting s. 47F(1) a visa to justify his continued lawful detention, even in circumstances where there was no realistic possibility of his removal from Australia in the foreseeable future.
120. The Department provided a 'second stage' submission to Minister Hawke in relation to s. 47F(1) sometime after the High Court's decision in *AJL20* (the actual date has been redacted in the version provided to the Commission). The Department noted that it was still under an obligation to remove s. 47F(1) from Australia 'as soon as reasonably practicable' but acknowledged that he would not be returned to South Sudan and the Department was not aware of any third countries willing to accept him.

121. The second stage submission noted that the average cost of managing a person in immigration detention had increased and for the 2020–21 financial year was \$428,451. By contrast, the annual cost of managing a person on a bridging visa in the community was less than \$4,000.

122. On 22 November 2021, Minister Hawke decided not to exercise his power under s 195A to grant s. 47F(1) a bridging visa. As a result, s. 47F(1) remains in immigration detention.

(c) *Consideration of less restrictive alternatives for s. 47F(1)*

123. s. 47F(1) was considered against the s 195A guidelines in November 2019 and against the s 195A and 197AB guidelines in December 2020. On each occasion, he was found by a departmental officer not to meet the guidelines for referral to the Minister. In the second assessment, the officer correctly recorded that s. 47F(1) could not be involuntarily removed to 'Sudan' (scil. South Sudan) and was 'at risk of ongoing and indefinite detention'. However, somewhat surprisingly, the officer said that s. 47F(1) continued detention was 'due to his refusal to voluntarily return to [South] Sudan'.

124. I am concerned that officers of the Department appear to consider that it is appropriate to expect people to whom Australia has protection obligations to volunteer to be taken to situations of persecution. The Department had held that s. 47F(1) 'country of former habitual residence' for the purpose of assessing his protection claims was South Sudan and that he faced a real chance of persecution should he be taken there. There should have been no expectation that s. 47F(1) volunteer to be taken to a place where the Department recognised that he faced a real chance of persecution. s. 47F(1) was not being detained because of a refusal to be voluntarily taken to South Sudan. He was being detained because he could not be taken to South Sudan and the Minister had not exercised a discretionary power to release him from detention.

125. It appears that the finding that s. 47F(1) could end his detention by volunteering to be taken to South Sudan may have influenced the officer's decision that s. 47F(1) case should not be referred to the Minister for consideration of less restrictive alternatives to held detention.

126. s. 47F(1) case was eventually referred to Minister Hawke on 18 January 2022, along with 17 other long term detainees who faced the prospect of indefinite detention. The cohort was described in the submission in the following way:

[T]he Department notes that all 18 clients are long term detainees who are unlikely to be able to be removed from Australia in the foreseeable future, and with no options for release from Immigration detention without Ministerial consideration under section 195A of the Act.

These detainees are either not eligible to be granted a visa due to having an application bar in effect or have had their visa cancelled due to their criminality. Further, they cannot be removed without breaching Australia's non-refoulement obligations and there are unlikely to be any third country settlement options in the foreseeable future.

127. On 7 February 2022, the Minister indicated that he did not wish to consider the exercise of his powers in relation to any of the 18 detainees listed in the departmental submission. As a result, s. 47F(1) also remains in immigration detention.

4.3 Findings

128. My preliminary view is that the continued detention of s. 47F(1) in closed detention facilities cannot be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. As a result, my preliminary view is that their continued detention is arbitrary, contrary to article 9 of the ICCPR.
129. In this preliminary view, I have focused on the following acts which appear to be the most determinative in relation to their continued detention:
- the decision by Minister Coleman on 4 October 2019 not to consider exercising his power under s 195A of the Migration Act to grant s. 47F(1) a visa – this was the first occasion on which a Minister was asked to consider s. 47F(1) particular circumstances (his case was later also considered by Minister Hawke who decided not to exercise his power under s 195A on 22 November 2021)
 - the decision by Minister Hawke on 7 February 2022 not to consider exercising his power under s 195A of the Migration Act to grant s. 47F(1) a visa – this was the first occasion on which a Minister was asked to consider s. 47F(1) particular circumstances.
130. In focusing on these acts, I do not discount the potential for the detention of s. 47F(1) to have become arbitrary at an earlier point in time. In particular, I consider that the Department could, and should, have made earlier referrals to a relevant Minister seeking the exercise of the Minister's discretionary powers.
131. For example, in s. 47F(1) case it was clear by 25 May 2018, when the AAT dismissed his application for review of the decision to refuse him a protection visa, that he faced the prospect of indefinite detention. However, it took more than a year for his case to be referred to the Minister for consideration of alternatives to held detention.

132. In s. 47F(1) case, the Department twice considered that he did not meet the guidelines for referral in 2019 and 2020, but in doing so on one occasion inappropriately suggested that it was reasonable to expect him to volunteer to return to a situation of persecution (see paragraphs 123 to 125 above).
133. The departmental submissions to the Minister in relation to each of the decisions referred to in paragraph 129 above are brief. This is particularly so in relation to the submission dealing with s. 47F(1) case was referred to the Minister along with the cases of 17 other detainees. The background circumstances of each detainee were described in a single page. In s. 47F(1) case, the material placed before the Minister included no submissions made on s. 47F(1) behalf, for example submissions from his representatives or advocates, or submissions by his family members. While there was a single sentence indicating that Australia owed s. 47F(1) protection obligations, there was no discussion of why this was the case. Instead, the primary focus of the single page description of his circumstances was what was described as s. 47F(1) 'extensive criminal history'.
134. My preliminary view is that in making the decisions referred to in paragraph 129 above, insufficient weight was given to the following important factors:
- Australia's obligations towards humanitarian entrants it has selected for resettlement in Australia
 - the differences between judicially imposed sentences of imprisonment and subsequent administrative detention
 - the prospect that s. 47F(1) faced indefinite detention in the absence of Ministerial intervention.
135. These points are expanded on briefly below.

(a) *Australia's obligations towards humanitarian entrants*

136. s. 47F(1) arrived in Australia as teenagers almost 20 years ago. They came as part of a program pursuant to which Australia 'pro-actively seeks out refugees at risk and offers them sanctuary' (see paragraph 18 above). For many people in their situation 'resettlement programs such as run by Australia will be their only hope' (paragraph 18 above). The intention of resettlement was to provide a 'durable solution for refugees and others in humanitarian need overseas who do not have any other solution available to them' (paragraph 21 above). The durable solution came in the form of the grant of a visa that Australia described as 'permanent' that allowed the holder to remain in Australia indefinitely.

137. The decision by the Australian Government to resettle s. 47F(1) and their family came with a responsibility to ensure that the family was adequately supported so that resettlement would be successful. However, it is clear from the history of resettlement of Sudanese humanitarian entrants over this period that many of them felt insufficiently supported.
138. Resettling refugees and humanitarian entrants is not a simple exercise. While many new entrants adapt quickly to their new circumstances and thrive, for others resettlement is difficult. It is clear that in the years immediately after resettling large numbers of people from Sudan, including s. 47F(1) family, the Australian Government realised that this group had 'greater settlement needs than people from previous source regions, reflecting their experiences and circumstances prior to arriving in Australia' and that the Government had a responsibility to improve initially poor settlement outcomes (see paragraph 26 above).
139. A particular issue highlighted in research by VEOHRC and the Commission between 2008 and 2010 was reports by Australian-Sudanese young people that they felt 'over policed' in public spaces. Some years prior to this, the Australian Government had recognised that it was 'critical' to target support to assist at-risk youth (see paragraph 27 above). It was during this period that s. 47F(1) were convicted of a significant number of minor offences, predominantly involving interactions with police. I describe these offences as minor because, in almost all cases, when they were heard by a court s. 47F(1) and s. 47F(1) were either sentenced to pay a fine or no penalty was imposed.
140. The general resettlement experiences of the Australian-Sudanese community, and Australia's responsibility to this community, appear to have formed no part of the ministerial consideration of whether s. 47F(1) should remain in immigration detention. Of course, each of them must take responsibility for their own actions, including the serious assault they were involved in 10 years ago. This issue is considered in the following section. These initial comments seek to identify the reciprocal obligations that Australia had to each of them.
141. One way of demonstrating that Australia was serious about integrating newly arrived humanitarian entrants would be to treat them in the same way as Australians if they break the law. That would involve a court hearing to determine culpability, followed by the imposition of court ordered sanctions. It would not involve superadded executive detention of indefinite duration.
142. Further, in this case it is appropriate to take into account the length of time that s. 47F(1) have been part of the Australian community. They have both spent almost 20 years in Australia - more than half of their lives and all of their adult lives. When the Full Court of the Federal Court was

considering s. 47F(1) appeal against the refusal of his judicial review application, dealing with the Minister's decision to cancel his visa, the Court began its unanimous judgment with this observation:⁴⁹

This is another in a long line of cases which have come before the Court arising from a decision of the Minister (or his or her delegate) to cancel a person's visa under s 501(2) of the *Migration Act 1958* (Cth). It is not surprising that such decisions have given rise to so much litigation (in this Court and in the Administrative Appeals Tribunal (AAT)). Many of the decisions affect visa holders who have lived in Australia for a long time and have developed strong family and other connections here. In many cases the visa-holder's family includes individuals who are Australian citizens and whose interests will be significantly and dramatically affected if the visa holder is removed from Australia. The potentially serious ramifications of cancelling a person's visa were emphasised by Brennan J in *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247 at 255 when, as the foundation President of the AAT, his Honour said:

When an alien has been resident in this country for many years, when his roots are deep in Australia and the ties which bind him to Australia are strong, a clear case will be required to persuade the decision-maker that it is in the best interests of Australia to banish him from our shores.

(b) *The differences between judicially imposed imprisonment and administrative detention*

143. s. 47F(1) were involved in a serious act of violence in 2012. They were convicted and sentenced to terms of imprisonment. In s. 47F(1) case, the trial judge rightly concluded that '[y]our unfortunate background in Sudan does not give you a right to commit offences with impunity in this country'. The same comment applies equally to s. 47F(1).
144. s. 47F(1) were sentenced to imprisonment for 4 years and 4 weeks, and 2 years and 50 weeks, respectively. s. 47F(1) served his sentence in full. s. 47F(1) was released early on parole and was living in the community for 18 months before his visa was cancelled. After he was detained in immigration detention, s. 47F(1) also served a subsequent period of imprisonment of 8 months. Since mid-2015, both men have spent more than 7 years in administrative immigration detention. This administrative detention has been far longer than their original sentence of imprisonment, does not have an end date, and at present appears likely to continue indefinitely.
145. The original sentences of imprisonment were imposed by the District Court of South Australia. The sentences followed a trial where evidence could be tested and where the obligation of the court following conviction was to

impose a sentence within the range provided for by statute that was proportionate to the gravity of the offending.⁵⁰

146. South Australia has a legislative scheme pursuant to which conditions can be imposed on certain high risk offenders for a period of up to five years following the expiration of their sentences. The regime is contained in the *Criminal Law (High Risk Offenders) Act 2015* (SA). Relevantly, a 'high risk offender' includes a person who was convicted of causing serious harm to a person and who was sentenced to a period of imprisonment in respect of the offence.⁵¹ The South Australian Attorney-General can apply to the Supreme Court of South Australia for an extended supervision order (ESO) in relation to a high risk offender. The application must be made within 12 months of the expiration of the person's sentence. Before determining whether to make an ESO, the Supreme Court must direct that one or more health professionals examine the respondent and provide a report to the Court about the likelihood of the respondent committing a further serious act of violence.⁵² In determining whether to make an ESO, the paramount consideration of the Supreme Court must be the safety of the community.⁵³ The Supreme Court must also take into account a range of other matters, including:

- the likelihood of the respondent committing a further serious offence of violence
- the report from the health professional that the Court was required to obtain
- any report prepared by the Parole Board
- other relevant reports, including the results of any statistical or other assessment of the likelihood of persons with histories and characteristics similar to those of the respondent committing a further relevant offence
- any relevant evidence or representations that the respondent may want to put to the Court
- any treatment or rehabilitation program in which the respondent has had an opportunity to participate, including his or her willingness to so participate and the extent of such participation
- the circumstances and seriousness of the respondent's offending and any pattern of offending behaviour
- any remarks made by the sentencing court in passing sentence.⁵⁴

147. The regime also permits a continuing detention order to be made, that is, an order requiring the person to continue to be detained in custody following the expiration of their sentence. However, a continuing detention order may only be made where an ESO was first made and the person did not comply with the terms of the ESO.⁵⁵ In those circumstances, the maximum term of a continuing detention order is the period of time remaining on the ESO.⁵⁶ The Supreme Court can only make a continuing detention order if it finds that the person 'poses an appreciable risk to the safety of the community if not detained in custody'.⁵⁷
148. The South Australian regime commenced on 25 January 2016, shortly after s. 47F(1) were released from prison and taken into immigration detention, and so may not have been available in their case. However, regardless of whether the regime was available at that time, its enactment is clear indication from the Parliament of South Australia of the limited circumstances in which further restrictions could be placed on a person's liberty as a result of historical criminal conduct when there is a risk of future harm to the community. It is also a clear indication of the safeguards that should properly apply in such a situation.
149. The scheme for administrative detention under the Migration Act, particularly in circumstances where there is no prospect of removal from Australia in the foreseeable future and detention is sought to be justified on the basis of arguments grounded in the safety of the community, lacks many of the important safeguards of the South Australian post-sentence regime. In particular:
- the powers are wholly at the discretion of the executive and are not subject to independent oversight by the judiciary
 - the default position is detention rather than liberty
 - there is no obligation on a Minister to consider the exercise of the discretionary powers that would permit the release of s. 47F(1) and s. 47F(1) from detention
 - there is no right for s. 47F(1) to make submissions about whether they should continue to be detained or to have any submissions taken into account – indeed, as noted above, the departmental submission to the Minister in s. 47F(1) case contained no reference to any submissions made on his behalf
 - there is no obligation on the Minister to assess whether s. 47F(1) or s. 47F(1) pose a risk to the community

- to the extent that risk is considered, there is no obligation to obtain independent expert evidence that bears on that risk or to have regard to actuarial data about the risk of people in similar circumstances
- there is no limit to the period for which a person may continue to be administratively detained.

150. In the submission to Minister Coleman in relation to s. 47F(1), referred to in paragraph 129 above, the consideration under the heading 'Risk to the community' focuses entirely on the 2018 assessment by the AAT referred to in paragraphs 73 to 75 above that he was a danger to the community. For the reasons given in paragraphs 76 to 79 above, I have concerns with the reasoning process employed by the Member. The Member concluded that s. 47F(1) was a danger to the Australian community *because* he had a sense that he had been discriminated against. That reasoning is extraordinary, both because the experience described by s. 47F(1) was shared by many other Australian-Sudanese youth during the same period, and because the Commission is not aware of any credible risk prediction model that identifies a causative correlation between a person feeling that they have been discriminated against and that person being a danger to the community.

151. It does not appear that the Member had the benefit of any of the kinds of objective evidence about risk that would have been required in a proceeding under the *Criminal Law (High Risk Offenders) Act 2015* (SA). My preliminary view is that it was unsafe for the Minister to rely on the finding by the AAT when assessing the risk that s. 47F(1) posed to the community.

152. The submission to the Minister also attached a statement from s. 47F(1) that was in the following form:

My name is s. 47F(1), I am writing this letter in regards to my visa cancellation. My visa was cancelled on 25th October 2014, and now my residency status is in the consideration of the Minister.

I arrived in Australia in 2003 at the age of 16 along with my Mother and my Siblings. At the time I was young and vulnerable and got involved with the wrong crowd which led me to Prison, and after Prison I was transferred to Immigration Detention Centre here in Australia. While I was [in] Prison I rehabilitated and achieved certificates for Completion on various behavioural courses.

Currently my Mother is alone in the community, recently my older brother passed away and my younger siblings are settled with their families & unfortunately there is no one to support my Mother.

The Prison and Detention has made me realise for the privileges I had lost and I feel immense remorse for my actions in the past which led me to prison. I

have learned a lot during this time and am seeking just one chance from the government to be able to live in the community and to prove myself that I am not here to break any laws rather abide by them to make a better future and to prove that I am not a danger to the community.

I am hoping that my current Visa situation would be sorted out based on the facts that I have changed for the better & I am hoping to be given a chance to prove it. I am also willing to accept any terms or conditions that would be given to me by the Home Affairs Minister in order for me to be in the Community once again.

153. There is no discussion in the departmental submission of whether any risk posed by s. 47F(1) could be mitigated through the imposition of conditions on his visa. My preliminary view is that the evidence given by s. 47F(1) on his own behalf, including the potential for conditions to be imposed on any visa granted to him, was given insufficient weight by the Minister.
154. The one page summary of s. 47F(1) situation in the submission to Minister Hawke refers to the fact that his CPAT rating recorded a 'high risk of harm to the community'. It is clear from the CPAT that the determinative factor in this assessment was his prior criminal record. The preparation of the CPAT did not involve obtaining independent expert evidence about s. 47F(1) future risk. It did not involve consideration of actuarial data about the risk of people in similar circumstances. s. 47F(1) was not able to test the assessment of risk and was not given the opportunity to make any submissions about his risk. Any submissions previously made by him were not included in the departmental summary provided to the Minister. In all of the circumstances, my preliminary view is that this process for assessing whether he should be granted a visa was seriously flawed because it did not involve the evaluation of all of the factors necessary for a decision properly to be made.

(c) *Prospect of indefinite detention*

155. When s. 47F(1) visas were cancelled, the relevant Minister responsible for each cancellation decision was operating under the mistaken belief that Australia did not owe protection obligations to either of them, and that they could be removed to South Sudan (see paragraphs 64 and 84 above). As a result, the relevant Ministers were not informed that a likely outcome of visa cancellation would be indefinite detention. It may be that, had they been so informed, they would not have decided to cancel the visas.
156. Once the visas were cancelled, it became significantly more difficult for s. 47F(1) and s. 47F(1) to regain their former residency status. Despite being owed protection, there were both found to be ineligible for a protection visa as a result of their criminal convictions, meaning that any restoration of their visa status depended on the exercise of non-compellable ministerial powers.

157. In *Commonwealth v AJL20* (2021) 273 CLR 43, the High Court found that the Migration Act authorises and requires the detention of an unlawful non-citizen until they are *actually* removed from Australia or granted a visa. The Court noted that the authority and obligation to detain was 'hedged about by enforceable duties', including the duty in s 198(6) to remove an unlawful non-citizen from Australia 'as soon as reasonably practicable'.⁵⁸ However, the fact that one of these duties was not complied with (for example, a failure to remove a person from Australia as soon as reasonably practicable), did not result in an obligation to release the person from immigration detention. In those cases, the remedy for failure to comply with a duty was a writ of mandamus compelling the executive to perform the duty.
158. The effect of s 197C of the Migration Act (as amended with effect from 25 May 2021) is that s 198 does not require or authorise an officer to remove s. 47F(1) or s. 47F(1) to South Sudan because protection findings were made in their favour as part of their applications for a protection visa (even though the protection visa applications were refused on other grounds).
159. The only options available to s. 47F(1) to be removed from immigration detention are the grant of a visa by the Minister, or the identification of some safe third country to which they could be removed. In a November 2021 ministerial submission, the Department confirmed that 'the Department is not aware of any third countries that are willing to accept s. 47F(1) to enter and reside. s. 47F(1) is also not willing to consider third country options at this stage.' The Department concluded that it 'will likely not be able to effect the removal of s. 47F(1) in the foreseeable future and therefore his detention will likely continue to be protracted, unless you decide to exercise your section 195A power to grant him a visa'. There is no reason to think that the position with respect to s. 47F(1) is any different.
160. The same submission noted that there was a legal risk if s. 47F(1) filed proceedings seeking the performance of the duty to remove him to a safe third country. The Department said:
- Such cases will scrutinise the steps taken [by] the Department to investigate viable third country removal options. Where the Department is unable to adduce evidence of adequacy of removal efforts to the satisfaction of a court, this may lead to the grant of mandamus compelling the performance of the section 198 duty in circumstances where a viable third country to which removal could reasonably be effected, has yet to be identified for an individual. The constitutionality of the ongoing detention may also become an issue in dispute.
161. I accept that in both of the submissions relevant to the decisions referred to in paragraph 129 above, the department identified that indefinite detention was a real possibility if the Minister did not exercise the discretionary power to

grant a visa. However, for the reasons discussed above, I do not consider that the serious consequences of this outcome were properly weighed against the other factors described in sections (a) and (b) above including the obligations that Australia owed to them as humanitarian entrants and the risk that they pose to the community.

162. For the reasons discussed above, my preliminary view is that the continued detention of s. 47F(1) in closed detention facilities cannot be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. As a result, my preliminary view is that their continued detention is arbitrary, contrary to article 9 of the ICCPR.

5 Next steps

163. While my findings have focused on two relevant decisions of Ministers, it has also had regard to the way in which those Ministers were briefed. In the circumstances, I intend to seek responses to this preliminary view from both the Department and the current Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.
164. Under s 27 of the AHRC Act, the Commonwealth may elect to make either oral or written submissions in relation to my preliminary view of the acts raised by the complainant that appear to be inconsistent with or contrary to a human right.
165. If the Commonwealth wishes to make submissions, I would be grateful to receive these within 28 days of the day of this letter. If Mr the complainants wish to make submissions, I ask that these be provided by the same date.
166. The lawyer assisting me in this inquiry is Deputy General Counsel Graeme Edgerton. If you would like to discuss this matter, please contact Mr Edgerton by telephone on s. 47F(1) or by email at s. 47F(1).



Emeritus Professor Rosalind Croucher AM
President

- ¹ Migration Regulations 1994 (Cth), Sch 2, item 200.211(1)(a).
- ² The Hon Phillip Ruddock MP, Minister for Immigration and Multicultural and Indigenous Affairs, 'Remember Refugees at Risk on World Refugee Day' Media Release, 20 June 2002.
- ³ The Hon Phillip Ruddock MP, Minister for Immigration and Multicultural and Indigenous Affairs, 'Humanitarian Program Intake for 2003-04' Media Release, 31 March 2003.
- ⁴ Department of Immigration and Multicultural and Indigenous Affairs, *2003-04 Annual Report*, p 68, at <https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/dimia-annual-report-2003-04.pdf>.
- ⁵ Department of Immigration, Multicultural and Indigenous Affairs, *Generic Guidelines D – The offshore humanitarian program* (2003), section 4.
- ⁶ Department of Immigration and Multicultural and Indigenous Affairs, *Report on the Review of Settlement Services for Migrants and Humanitarian Entrants* (2003), p 61, at https://webarchive.nla.gov.au/awa/20030608082356/http://www.immi.gov.au/settle/settle_review/index.htm.
- ⁷ Department of Immigration and Multicultural and Indigenous Affairs, *Report on the Review of Settlement Services for Migrants and Humanitarian Entrants* (2003), p 65, at https://webarchive.nla.gov.au/awa/20030608082356/http://www.immi.gov.au/settle/settle_review/index.htm.
- ⁸ Andrew Jakubowicz, *Australia's migration policies: African dimensions: background paper for African Australians: A review of human rights and social inclusion issues* (2010), p 7, at https://humanrights.gov.au/sites/default/files/content/africanaus/papers/africanaus_paper_jakubowicz.pdf.
- ⁹ Andrew Jakubowicz, *Australia's migration policies: African dimensions: background paper for African Australians: A review of human rights and social inclusion issues* (2010), p 14, at https://humanrights.gov.au/sites/default/files/content/africanaus/papers/africanaus_paper_jakubowicz.pdf.
- ¹⁰ Australian Government, *Measures to Improve Settlement Outcomes for Humanitarian Entrants*, Discussion Paper, October 2006, p 7.
- ¹¹ Australian Government, *Measures to Improve Settlement Outcomes for Humanitarian Entrants*, Discussion Paper, October 2006, p 3.
- ¹² Eileen Pittaway, Chrisanta Muli and Sarah Shteir, "'I Have a Voice—Hear Me!' Findings of an Australian Study Examining the Resettlement and Integration Experience of Refugees and Migrants from the Horn of Africa in Australia' (2009) 26(2) *Refugee* 133 at 143.
- ¹³ Department of Immigration and Citizenship, *Annual Report 2007-08*, pp 80 and 86, at <https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/diac-annual-report-2007-08.pdf>.
- ¹⁴ Farah Farouque, Andrea Petrie and Daniella Miletic, 'Minister cuts African refugee intake' *The Age*, 2 October 2007 at <https://www.theage.com.au/national/minister-cuts-african-refugee-intake-20071002-ge5yb1.html>; Alison Caldwell, 'Andrews under fire for cutting African refugee intake' *ABC News*, 2 October 2007 at <https://www.abc.net.au/news/2007-10-03/andrews-under-fire-for-cutting-african-refugee/688430>.
- ¹⁵ Australian Human Rights Commission, *In our own words, African Australians: A review of human rights and social inclusion issues* (2010) at <https://humanrights.gov.au/our-work/race-discrimination/projects/our-own-words-african-australians-review-human-rights-and#engaging>.
- ¹⁶ Australian Human Rights Commission, *In our own words, African Australians: A review of human rights and social inclusion issues* (2010), pp 29–30.
- ¹⁷ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105 at [6].
- ¹⁸ The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- ¹⁹ See *Secretary, Department of Defence v HREOC, Burgess and Ors* (1997) 78 FCR 208.
- ²⁰ UNHRC, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *C v Australia*,

- Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
- ²¹ UNHRC, 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].
- ²² *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UNHRC in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- ²³ *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).
- ²⁴ United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
- ²⁵ United Nations Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
- ²⁶ United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams and 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).
- ²⁷ United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
- ²⁸ 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].
- ²⁹ See the description of these factors in *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105 at [11], [44]-[45] and [59].
- ³⁰ Migration Act, s 500(1)(b).
- ³¹ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCA 681.
- ³² *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105.
- ³³ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCA 681 at [39] and [44]-[46].
- ³⁴ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105 at [45].
- ³⁵ Paragraph quoted from US Department of State, *Country Report on Human Rights Practices 2016 - Sudan* (2017), 49 at <https://www.state.gov/wp-content/uploads/2019/01/Sudan-1.pdf>.
- ³⁶ *YLHG and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1454.
- ³⁷ *YLHG and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1454 at [76]-[77].
- ³⁸ *YLHG and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1454 at [50] and [53].
- ³⁹ *YLHG and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1454 at [83].
- ⁴⁰ s. 47F(1)
- ⁴¹
- ⁴²
- ⁴³ *RWDX and Minister for Immigration and Border Protection (Migration)* [2019] AATA 123.
- ⁴⁴ *RWDX and Minister for Immigration and Border Protection (Migration)* [2019] AATA 123 at [33]-[34].
- ⁴⁵ *RWDX v Minister for Immigration and Border Protection* [2020] FCA 391.
- ⁴⁶ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, pp 21-24.
- ⁴⁷ Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Cth).
- ⁴⁸ *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [26].

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- ⁴⁹ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105 at [1].
- ⁵⁰ *Sentencing Act 2017* (SA), s 10(1)(a).
- ⁵¹ *Criminal Law (High Risk Offenders) Act 2015* (SA), s 5.
- ⁵² *Criminal Law (High Risk Offenders) Act 2015* (SA), s 7(3)(b).
- ⁵³ *Criminal Law (High Risk Offenders) Act 2015* (SA), s 7(5).
- ⁵⁴ *Criminal Law (High Risk Offenders) Act 2015* (SA), s 7(6).
- ⁵⁵ *Criminal Law (High Risk Offenders) Act 2015* (SA), ss 15–17.
- ⁵⁶ *Criminal Law (High Risk Offenders) Act 2015* (SA), s 18(2).
- ⁵⁷ *Criminal Law (High Risk Offenders) Act 2015* (SA), s 18(2)(b).
- ⁵⁸ *Commonwealth v AJL20* (2021) 273 CLR 43 at [44] (Kiefel CJ, Gageler, Keane and Steward JJ).



Australian Government
Department of Home Affairs

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OHR-21-00041 and OHR21-00345

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Dear Professor Croucher

Thank you for your letter to the Secretary dated 31 March 2023, providing notice under section 27 of the *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act) of your preliminary views in relation to complaints made by **s. 47F(1)** against the Commonwealth of Australia, in particular the Department of Home Affairs, alleging a breach of their human rights.

The Department values the role of the Australian Human Rights Commission to inquire into human rights complaints and appreciates the Commission's understanding in the delay of this response. The Department's response is at **Attachment A**.

Should you wish to discuss any aspects of the Department's response, please contact Assistant Secretary Audit and Assurance, Robyn Miller on **s. 22(1)(a)(ii)**

Yours sincerely

Dr Michelle Graham
Acting First Assistant Secretary
Integrity, Security and Assurance

17 July 2023

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The Department does not accept the preliminary view of the Australian Human Rights Commission (the Commission) that the continued detention of s. 47F(1) is arbitrary, contrary to Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). s. 47F(1) are lawfully detained as unlawful non-citizens under section 189 of the *Migration Act 1958* (the Act). At no point has s. 47F(1) detention become arbitrary. The Department maintains s. 47F(1) placement in held immigration detention is reasonable, necessary and proportionate in the individual circumstances of their cases.

The Department undertakes regular reviews, escalations and referrals for persons in immigration detention to ensure the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department maintains its review mechanisms regularly consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention.

Portfolio Ministers' personal intervention powers under the Act allow them to grant a visa to a person in immigration detention or to make a residence determination if they think it is in the public interest to do so. The Department reiterates that the powers are non-compellable and what is in the public interest is a matter for the Minister to determine.

The below table outlines the Department's response to the Commission's preliminary views.

Preliminary views	Department's response
Paragraph 9 <i>My preliminary view is that the continued detention of s. 47F(1) and s. 47F(1) in closed detention facilities cannot be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. As a result, my preliminary view is that their continued detention is arbitrary, contrary to article 9 of the ICCPR.</i>	The Department does not accept the preliminary view of the Commission that the continued detention of s. 47F(1) is arbitrary, contrary to Article 9(1) of the ICCPR. s. 47F(1) are lawfully detained as unlawful non-citizens under section 189 of the Act. At no point has s. 47F(1) detention become arbitrary. The Department maintains s. 47F(1) placement in held immigration detention is reasonable, necessary and proportionate in the individual circumstances of their cases. Mr s. 47F(1) ongoing detention is as a result of the application of the Act in his individual circumstances that have resulted in the outcome that he is an unlawful non-citizen. • An unlawful non-citizen must be detained under section 189 of the Act. • He has had a visa cancelled under section 501 of the Act and as a result he is section 501E barred from making any onshore visa application other than for a Protection visa (PV). • He has made an application for a PV which has been refused. In the course of considering his PV application, a protection finding was made for s. 47F(1) with respect to South Sudan, such that section 197C of the Act prevents his removal to South Sudan and none of the circumstances in subsection 197C(3)(c) are currently applicable. He has no ongoing immigration matters. • The effect of the section 501E bar is that he can only be released from immigration detention through the grant of a visa via Ministerial Intervention or through departure from Australia. • The Minister has the power to grant a visa to a person in immigration detention under section 195A of the Act. This public interest power is non-delegable and non-compellable and it is for the Minister to determine what is in the public interest. s. 47F(1) ongoing detention is as a result of the application of the Act in his individual circumstances that have resulted in the outcome that he is an unlawful non-citizen. • An unlawful non-citizen must be detained under section 189 of the Act. • He has had a visa cancelled under section 501 of the Act and as a result he is section 501E barred from making any onshore visa application other than for a PV.

ATTACHMENT A

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Preliminary views	Department's response
	• He has made an application for a PV which has been refused. In the course of considering his PV application, a protection finding was made for s. 47F(1) with respect to South Sudan, such that section 197C of the Act prevents his removal to South Sudan and none of the circumstances in subsection 197C(3)(c) are currently applicable. He has no ongoing immigration matters. • The effect of the section 501E bar is that he can only be released from immigration detention through the grant of a visa via Ministerial Intervention or through departure from Australia. • The Minister has the power to grant a visa to a person in immigration detention under section 195A of the Act. This public interest power is non-delegable and non-compellable and it is for the Minister to determine what is in the public interest.
Paragraph 107 The Department observed..... • The second option was the grant of return pending bridging visa, also with work rights.....	Correction the reference to 'return pending bridging visa' – the visa is a Bridging (Removal Pending) (BVR) Visa.
Paragraph 108 There were significant cost differences between continuing to hold s. 47F(1) in detention and granting him a bridging visa. The Department estimated that the cost of managing a person in held detention was approximately \$360,000 per annum, while the cost of managing a person on a bridging visa was approximately \$10,250 per annum.	The September 2019 submission outlined that the Department was unable to provide specific details regarding the financial implications of managing an individual, either in the community or in detention. The cost information included in the submission, while based on an average and not specific to s. 47F(1) case, ensured that the potential cost implications were able to be considered as part of any decision in this case.
Paragraph 110 On 5 June 2020, the Department found that s. 47F(1) case did not meet the guidelines for referral to the Minister. This was based on an assessment by a departmental officer that 'the risk to the community if s. 47F(1) reoffends is greater than any other consideration'. As with previous assessments of risk, there was no attempt to quantify the likelihood of the future risk or its magnitude, nor was any expert evidence about risk relied on such as would have been required in a	The Department acknowledges the 5 June 2020 Ministerial Intervention guidelines assessment should not have stated 'the risk to the community if s. 47F(1) reoffends is greater than any other considerations'. A guidelines assessment is to take all factors of a case into consideration. The Department has addressed this with all case officers in the Ministerial Intervention section via an all staff meeting and followed up in writing to all staff. This advice emphasised that staff must balance all factors set out in the guidelines when undertaking a guidelines assessment and that one

ATTACHMENT A

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Preliminary views	Department's response
<i>continuing detention order application under a State based judicial regime.</i>	factor alone cannot outweigh all other factors. This direction has also been updated in the relevant operating procedures and training materials. The Department has also developed additional quality assurance for guidelines assessments which is currently being trialled before it is implemented in the Ministerial Intervention section and will assist to identify learning needs and inform training and procedural guidance.
<i>Paragraph 120</i> <i>The Department provided a 'second stage' submission to Minister Hawke in relation to s. 47F(1) sometime after the High Court's decision in AJL20 (the actual date has been redacted in the version provided to the Commission).</i>	The Department notes this date did not need to be redacted in the copy of the submission provided to the Commission. The redacted date is 29 October 2021. A copy without the date redacted could be provided if required.
<i>Paragraph 123</i> <i>s. 47F(1) was considered against the s 195A guidelines in November 2019 and against the s 195A and 197AB guidelines in December 2020. On each occasion, he was found by a departmental officer not to meet the guidelines for referral to the Minister. In the second assessment, the officer correctly recorded that s. 47F(1) could not be involuntarily removed to 'Sudan' (scil. South Sudan) and was 'at risk of ongoing and indefinite detention'. However, somewhat surprisingly, the officer said that s. 47F(1) continued detention was 'due to his refusal to voluntarily return to [South] Sudan'.</i>	The Department acknowledges the 2020 Ministerial Intervention guidelines assessment should not have implied that s. 47F(1) continued detention was due to his refusal to voluntarily return to his country of reference (South Sudan). The Department has addressed this with all case officers in the Ministerial Intervention section via an all staff meeting and followed up in writing to all staff. This advice emphasised that a client who has been found to engage Australia's protection obligations (such that a 'protection finding' of the purposes of section 197C of the Act has been made for them) is not expected to voluntarily return to the country in respect of which the protection finding was made. This direction has also been updated in the section's operating procedures and training materials. As noted the additional Quality Assurance process over guidelines assessments, which will be implemented in the Ministerial Intervention section, will support identification of training needs and the overall quality and consistency of guidelines assessments. A trial is currently underway with a Quality Assurance question-set to be used by an Executive Level 1 officer to review a sample of Guidelines Assessments prepared and cleared by other officers to ensure the assessment is

ATTACHMENT A

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Preliminary views	Department's response
	consistent with relevant policy and procedures. At the conclusion of this trial, a final question-set will be proposed for inclusion in the Department's Quality Assurance system, Equip. The Department considers the final outcome and the assessment would still have resulted in s. 47F(1) case not meeting the guidelines. Although this statement was in the concluding summary of the guidelines assessment, the case officer provided details of the factors which were weighed in coming to their decision. This includes: • s. 47F(1) visa was cancelled by the Minister under section 501 of the Act; • While he has been found to be a Refugee, he was refused a Protection visa (PV) as he was deemed to be a danger to the Australian community; • He is at risk of ongoing and indefinite detention as he has been in held detention for more than five years; • IHMS reported that s. 47F(1) has no health conditions that cannot be properly cared for in a held immigration detention facility; • He is an unlawful non-citizen and as per section 196(1) of the Act, an unlawful non-citizen detained under section 189 of the Act must remain in immigration detention until they depart Australia or are granted a visa; • s. 47F(1) has an extensive criminal history and served two separate prison sentences; • While his ongoing detention may cause his Australian citizen family members some distress, there is no evidence it would result in irreparable harm and continuing hardship; • Interference with his family unit may be considered a reasonable outcome of migration law due to his extensive criminal history; • There are no compelling or compassionate circumstances in his case; and

ATTACHMENT A

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Preliminary views	Department's response
	- His Community Assessment Protection Tool (CPAT) result has a recommendation of a Tier 3 – Held Detention. s. 47F(1) ongoing detention is as a result of the application of the Act in his individual circumstances that have resulted in the outcome that he is an unlawful non-citizen who cannot presently be removed to South Sudan. - An unlawful non-citizen must be detained under section 189 of the Act. - He has had a visa cancelled under section 501 of the Act and as a result he is section 501E barred from making any onshore visa application other than for a PV. - He has made an application for a PV which has been refused. In the course of considering his PV application, a protection finding was made for s. 47F(1) with respect to South Sudan, such that section 197C of the Act prevents his removal to South Sudan and none of the circumstances in subsection 197C(3)(c) are currently applicable. He has no ongoing immigration matters. - The effect of the section 501E bar is that he can only be released from immigration detention through the grant of a visa via Ministerial Intervention or through departure from Australia. - The Minister has the power to grant a visa to a person in immigration detention under section 195A of the Act. This public interest power is non-delegable and non-compellable and it is for the Minister to determine what is in the public interest.
Paragraph 124 <i>I am concerned that officers of the Department appear to consider that it is appropriate to expect people to whom Australia has protection obligations to volunteer to be taken to situations of persecution. The Department had held that s. 47F(1) 'country of former habitual residence' for the purpose of assessing his protection claims was South Sudan and that he faced a real chance of</i>	The Department acknowledges an error was made in the 2020 Ministerial Intervention guidelines assessment by stating it was open to s. 47F(1) to voluntarily return to his country of reference (South Sudan), however, for the reasons discussed above, this would not have changed the final outcome and the assessment would still have resulted in the case not meeting the guidelines. The Department has taken steps to address this issue with all Ministerial Intervention case officers as outlined in the response to Paragraph 123.

ATTACHMENT A

OFFICIAL: Sensitive Personal privacy

Preliminary views	Department's response
persecution should he be taken there. There should have been no expectation that s. 47F(1) volunteer to be taken to a place where the Department recognised that he faced a real chance of persecution. s. 47F(1) was not being detained because of a refusal to be voluntarily taken to South Sudan. He was being detained because he could not be taken to South Sudan and the Minister had not exercised a discretionary power to release him from detention.	It is not the Department's position to expect a person who engages Australia's protection obligations to voluntarily return to the country in respect of which a protection finding has been made. As stated in response to Paragraph 123, s. 47F(1) continued detention results from the application of the Act in his circumstances. s. 47F(1) case has been referred for consideration of a section 197D assessment to establish whether he still engages Australia's <i>non-refoulement</i> obligations. s. 47F(1) can only be released from held immigration detention if a Minister intervenes using their personal, non-compellable public interest power under section 195A of the Act to grant him a visa or make a residence determination under section 197AB of the Act. The Department continues to explore removal to a third country for s. 47F(1).
Paragraph 129 In this preliminary view, I have focused on the following acts which appear to be the most determinative in relation to their continued detention: • the decision by Minister Coleman on 4 October 2019 not to consider exercising his power under s 195A of the Migration Act to grant s. 47F(1) a visa – this was the first occasion on which a Minister was asked to consider s. 47F(1) particular circumstances (his case was later also considered by Minister Hawke who decided not to exercise his power under s 195A on 22 November 2021) • the decision by Minister Hawke on 7 February 2022 not to consider exercising his power under s 195A of the Migration Act to grant s. 47F(1) a visa – this was the first occasion on which a Minister was asked to consider s. 47F(1) particular circumstances.	The Department cannot comment on how the then Ministers formulated their decisions. The Minister's public interest power to grant a visa to a person in immigration detention under section 195A of the Act is non-compellable and it is for the Minister to determine what is in the public interest.
Paragraphs 130 - 133 In focusing on these acts, I do not discount the potential for the detention of s. 47F(1) to have become arbitrary at an earlier point in time. In particular, I consider that the Department could, and	s. 47F(1) were lawfully detained as unlawful non-citizens under section 189 of the Act. At no point in time has the detention of s. 47F(1) become arbitrary.

ATTACHMENT A

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Preliminary views	Department's response
should, have made earlier referralsto a relevant Minister seeking the exercise of the Minister's discretionary powers. For example, in s. 47F(1) case it was clear by 25 May 2018, when the AAT dismissed his application for review of the decision to refuse him a protection visa, that he faced the prospect of indefinite detention. However, it took more than a year for his case to be referred to the Minister for consideration of alternatives to held detention. In s. 47F(1) case, the Department twice considered that he did not meet the guidelines for referral in 2019 and 2020, but in doing so on one occasion inappropriately suggested that it was reasonable to expect him to volunteer to return to a situation of persecution (see paragraphs 123 to 125). The departmental submissions to the Minister in relation to each of the decisions referred to in paragraph 129 above are brief. This is particularly so in relation to the submission dealing with s. 47F(1) s. 47F(1) case was referred to the Minister along with the cases of 17 other detainees. The background circumstances of each detainee were described in a single page. In s. 47F(1) case, the material placed before the Minister included no submissions made on s. 47F(1) behalf, for example submissions from his representatives or advocates, or submissions by his family members. While there was a single sentence indicating that Australia owed s. 47F(1) protection obligations, there was no discussion of why this was the case. Instead, the primary focus of the single page description of his circumstances was what was described as s. 47F(1) 'extensive criminal history'	Throughout a person's time in detention, their case is regularly reviewed by a Status Resolution Officer (SRO) to consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention. SROs conduct formal monthly case reviews of all persons in immigration detention. Reviews of a detainee's CPAT also occur at regular intervals, including every six months for detainees who have had a section 501 cancellation and every three months for all other detainees. Following the Administrative Appeal Tribunal's (AAT) decision to affirm s. 47F(1) Protection visa refusal on 25 May 2018, s. 47F(1) case continued to be regularly reviewed by the Department. The reviews did not identify any circumstances that warranted a change in s. 47F(1) placement. In this context, placement refers to whether the non-citizen should reside in the community on a bridging visa or under a residence determination arrangement, or be placed in held immigration detention. As discussed above in the responses to Paragraphs 123 and 124, the Department does not expect a person who engages Australia's protection obligations to voluntarily return to the country in respect of which a protection finding has been made. The Department acknowledges an error was made in the 2020 Ministerial Intervention guidelines assessment by stating that s. 47F(1) continued detention was due to his refusal to voluntarily return to his country of reference (South Sudan), however this result would not have changed the final outcome and the assessment would still have resulted with the case not meeting the guidelines. The Ministers expect the Department to bring to their attention in section 195A submissions, any information that may be relevant including information that could be perceived as adverse information. The Department does not agree with the assertion that the submission for s. 47F(1) was 'brief'. The one page case summary for s. 47F(1) included all the required information to be presented to the Minister as outlined in the section 195A Ministerial Information guidelines.

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ATTACHMENT A

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Preliminary views	Department's response
	A submission is referred to the Minister under section 195A of the Act when initiated by the Department or specifically requested by the Minister. There is nothing specifically in the Act or the Migration Regulations 1994 (the Regulations) that creates a positive obligation on the Department to seek input from a person who is in detention under section 189 of the Act for preparing a submission to the Minister for section 195A purposes. However, if a letter addressed to the Department or Minister is received from the client or their agent in support of their case, it can be attached to a submission to the Minister.
Paragraph 149 <i>The scheme for administrative detention under the Migration Act, particularly in circumstances where there is no prospect of removal from Australia in the foreseeable future and detention is sought to be justified on the basis of arguments grounded in the safety of the community, lacks many of the important safeguards of the South Australian post-sentence regime. In particular:</i> • <i>there is no right for s. 47F(1) to make submissions about whether they should continue to be detained or to have any submissions taken into account – indeed, as noted above, the departmental submission to the Minister is s. 47F(1) case contained no reference to any submission made on his behalf.</i>	The Department does not agree with the assertion that “there is no right for s. 47F(1) or s. 47F(1) to make submissions about whether they should continue to be detained or to have any submissions taken into account”. The Department notes their legal representative sent correspondence to the then Ministers in October, November and December 2021, querying what specific steps were being taken to either remove them from Australia or release them into the Australian community. Their legal representative did not provide any submissions on their behalf.
Paragraph 150 <i>In the submission to Minister Coleman in relation to s. 47F(1), referred to in paragraph 129 above, the consideration under the heading ‘Risk to the community’ focuses entirely on the 2018 assessment by the AAT referred to in paragraphs 73 to 75 above that he was a danger to the community. For the reasons given in paragraphs 76 to 79 above, I have concerns with the reasoning process employed by the Member. The Member concluded that s. 47F(1) was a danger to the Australian community because he had a sense that he had been discriminated against. That reasoning is extraordinary, both because the experience described by s. 47F(1) was shared by many other Australian-Sudanese</i>	The Department cannot comment on the AAT member’s reasoning process.

ATTACHMENT A

OFFICIAL: Sensitive Personal privacy

Preliminary views	Department's response
youth during the same period, and because the Commission is not aware of any credible risk prediction model that identifies a causative correlation between a person feeling that they have been discriminated against and that person being a danger to the community.	
Paragraph 151 <i>It does not appear that the Member had the benefit of any of the kinds of objective evidence about risk that would have been required in a proceeding under the Criminal Law (High Risk Offenders) Act 2015 (SA).</i> <i>My preliminary view is that it was unsafe for the Minister to rely on the finding by the AAT when assessing the risk that s. 47F(1) posed to the community.</i>	The Department cannot comment on how the then Ministers formulated their decisions from the information outlined in the September 2019 and October 2021 submissions, or what from that information was given particular weight noting that it is for the Minister to determine what is in the public interest. The September 2019 submission outlined s. 47F(1) appearance before the AAT hearing and the outcome of that hearing. The submission also included a letter from s. 47F(1) to the then Minister for Home Affairs stating he was remorseful, rehabilitated and has changed his life for the better. This submission was included as an attachment to the October 2021 submission, which the then Minister declined to intervene in s. 47F(1) case under section 195A of the Act.
Paragraph 153 <i>There is no discussion in the departmental submission of whether any risk posed by s. 47F(1) could be mitigated through the imposition of conditions on his visa.</i> <i>My preliminary view is that the evidence given by s. 47F(1) on his own behalf, including the potential for conditions to be imposed on any visa granted to him, was given insufficient weight by the Minister.</i>	The September 2019 submission outlined the visa conditions that would be imposed should the then Minister intervene under section 195A of the Act. The following conditions would have been imposed on any Bridging Visa E granted under section 195A: • conditions to promote engagement - 8401 (report as directed), 8506 (notify new address) • conduct related conditions - 8564 (must not engage in criminal behaviour), 8566 (not breach Code of Behaviour)). The mandatory conditions as set out in clause 070.611 of the Regulations would have been imposed on any BVR granted under section 195A, including condition 8303, which required a visa holder not to become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community.

ATTACHMENT A

OFFICIAL: Sensitive Personal privacy

Preliminary views	Department's response
	The October 2021 submission outlined the visa conditions that would be imposed should the then Minister have intervened to grant a BVE under section 195A of the Act. • conditions to promote engagement – 8401 (report as directed) and 8506 (notify new address); • conduct related conditions – 8564 (must not engage in criminal behaviour) and 8566 (not breach Code of Behaviour) - 8303 (must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community); conditions 8554, 8555, 8560, 8562 and 8563 (must not acquire weapons/explosives or involve in certain activities without the Minister's approval); and 8556 (must not communicate or associate with specified terrorism entities or organisations). The Department referenced the letter from s. 47F(1) in the submission, outlining that he had requested Ministerial Intervention and stated he is rehabilitated, feels remorse and has changed for the better. The letter was also attached to the submission for the Minister's consideration. The Department cannot comment on how the then Ministers' formulated their decisions from the information outlined in the September 2019 and October 2021 submissions, or what from that information was given particular weight in any Ministerial decision noting that it is for the Minister to determine what is in the public interest.
Paragraph 154 <i>The one page summary of s. 47F(1) situation in the submission to Minister Hawke refers to the fact that his CPAT rating recorded a 'high risk of harm to the community'. It is clear from the CPAT that the determinative factor in this assessment was his prior criminal record. The preparation of the CPAT did not involve obtaining independent expert evidence about s. 47F(1) future risk. It did not involve consideration of actuarial data about the risk of people in similar circumstances. s. 47F(1) was not able to test the assessment of risk and was not given the opportunity to make any submissions about</i>	The CPAT is a decision support tool to assist SROs to assess the most appropriate placement for an individual (detention or community) and is not a determinative decision-making tool. Prior offending of a criminal nature (as in the case of s. 47F(1) circumstances) would generally indicate a detainee to be considered 'high risk of harm to the community.' The Department notes that prior offending is one of many factors an SRO considers when completing a CPAT. SROs consider additional factors as part of the placement assessment, including potential vulnerabilities such as the non-citizen's age, health, if they have been, or are at, a higher risk of being the victim of a crime, and any behaviour impacting their own wellbeing. SROs can also record and consider strength based factors, such as community support and employable skills, which

ATTACHMENT A

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Preliminary views	Department's response
<i>his risk. Any submissions previously made by him were not included in the departmental summary provided to the Minister. In all of the circumstances, my preliminary view is that this process for assessing whether he should be granted a visa was seriously flawed because it did not involve the evaluation of all of the factors necessary for a decision properly to be made.</i>	would support a community placement. The CPAT is not a process for considering whether a person should be granted a visa. As noted above in response to paragraph 123, due to the operation of the Act in s. 47F(1) case the only mechanism through which he could be granted a visa is through Ministerial Intervention.



THE HON ANDREW GILES MP
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MS23-001606

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear President Croucher

Thank you for your correspondence of 31 March 2023 concerning the notice under section 27 of the *Australian Human Rights Commission Act 1986* (Cth) of your preliminary views in relation to complaints made by s. 47F(1) against the Commonwealth of Australia - Department of Home Affairs, alleging a breach of their human rights. I appreciate the time you have taken to bring this matter to my attention.

The Department of Home Affairs will provide a written response to your preliminary view, however I would like to advise I am unable to comment on acts done by former Ministers in the exercise of their powers under the *Migration Act 1958* (Cth) (the Act).

I acknowledge the impacts of prolonged immigration detention and I continue to explore, with the Department, measures aimed at addressing barriers to status resolution and associated risks of long-term detention, in line with the Australian Government commitments and Australia's international obligations.

In November 2022, I agreed to the Department referring detainees in identified cohorts including those who have been found to engage protection obligations and have been in held immigration detention for more than five years, for my consideration under sections 195A or 197AB of the Act.

On 1 March 2023, after careful consideration of their cases, I declined to consider intervening under sections 195A and 197AB of the Act in respect of s. 47F(1)

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under the Freedom of Information Act 1982

In light of this preliminary view report, on 7 August 2023, I requested the Department prepare a new Ministerial Intervention submission for my consideration under section 195A or 197AB of the Act for s. 47F(1) [REDACTED]. The Department is currently progressing this submission.

Thank you for raising these matters.

Yours sincerely



ANDREW GILES

6 / 9 / 2023