# 1 Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into two separate complaints by Mr TZ and Mr UA respectively, against the Commonwealth of Australia, alleging a breach of their human rights.

2. Both complainants claim that their detention is, or was, arbitrary – contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

3. The complaints have been considered together in a joint report because both complainants are stateless and their complaints relate to their prolonged detention in circumstances where they cannot be removed from Australia.

4. Mr TZ was born in Lebanon to Palestinian refugee parents. He arrived in Australia in 2005 as a dependant on his mother's partner visa. Since 2009, Mr TZ has been in between criminal custody and immigration detention. He has been unsuccessful in his applications for a Protection Visa (PV). Mr TZ has requested removal from Australia, but the Department has been unable to obtain travel documents for him.

5. As a stateless person who was also classified as an unlawful non-citizen, Mr TZ faced indefinite detention until the High Court's orders in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (NZYQ). Mr TZ was identified as being *'NZYQ affected'* and was released from immigration detention and granted a Bridging (Removal Pending) Subclass 070 visa (BVR) on 11 November 2023.

6. Mr UA arrived in Australia as an infant in 1978. It is believed that he was born in transit from Vietnam and his birth was never registered. Mr UA and his parents were assessed as refugees and granted residence permits. In 2017, Mr UA's visa was mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) (Migration Act) after several criminal convictions and long custodial sentences. The Department has been unable to obtain citizenship or travel documents for him. He was granted a bridging visa in September 2022 after a protracted period in immigration detention.

7. This inquiry has been undertaken pursuant to s11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

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

# 2 Summary of findings and recommendations

9. As a result of this inquiry, the previous President of the Commission, Emeritus Professor Rosalind Croucher, found that the Commonwealth's acts and omissions in relation to both Mr TZ and Mr UA, as set out below at paragraphs [76]–[77], resulted in their detention becoming arbitrary, contrary to Article 9(1) of the ICCPR.

10. Professor Croucher made the following recommendations:

**Recommendation 1**

The Commission recommends that the Australian Government should introduce a formal statelessness status determination procedure. The Commission recommends that, in formulating such a procedure, the Department should take the following steps:

- draft a proposed policy and procedure
- consult on the draft with civil society
- ensure that the policy and procedure are available on LEGEND.com

**Recommendation 2**

The Commission recommends that a clear visa pathway to permanent residency should be established for stateless persons who are not found to be refugees or otherwise owed protection.

**Recommendation 3**

The Commission recommends that the Minister consider issuing a new direction pursuant to s 499 of the Migration Act to replace Direction No. 99, and that the new direction:

- list, as a primary consideration, Australia's international obligations under the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness
- ensure that decision makers make an assessment of, or obtain advice about, the applicant's statelessness status and the implications of this in the event of their visa refusal or cancellation.

**Recommendation 4**

The Commission recommends that statelessness should be included as a specific consideration in the guidelines for Ministerial Intervention under ss 351, 417, 501J and 195A of the Migration Act.

**Recommendation 5**

The Commission recommends that any non-citizen who is, or is reasonably suspected of being, stateless should automatically be referred to the Minister for consideration of their intervention powers.

# 3 Background

## 3.1 Mr TZ's background

11. Mr TZ is a Palestinian man who was born and grew up in Lebanon. On 18 May 2005, at age 18, Mr TZ arrived in Australia as a dependant on his mother's Partner (Provisional) (subclass 309) visa. He travelled from Lebanon on a *Titre de Voyage* issued by the Lebanese authorities. He claims that this document was later stolen during a robbery at his home in Adelaide, leaving him with no travel or citizenship documents. As a stateless Palestinian, he does not have an automatic right to reside in Lebanon and could be subjected to severe discrimination in the event of his return there.[1]

12. Mr TZ's mother, siblings and young daughter are all Australian citizens residing in Australia.

13. In 2007, Mr TZ received a 28–month suspended sentence for an aggravated assault conviction. He then withdrew his dependence upon his mother's visa application so that his conviction would not jeopardise his family's prospects of being granted a visa.

14. On 28 January 2009, Mr TZ was granted a Bridging A visa (BVA). When this visa ceased, he became classified as an unlawful non-citizen.

15. On 3 March 2009, Mr TZ lodged an application for a Protection (subclass 866) visa (PV). He was granted a Bridging C visa (BVC) in connection with his PV application. He was found not to engage Australia's protection obligations and a delegate of the Minister refused to grant him a PV. On 25 June 2009, he sought review of this decision by the Refugee Review Tribunal (RRT).

16. On 31 October 2009, Mr TZ was arrested by South Australian Police and remanded into custody. On 15 November 2009, he was sentenced to 28

months imprisonment for breach of bond, and 20 months for damage property, dishonestly take property without consent, commit assault (aggravated), hinder police, and threaten to harm person (aggravated).

17. On 16 November 2010, the RRT affirmed the delegate's decision to refuse to grant Mr TZ a PV. The RRT identified Mr TZ's case as one for possible consideration of Ministerial Intervention and a request was initiated under s 417 of the Act. In referring the case, the RRT noted that Palestinians living in Lebanon are subjected to severe forms of discrimination and that Mr TZ could have difficulty obtaining a right of re-entry. The RRT also noted the need to weigh the humanitarian aspects of the case against Mr TZ's significant criminal history.

18. The next day, Mr TZ's case was assessed by the Department as not meeting the Minister's guidelines for referral under s 417 and was found to be inappropriate to consider given that an alternative pathway was available to him through his mother's partner visa application.

19. On 14 December 2010, Mr TZ's BVC ceased and he became classified as an unlawful non-citizen once again.

20. On 15 March 2011, Mr TZ lodged a request for Ministerial Intervention under s 417 of the Act. On 4 April 2011, his case was assessed by the Department as meeting the guidelines for referral. However, nearly two years passed before a referral was made.

21. On 29 October 2012, Mr TZ was granted a Bridging E visa (BVE) while in criminal custody.

22. In December 2012, the Department sought advice from the Visa Applicant Character Consideration Unit (VACCU) regarding the likelihood of Mr TZ meeting the character requirements should he apply for a visa. VACCU advised that due to the length of his convictions, he would fail the character test, and that any future visa application would be considered under the provisions of s 501 of the Migration Act.

23. On 8 January 2013, a first stage submission was referred to the Minister for consideration under s 417 of the Migration Act. On 28 March 2013, the Minister declined to intervene.

24. On 10 May 2013, Mr TZ lodged a further request for ministerial intervention. The request was treated as a 'repeat request' which, according to the guidelines, the Minister does not wish to consider unless the Department is satisfied that there is a significant change in

circumstances that would constitute unique or exceptional circumstances. As such, on 3 July 2013, the case was assessed by the Department as not meeting the guidelines and was not referred to the Minister.

25. On 22 August 2013, Mr TZ lodged a second application for a PV following the Full Federal Court judgment in *SZHIZ v Minister for Immigration and Citizenship*,[2] in which it was found that s 48A of the Migration Act did not prevent a person from making a further PV application on complementary grounds, where the first application was refused before the commencement of the complementary protection provisions on 24 March 2012.

26. On 29 October 2013, Mr TZ's BVE ceased and he became classified as an unlawful non-citizen again.

27. On 30 October 2013, Mr TZ was released from criminal custody and granted a Bridging D visa (BVD) which was cancelled on the same day under s 116(1)(f) of the Migration Act as the Minister was satisfied that it should not have been granted. Mr TZ was taken into immigration detention under s 189 of the Migration Act. Mr TZ sought review of this decision by the Migration Review Tribunal. Although the Tribunal set aside the cancellation decision, the visa had already ceased.

28. On 19 November 2013, Mr TZ lodged a BVE application. However, on 17 February 2014, the Minister determined that Mr TZ failed the character test under s 501 of the Act and refused to grant the visa. In the Statement of Reasons, the Minister noted Mr TZ 's lengthy custodial sentences and made reference to the fact that his violence or threatened violence had mostly been directed towards his former partner. The Minister considered the best interests of Mr TZ's child but found that he had no active relationship with her.

29. On 8 May 2014, Mr TZ was once again found not to engage protection obligations and a delegate refused to grant him a PV. On 9 May 2014, Mr TZ sought review of this decision at the RRT. The RRT affirmed the decision but accepted that he is a stateless Palestinian whose country of former habitual residence was Lebanon. On 22 September 2014, Mr TZ sought review of the RRT decision at the Federal Circuit Court. This application was later dismissed.

30. On 23 September 2014, Mr TZ lodged another BVE application. The application was deemed invalid due to the operation of s 501E of the Migration Act.

31. On 22 November 2014, Mr TZ was involved in an incident at Christmas Island Immigration Detention Centre (Christmas Island IDC). He was

arrested by the AFP, granted bail and then transferred back to Christmas Island IDC. On 8 January 2015, Mr TZ was arrested on additional assault charges and transferred to criminal custody at the Perth Remand Centre. On 9 January 2015, he was sentenced to 12 months imprisonment for three counts of common assault, two counts of threats to injure, one count of assault occasioning bodily harm and one count of being armed.

32. On 2 January 2016, following his release from criminal custody, Mr TZ was nonetheless detained at Casuarina Prison under Alternative Place of Detention (APOD) arrangements due to the 'high risk he posed to the safety and good order of the IDC environment', according to the Department.

33. On 28 June 2016, Mr TZ lodged another request for Ministerial Intervention under s 417 of the Migration Act. The case was again treated by the Department as a 'repeat request' and found not to meet the guidelines for referral, as the Department considered that the claims and circumstances presented were 'not unique or exceptional when assessed against the Minister's guidelines'.

34. On 1 December 2016, Mr TZ was detained under s 189(1) of the Migration Act and transferred to Perth Immigration Detention Centre (Perth IDC). On 26 April 2017, Mr TZ absconded from immigration detention. He was located by Western Australia Police three days later, charged with escaping immigration detention, and remanded back into criminal custody.

35. On 25 May 2017, Mr TZ was granted a BVE while still in custody.

36. On 26 July 2017, the Minister intervened to 'lift the bar' under s 46A(2) and s 48B of the Act, after Mr TZ was identified as part of the cohort of persons impacted by an unintentional disclosure of their personal information on the Department's website in 2014 (data breach). This meant that Mr TZ was classified as a 'fast track applicant' and was allowed to apply for a visa.

37. On 12 September 2017, Mr TZ lodged his third PV application. This was refused on the grounds that Mr TZ was not a non-citizen in respect of whom Australia has protection obligations. The decision was referred to the Immigration Assessment Authority (IAA) for review under Part 7AA of the Act. The IAA affirmed the delegate's decision to refuse the PV.

38. On 9 August 2018, Mr TZ 's BVE ceased and he became classified as an unlawful non-citizen. On 13 August 2018 he was released from prison, detained under s 189(1) of the Migration Act and transferred to Yongah Hill Immigration Detention Centre (YHIDC). Over the course of the next

year, he was moved around within the immigration detention network. During this time, the Department attempted to obtain Lebanese travel documents to facilitate his removal from Australia. The Department also explored options for Mr TZ to return to Palestine, but it was determined that this was not a viable alternative.

39. On 2 November 2018, Mr TZ was sentenced to 10 months imprisonment (time served), for absconding from immigration detention.

40. Mr TZ's case was referred for assessment by the Department against the Minister's s 195A guidelines on 18 May 2021, 9 February 2022 and 8 June 2022. On these occasions, Mr TZ's case was assessed as not meeting the guidelines and was not referred to the Minister.

41. Mr TZ made several requests to be removed from Australia but, as he did not nominate a returning country, he was considered to be on an 'involuntary removal pathway'. The Department has been unsuccessful in obtaining any travel documents to facilitate his removal. The Department says that Mr TZ has been uncooperative in this process by declining to attend the NSW Lebanese Consulate for an interview to confirm his identity, which is required in order to obtain a travel document issued for the purpose of his removal.

42. Subsequent to Professor Croucher's preliminary view, the Minister for Immigration, Citizenship and Multicultural Affairs agreed to the Department conducting a Detention Status Resolution Review. This review involves a streamlined referral of submissions for possible Ministerial Intervention under sections 195A and 197AB of the Migration Act for long-term detainees in held detention and those who would likely be subject to protracted detention due to complex removal barriers, such as statelessness.

43. Consistent with this review, in August 2023 the Department referred Mr TZ's case to the Minister for consideration under sections 195A and 197AB of the Migration Act. On 13 September 2023, the Minister declined to intervene in Mr TZ's case under s 195A and declined to consider the case under s 197AB.

44. Following the High Court's orders in *NZYQ,* Mr TZ was identified as being *'NZYQ affected'* and was released from immigration detention and granted a Bridging (Removal Pending) Subclass 070 visa (BVR) on 11 November 2023.

45. Mr TZ has spent the following periods in closed immigration detention facilities:

- 30 October 2013 – 8 January 2015
- 2 January 2016 – 26 April 2016
- 13 August 2018 – 11 November 2023

## 3.2 Working Group on Arbitrary Detention

46. On 13 September 2023, the United Nations Working Group on Arbitrary Detention (WGAD) published its opinion in relation to Mr TZ's case.[3] The opinion was published before the High Court's decision in *NZYQ,* and considered Mr TZ's detention at the time, which was ongoing and indefinite. The opinion sets out Mr TZ's background, and the procedural history related to the Department's attempts to secure travel documents and enforce his removal from Australia.

47. The WGAD referred to previous cases and 'reiterated its alarm' that the Australian Government 'has argued that detention is lawful purely because it follows the stipulations of the Migration Act'.[4] The WGAD stated that:

> such arguments can never be accepted as legitimate in international human rights law. The fact that a State is following its own domestic legislation does not in itself prove that the legislation conforms with the obligations that State has undertaken under international human rights law. No State can legitimately avoid its obligations under international human rights law by citing its domestic laws and regulations.[5]

48. The WGAD further explained that any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose. It stated that 'the Working Group cannot accept that detention for over five years could be described as a brief initial period'.[6]

49. The WGAD further found that Mr TZ had been subjected to *de facto* indefinite detention due to his migratory status without the possibility of challenging the legality of such detention before a judicial body. The WGAD concluded that his detention was arbitrary and considered that the appropriate remedy would be to release Mr TZ immediately and accord him an enforceable right to compensation and other reparations. The WGAD further urged the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr TZ and take appropriate measures against those responsible for the violation of his rights.

## 3.3 Mr UA's background

50. On 13 November 1978, Mr UA arrived in Australia with his parents. He was an infant who had reportedly been born on a boat during the transit from Vietnam. Mr UA and his parents were assessed as refugees and granted permanent residence permits on 2 July 1981.

51. Mr UA has resided in Australia for over 40 years and has a partner and children who are Australian citizens.

52. On 3 December 2013, Mr UA was given an effective custodial sentence of 11 years and three months following a series of convictions related to drug and weapons possession. On 3 August 2015, he was sentenced to a further 6 months imprisonment following another conviction related to possession of drugs.

53. On 28 June 2017, a delegate of the Minister mandatorily cancelled Mr UA's visa under s 501(3A) of the Migration Act. The delegate was satisfied that Mr UA did not pass the character test on the ground that he had a substantial criminal record within the meaning of s 501(6)(a), and because he was serving a full-time sentence at the time. He subsequently became classified as an unlawful non-citizen. He was notified and invited to apply for revocation of the decision.

54. On 19 July 2017, Mr UA made representations to the Minister for revocation of the cancellation decision.

55. On 19 March 2018, Mr UA was released from criminal custody, detained under s 189 of the Migration Act, and transferred to Brisbane Immigration Transit Accommodation (BITA).

56. On 31 August 2018, the Minister decided not to revoke the cancellation of Mr UA's visa. The Minister was not satisfied, on the basis of Mr UA's representations, that he passed the character test or that there was any other reason why the mandatory cancellation of his visa should be revoked, pursuant to s 501CA(4)(b)(ii). In reaching this decision, the Minister took into account three primary considerations: (a) the protection of the Australian community; (b) the best interests of minor children in Australia; and (c) expectations of the Australian community.

57. Mr UA sought review of this decision at the Administrative Appeals Tribunal (AAT) on 13 September 2018. On 29 November 2018, the AAT affirmed the non-revocation decision. The AAT considered factors in favour of revocation of the cancellation decision but found that they did not outweigh his extensive criminal history, violent offending and risk of reoffending.

58. On 7 June 2019, Vietnamese authorities informed the Department that they did not recognise Mr UA as Vietnamese.

59. On 19 June 2019, Mr UA's case was sent to the Complex Case Resolution Section (CCRS) for assessment against the s 195A guidelines. On 24 June 2019, the assessment process was commenced.

60. On 7 August 2019, the Vietnamese embassy advised that they still could not verify Mr UA's identity.

61. On 21 August 2019, Mr UA lodged an application for a Bridging E (Subclass 050) visa (BVE). On the same day, it was deemed invalid as it was precluded under s 501E. The operation of s 501E meant that Mr UA had no viable immigration pathway.

62. On 14 February 2020, Mr UA's case was assessed as meeting the Ministerial Intervention guidelines. The assessment documents refer to Mr UA as 'stateless' and note the significant barriers to his removal and the likely protracted resolution of his case.

63. Almost a full year later, on 11 February 2021, the Department sent a first stage submission to the Minister for consideration under s 195A and s 197AB. The submissions explained that Mr UA's removal was unable to be progressed, that he had resided in Australia since he was an infant, that he is the father to three Australian citizen children, and that his immediate family are all Australian citizens. The submissions made reference to his family's refugee status and his inability to obtain Vietnamese citizenship or travel documents but noted that his statelessness would only be formally assessed through a Protection Visa process.

64. In October 2020, Mr UA commenced proceedings against the Commonwealth in the Federal Court, claiming that he had been unlawfully detained.

65. On 15 January 2021, Mr UA was assessed through the Community Protection Assessment Tool (CPAT), which considers removal readiness, risk to the community and engagement with the status resolution process. Based on this assessment, he was found to be a high risk of harm to the community, and a medium risk of not engaging with the department. A placement of *Tier 3 – Held Detention* was recommended.

66. On 24 May 2021, the Minister declined to consider Mr UA's case under either s 195A or s 197AB of the Migration Act.

67. On 12 September 2022, Mr UA was granted a BVE. By this date, Mr UA had been in immigration detention for approximately 1,637 days.

68. Mr UA's current visa is only temporary. He remains stateless and will face continued uncertainty once this visa ceases, unless he is granted another visa or the Department successfully obtains travel documents to facilitate his removal.

# 4 Legal Framework

## 4.1 Functions of the Commission

69. 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.

70. 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.

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

## 4.2 Scope of 'act' or 'practice'

72. 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.

73. 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.

74. 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.[7]

## 4.3 What is a human right?

75. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.

## 4.4 Act or practice of the Commonwealth

*(a) Mr TZ*

76. Professor Croucher considered the following acts or omissions of the Commonwealth as relevant to Mr TZ's inquiry:

- the Department's failure to refer the case to the Minister for intervention under s 417 or s 195A at any time between January 2013 and August 2023.
- the Department's failure to assess the case against the s 197AB guidelines until as late as 18 May 2021.

*(b) Mr UA*

77. Professor Croucher considered the following acts or omissions of the Commonwealth as relevant to Mr UA's inquiry:

- the Department's delay in referring the case to the Minister for intervention under s 195A and s 197AB until February 2021, almost 3 years after he was detained
- the Minister's failure to consider the exercise of his powers in relation to Mr UA's case under s 195A or s 197AB of the Migration Act until 12 September 2022.

## 4.5 Ministerial Intervention

78. Sections 351, 417 and 501J of the Migration Act allow the Minister to intervene by substituting a decision of a review tribunal with a more favourable decision, if the Minister is satisfied that it is in the public interest to do so. The Minister can only use this power when there is an appropriate existing decision from a review tribunal, such as the AAT or the former RRT.

79. Section 195A of the Migration Act permits the Minister, where he or she thinks that it is in the public interest to do so, to grant a visa to a person in immigration detention, subject to any conditions deemed necessary. This power is discretionary and non-compellable.

80. In addition to the power to grant a visa, the Minister also has a discretionary non-compellable power under s197AB 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.

## 4.6 Section 501(1) of the Act

81. Under s 501(1) of the Migration Act, a Minister or a delegate of the Minister may refuse to grant a visa if they are satisfied that the person does not pass the character test.

82. Under s 501(6)(a), the Minister may be satisfied that the person did not pass the character test on the ground that they have a substantial criminal record. Under s 501(7)(c), a person will have a substantial criminal record if they have been sentenced to a term of imprisonment of 12 months or more.

83. Section 501E of the Act prohibits an individual who did not pass the character test from applying for another visa, that is not a Protection visa or a visa specified in the *Migration Regulations 1994,* while they remain within Australia's migration zone.

## 4.7 Statelessness

84. Australia has obligations in respect of stateless persons as a party to the 1954 *Convention relating to the Status of Stateless Persons* (1954 Convention) and the 1961 *Convention on the Reduction of Statelessness* (1961 Convention). The 1954 Convention defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'. Such persons are considered stateless *de jure.* A further category of stateless persons is those described as stateless *de facto.* This term is not defined in the Convention but it is understood to refer to a person who has a nationality according to a particular country's laws, but who is unable or unwilling to utilise the protection of that country.[8]

85. In 2011, the UNHCR hosted a Ministerial Intergovernmental Event on Refugees and Stateless Persons, where States made pledges relating to statelessness. The Australia Government pledged:

> To better identify stateless persons and assess their claims. Australia is committed to minimising the incidence of statelessness and to ensuring that stateless persons are treated no less favourably than people with an identified nationality. Australia will continue to work with UNHCR, civil society and interested parties to progress this pledge.[9]

86. Australia is also party to several international agreements that ensure the right to nationality and to protect the rights of stateless persons. However,

there are no substantive visa pathways available in Australia to persons who appear to be stateless and have been found not to be refugees. Nor is there any formal, comprehensive mechanism available for determining statelessness.

87. Australia does not grant protection visas to people on the basis of statelessness alone. A person may therefore be assessed as stateless and therefore unlikely to be able to be removed, and yet left without a resolution. Under the current legislative framework, the only pathway to a resolution in such cases is through the exercise of non-compellable discretionary Ministerial Intervention to grant a visa, or locating a third country that is willing to accept the person as a lawful permanent resident. This often leaves stateless individuals at risk of mandatory and prolonged detention.

88. In November 2023, subsequent to Professor Croucher's preliminary view, the High Court handed down its orders and judgment in *NZYQ*.[10] In so doing, the Court ordered the immediate release of a stateless refugee, known as 'NZYQ', from immigration detention. The Court unanimously found that because there was 'no real prospect' of his removal from Australia 'becoming practicable in the reasonably foreseeable future', his detention was unlawful.[11] In making this judgment the High Court overturned the legality of indefinite immigration detention. This case highlighted the particular predicament of stateless people who had had their visas cancelled and faced mandatory immigration detention. Whilst such individuals can no longer be held indefinitely in immigration detention, it is important to note that their release does not entitle them to the grant of a substantive visa.

89. According to statistics published by the Department, in April 2023 there were 38 stateless people held in immigration detention facilities in Australia, and 14 stateless people living in the community under a residence determination.[12] By December 2023, according to the Department there were no stateless people in held immigration detention facilities, and 16 stateless people living in the community under a residence determination.

# 5 Arbitrary Detention

## *5.1* Article 9 of the ICCPR

90. 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.

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

    - 'detention' includes immigration detention[13]
    - 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[14]
    - 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[15]
    - detention should not continue beyond the period for which a State party can provide appropriate justification.[16]

92. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee (UN HR Committee) found detention for a period of 2 months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.[17] Similarly, the UN HR 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'.[18]

93. The UN HR Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.[19]

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

> Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to

> document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[20]

95. 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'.[21]

96. It will be necessary to consider whether the detention of both complainants 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.

# 6 Consideration of Mr TZ's complaint

## 6.1 Failure to refer for Ministerial Intervention

97. Mr TZ's case was assessed against the s 417 guidelines for Ministerial Intervention on multiple occasions. In 2010, the Department found that the request was invalid because there was an alternative pathway available to Mr TZ at the time, through his mother's partner visa application. As such, Professor Croucher did not make a finding about that particular assessment. However, it was noted that the assessment was initiated upon referral from the RRT, which highlighted the humanitarian reasons why assessment was appropriate.

98. The only time the case was assessed as meeting the guidelines under s 417 was on 4 April 2011. However, the case was not referred to the Minister until 8 January 2013, close to two years after the assessment. There is no apparent justification for this delay, but Professor Croucher

noted that Mr TZ was serving a custodial sentence during this period so the impact of the delay would have been minimal.

99. In the 2013 submissions to the Minister regarding possible ministerial intervention under s 417 of the Migration Act, the Department described Mr TZ's case as 'borderline', and set out the opposing considerations, including his criminal history, family ties, international obligations, and the best interests of his daughter.

100. Despite the subject line referring to Mr TZ as 'Stateless (Palestinian)', the Department did not describe Mr TZ as stateless in the body of the 2013 submissions. Rather, the Department noted that he didn't have travel documents and that, though he would be eligible to apply for replacement Lebanese documents, he would not have an automatic right to enter and reside in Lebanon. The Department also stated that:

> Should it eventuate that the Department cannot obtain a travel document, or that Lebanese authorities refuse to grant him permission to return, or removal barriers are found to be insurmountable, this case may be presented to you again for your further consideration.

101. However, the Department did not refer the case to the Minister again until August 2023. The Department assessed the case on numerous other occasions but either treated it as a 'repeat request' or concluded that it did not meet the guidelines. This is despite the fact that the Department was aware that during these years Mr TZ was stateless, the removal barriers were becoming insurmountable, as foreshadowed, and his detention had become prolonged.

102. Professor Croucher acknowledged that Mr TZ has a serious and extensive criminal history, including offences committed within immigration detention. Professor Croucher understood that these factors weighed against referral to the Minister. However, she found that the Department failed adequately to take into account the fact that his removal from the country was not practicable and that his cumulative time in immigration detention had become prolonged.

103. The guidelines for ministerial intervention give examples of the types of cases the Minister wants referred. Relevantly, under the s 195A guidelines, this includes cases where 'circumstances outside your control mean you cannot go back to your country of citizenship or to the country you usually live in'.[22] This is also listed in the s 417 guidelines, as well as cases where 'a person's particular circumstances or personal characteristics provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity if they return to their country of

origin, but the mistreatment does not meet the criteria for the grant of any type of protection visa'.[23] Mr TZ clearly identified with those circumstances.

104. In response to Professor Croucher's preliminary view, the Department did not accept that it had failed to take into account that Mr TZ's removal was not practicable. The Department noted that Mr TZ's case was referred to the relevant Minister 'on a number of occasions during his detention'. However, the Department then provided a timeline which shows that while the case was assessed on numerous occasions, it was only referred to the Minister in January 2013 and August 2023. Professor Croucher was not satisfied that this is sufficient, given the extremely long period that Mr TZ spent in held detention. By the time he was released in November 2023, Mr TZ had spent three separate periods in held immigration detention. This came to a cumulative period of 2466 days, being over 6.5 years. During his third period of detention, which lasted over five years from August 2018, the Department only referred the case to the Minister once in August 2023.

105. In response to Professor Croucher's preliminary view, the Department also accepted that, because of the reasoning in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs (Davis)*,[24] 'the decision not to refer to the Minister the request for Ministerial Intervention was made in excess of the executive power of the Commonwealth'.

106. Professor Croucher found that Mr TZ's status as a stateless person was a 'unique and exceptional circumstance',[25] which ought to have been considered by the Department when assessing his case against the s 417 and s 195A guidelines for ministerial intervention. The Department's failure to refer the case to the Minister on these terms, save for on two occasions in 2013 and 2023, contributed to his protracted detention, contrary to article 9 of the ICCPR.

107. In response to Professor Croucher's preliminary view, the Department stated that it does not accept this assertion. The Department pointed out that Mr TZ had lodged a second PV application in 2013, which was refused in 2014, a decision which was then affirmed by the RRT. The Department also noted that the Ministerial Intervention assessments did consider his statelessness and take into account that his removal was protracted due to a number of barriers.

108. However, review of the Department's guidelines assessments shows that very little substantial consideration was given to Mr TZ's statelessness. The

September 2020 and the June 2021 assessments focus on his behaviour in detention, character concerns, health and community links. The September 2020 assessment erroneously states that Mr TZ has Lebanese citizenship and sets out the history of Mr TZ's requests for removal and his varying levels of cooperation with the removal process. Both assessments state that his removal has been protracted due to a number of barriers, including delays in obtaining a Lebanese travel document. Neither assessment gives substantial consideration to the exceptional circumstances of Mr TZ's status as a stateless person.

109. Further, during the period of Mr TZ's detention, people in immigration detention were under no general obligation to cooperate with the process of their removal.[26] Professor Croucher noted, however, the Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill), which sought to change this by enabling the Minister to issue a direction to a non-citizen who has no legal basis to remain in Australia, requiring them to take steps to assist the Department in its removal efforts. Failure to comply with the direction without a reasonable excuse, would result in a mandatory minimum sentence of 12 months' imprisonment, and a maximum available sentence of five years' imprisonment. The Commission expressed its concerns about the human rights implications of the bill, and recommended that it not be passed. However, it received Royal Assent on 4 December 2024, and the Migration Amendment (Removal and Other Measures) Act 2024 commenced the following day.

110. Regardless of the Act, Mr TZ's reportedly wavering cooperation with obtaining Lebanese travel documents, and his changing decisions regarding his removal, did not alter his status as a stateless person.

## 6.2 Delay in assessing alternatives to closed detention

111. The Department did not assess Mr TZ's case against the guidelines for possible referral under s 197AB until 18 May 2021.

112. Professor Croucher acknowledged that assessment for a possible residence determination would not have been relevant during the periods where Mr TZ was serving a custodial sentence. However, there are considerable periods during which the Department could have assessed him for possible intervention under s 197AB. Those periods are as follows:

- 30 October 2013 – 8 January 2015
- 2 January 2016 – 26 April 2016
- 13 August 2018 – 18 May 2021

113. The monthly case reviews undertaken in relation to Mr TZ's continued detention appeared to rely on his CPAT rating which was 'Tier 3- held detention'. The case reviews continually noted that Mr TZ's detention was appropriate and that referral to a detention review manager was not required.

114. However, in the circumstances described above where his removal was not practicable and he faced indefinite detention, consideration of a less restrictive form of detention would have been warranted. It appears that, prior to May 2021, the Department failed to explore the possibility that any identified risks to the community could have been mitigated by parole-like conditions. A residence determination is still a form of immigration detention and, while Mr TZ would have had freedom of movement within the community, he would have been required to reside at a specific address and the Department would have continued to manage his case closely. The Minister would have been able to revoke the placement under s 197AD at any point if Mr TZ were not to abide by conditions imposed.

115. In response to Professor Croucher's preliminary view, the Department disagreed with the assertion that it had failed to explore the possibility that identified risks could have been mitigated by conditions. The Department stated that it had considered Mr TZ's CPAT rating and his un-cooperative behaviour in detention. However, in circumstances where the Department did not assess his case under s 197AB until as late as May 2021, Professor Croucher was not satisfied that the Department gave timely or adequate consideration to the possibility of a residence determination or appropriate risk management conditions.

116. Closed detention should only be used as an exception when less restrictive alternatives cannot be appropriately managed with the imposition of conditions to mitigate any real or perceived risks.

117. Based on Mr TZ's specific circumstances, Professor Croucher found that the Department's failure to assess his case against the s 197AB guidelines at any point before May 2021 resulted in his detention being arbitrary, contrary to article 9 of the ICCPR.

# 7 Consideration of Mr UA's Complaint

## 7.1 Delay in referring for Ministerial Intervention

118. Mr UA was detained in immigration detention in March 2018. The Department assessed that Mr UA's case met the guidelines for referral for ministerial intervention on 14 February 2020. However, the case was not referred to the Minister for consideration until 11 February 2021.

119. The Department did not provide any material that adequately explains the Department's delay in assessing and referring the case. In response to Professor Croucher's preliminary view, the Department acknowledged that it took a year to refer the case to the Minister following the positive guidelines assessment. The Department stated that from March 2020, efforts were focused on the COVID-19 Response and Ministerial Intervention slowed during this period before returning to normal activity by August 2020. This does not explain why the case wasn't referred until February 2021.

120. By the time the assessment was made, the Department was evidently aware of the significant barriers to resolving his case. The Department had acknowledged Mr UA's statelessness, his inability to be removed, and the absence of any visa pathway available to him. In their s 195A assessment, the Department stated that they were 'Unable to facilitate removal as the client is stateless due to the Vietnamese embassy advising he is not eligible for Vietnamese citizenship or the issue of a travel document'. Further, the Department was aware of the impact that his continued detention was having on Mr UA's immediate family, including his Australian citizen children. The Department's submissions to the Minister stated that 'the children may develop emotional and behavioural disturbance if their relationship with their father is significantly disrupted'.

121. Professor Croucher acknowledged that the Department experiences a high volume of cases to assess, and that capacity at that time may have been affected by the COVID-19 pandemic. However, given the effective absence of any option other than to remain in immigration detention awaiting possible ministerial intervention, the delay of two years before conducting an assessment of Mr UA's case, and a further year once Mr UA was found to meet the guidelines, is concerning.

122. In response to Professor Croucher's preliminary view, the Department noted that Mr UA's ongoing detention was 'as a consequence of the application of migration legislation in his individual circumstances'. The Department then reiterated that his visa had been cancelled under s 501 of the Migration Act, that he could only be released through the grant of a

visa or departure from Australia, that he had requested removal and that the Department explored options to address barriers to his removal. This response did not satisfy Professor Croucher that the Department's delays in assessing Mr UA's case and referring it to the Minister were justified. This is especially so considering that the Department's process in 'exploring options to address barriers to his removal' had been long and unsuccessful.

123. Professor Croucher found that the delay in conducting an assessment of Mr UA's case against the guidelines for referral to the Minister, and a further delay of one year after having made a positive assessment against the guidelines, resulted in Mr UA's detention being considered arbitrary, contrary to article 9 of the ICCPR.

## 7.2 Failure to intervene

124. On 24 May 2021, the Minister declined to consider Mr UA's case under either s 195A or s 197AB of the Act. The Minister did so in the knowledge that the decision not to intervene left Mr UA with no alternative but to remain in detention indefinitely. Professor Croucher noted that this decision was in response to the Department's first stage submissions, meaning that the Minister not only declined to exercise their intervention powers, but in fact declined even to consider the exercise of such powers.

125. Professor Croucher acknowledged Mr UA's extensive and serious criminal history, and the significant custodial sentences that he has served. She appreciated that Mr UA was assessed as posing a high risk of harm to the community and that these are important factors that must be taken into account.

126. However, Professor Croucher found that the countervailing factors in favour of considering Mr UA's case were not given adequate weight by the Minister. The submissions from the Department to the Minister state unequivocally that Mr UA's removal was unable to be progressed and that the Vietnamese authorities cannot issue a birth certificate or process a travel document. This makes it clear that his removal is not possible. Further, the Department made it clear to the Minister that, due to the operation of s 501(E) of the Act, Mr UA has no viable immigration pathway in Australia.

127. If the Minister was not minded to exercise his powers to grant Mr UA a visa, then it may have been appropriate to consider a residence determination under s 197AB as an alternative. As discussed above, a

residence determination is still a form of immigration detention, and allows the Department to closely monitor the case. It also allows the imposition of certain conditions, such as behavioural requirements and reporting, to help mitigate any perceived risks.

128. As Professor Croucher has noted above, closed detention should only be imposed in exceptional circumstances where identified risks cannot be managed. Consideration of alternatives to closed detention, with appropriate risk management conditions, is particularly crucial in complex cases involving barriers to removal. Professor Croucher was concerned that the Minister did not even consider the exercise of the power to explore whether Mr UA's circumstances would allow for a less restrictive alternative to closed detention.

129. The Minister declined to consider Mr UA's case despite knowing that such a decision resulted in the protracted and potentially indefinite detention of Mr UA. This decision not to consider Mr UA's case resulted in Mr UA's detention being considered arbitrary, contrary to article 9 of the ICCPR.

130. In response to Professor Croucher's preliminary view, the Department stated that it cannot comment on how the former Minister formulated their decision. The Minister's office has not responded to the preliminary view.

# 8 Consideration of both complaints

131. Professor Croucher found that the detention of both Mr TZ and Mr UA in closed detention facilities has not been justified as reasonable, necessary or proportionate in light of their particular circumstances. As a result, she found that their detention may be considered as 'arbitrary', contrary to article 9 of the ICCPR.

132. In response to the preliminary view, the Department restated that both Mr TZ and Mr UA were lawfully detained under the Migration Act, and that their detention was as a result of the application of the Act in their individual circumstances. This does not justify their detention, primarily because adherence to the Migration Act does not justify detention under international standards. As stated by the WGAD in relation to Mr TZ:

> Domestic law that violates international human rights law, and which has been brought to the attention of the Government on so many occasions, cannot be accepted as a valid legal basis for detention.[27]

133. Prior to the High Court's decision in *NZYQ,* prolonged and indefinite detention routinely occurred under the Commonwealth's mandatory

immigration detention regime. Once detained, non-citizens who did not hold valid visas could be kept in detention until they were removed from Australia or granted a visa. Of particular concern were cases where it has been determined that an individual is not owed protection under the Refugee Convention, is not considered for intervention under the Minister's discretionary powers, and has no prospect of removal to a country of origin or viable third country.

134. For those categorised as 'stateless', this often meant that their only possibility of release was through a non-compellable, non-reviewable and entirely discretionary power.

135. Statelessness is not adequately addressed as a specific issue in the guidelines for Ministerial Intervention, meaning that a pertinent issue in such cases is erroneously overlooked at the assessment stage. Further, 'statelessness' is not defined in the Migration Act and there is no legislative basis for making a specific statelessness status determination outside of any assessment relevant to a person's claim for protection. There is a lack of legal recourse or pathway for stateless individuals who have been found ineligible for Australia's protection obligations, or who have not applied for protection. Even those who are granted a visa through Ministerial Intervention are often only given temporary reprieve from the uncertainty they will face when their bridging visa ceases. There is no permanent, substantive visa pathway available and accordingly, the alternative is often arbitrary detention under the Migration Act.

136. The Commission has previously expressed concerns regarding the lack of a formal statelessness determination mechanism, and the absence of administrative pathways for the grant of substantive visas to stateless persons who have been found not to be owed protection.[28] Mr TZ and Mr UA's complaints highlight that these concerns remain relevant to the current legislative regime.

# 9 Recommendations

137. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.[29] The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.[30] The Commission may also recommend any other action to remedy or reduce the loss or damage suffered by a person.[31]

## 9.1 Determining Statelessness

138. In 1973, Australia acceded to both the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. At the 2011 ministerial conference marking the 60th and 50th anniversary of these Conventions, the Australian Government pledged to 'better identify stateless persons and assess their claims'.[32] Despite this, Australia still lacks a statutory statelessness determination process.

139. At present, stateless persons seeking protection in Australia are processed for a Protection visa under the refugee or complementary protection regimes through Australia's refugee status determination (RSD) procedure. However, not all stateless people meet the definition of a refugee and statelessness is not an independent ground for being granted a Protection visa.

140. For stateless persons who do not have protection claims, are deemed not to be in need of protection, or otherwise do not fit within the parameters of this process, there is no formal statutory process for determining their status. This presents a particular difficulty for stateless individuals who are found not to be in need of protection, cannot be granted a substantive visa, and are expected to be removed from the country. Before the High Court's decision in *NZYQ,* this meant that individuals in such circumstances were held in prolonged and indefinite administrative detention, and were reliant upon the Minister's intervention powers, which are discretionary, non-compellable and not open to review.

141. The introduction of a 'statelessness determination procedure' would ensure fairness, transparency and consistency with respect to statelessness determinations, and would improve Australia's capacity to meet its obligations under international law.[33]

**Recommendation 1**

142. The Commission recommends that the Australian Government should introduce a formal statelessness status determination procedure. The Commission recommends that, in formulating such a procedure, the Department should take the following steps:

- draft a proposed policy and procedure;
- consult on the draft with civil society;

  ensure that the policy and procedure are available on LEGEND.com

## 9.2 Visa pathway

143. Notwithstanding the decision in *NZYQ,* there is still no pathway for a substantive, permanent visa for stateless persons. As stated by the High Court, 'release from unlawful detention is not to be equated with a grant of right to remain in Australia'.[34] With no distinctive visa category for stateless people or a clear pathway to permanent residence, stateless people remain vulnerable to uncertainty which can only be resolved by the Minister's intervention, a third country being accessed, or by their statelessness being resolved as a result of a change in circumstances in their country of former habitual residence.

144. The Commission is concerned about the growing group of people who stand to remain on bridging visas for an indefinite period of time. Temporary visas do not provide a secure legal status as required by the *1954 Convention* and therefore do not provide a mechanism through which Australia's international obligation to stateless persons can be fulfilled.[35]

145. The Commission reported on the detrimental effects of prolonged time spent on a bridging visa in the report, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'.*[36] Issues faced by this comparable group of people included:

- inadequate access to income support
- increased pressure on non-governmental services
- barriers to employment
- difficulties accessing affordable health care
- negative impact on mental health due to ongoing uncertainty.

146. It is clear from these issues that a more durable solution would not only be beneficial for the individual, but also for the wider community. Professor Croucher acknowledged that both complainants had their visas either cancelled or refused on character grounds pursuant to s 501 of the Migration Act. She accepted that this would be the case for many detainees within the *NZYQ* cohort, and accepted that character would still be a relevant factor for consideration when formulating a pathway for substantive visas.

**Recommendation 2**

147. The Commission recommends that a clear visa pathway to permanent residency should be established for stateless persons who are found not to be refugees or otherwise owed protection.

## 9.3 Ministerial Direction No. 99

148. In making decisions regarding the refusal or consideration of any visa pursuant to s 501 of the Migration Act, the Department and the Administrative Review Tribunal (which replaced the AAT in October 2024) are bound to consider the terms of any direction issued by the Minister under section 499 of the Migration Act. A series of applicable directions have been made under this section. The current Direction 99[37] came into force on 3 March 2023, replacing Direction 90.[38] Direction 99, like its predecessor, is split into two types of considerations: those identified as 'primary considerations' and those as 'other considerations'. Decision makers are informed that primary considerations should generally be given greater weight than the other considerations.

149. The Direction does not specifically address statelessness as a consideration, nor refer to Australia's international obligations under the international treaties regarding statelessness.

**Recommendation 3**

The Commission recommends that the Minister consider issuing a new direction pursuant to s 499 of the Migration Act to replace Direction No. 99, and that in the new direction:

- list, as a primary consideration, Australia's international obligations under the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness
- ensure that decision makers make an assessment of, or obtain advice about, the applicant's statelessness status and the implications of this in the event of their visa refusal or cancellation.

## 9.4 Ministerial Intervention Guidelines

150. As set out above at [79]–[80], the Minister has public interest intervention powers under ss 351, 417 and 501J, as well as a separate and distinct power to grant a visa to a person in detention under s 195A.

151. The current guidelines in relation to intervention under ss 351, 417, 501J and 195A do not list statelessness as a specific consideration. The guidelines touch on circumstances where a person cannot return to their country of origin, or where their identity or nationality has not been confirmed. However, statelessness is not clearly or specifically identified. This is concerning given the particularly vulnerable situation faced by stateless persons who receive a negative guidelines assessment or a refusal to intervene by the Minister.

152. For both Mr TZ and Mr UA, this meant that the Department noted their statelessness and the barriers to their removal, but gave insufficient weight to the unique and exceptional nature of their status.

**Recommendation 4**

The Commission recommends that statelessness should be included as a specific consideration in the guidelines for Ministerial Intervention under ss 351, 417, 501J and 195A of the Migration Act.

**Recommendation 5**

The Commission recommends that any non-citizen who is, or is reasonably suspected of being, stateless should automatically be referred to the Minister for consideration of their intervention powers.

# 10 Department's response to the Commission's findings and recommendations

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

154. On 16 August 2024, The Department provided the following response to Professor Croucher's findings and recommendations:

> The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings identified in this report and the recommendations made by the President of the Commission.
>
> The Department notes that Mr TZ and Mr UA were assessed as being impacted by the High Court's decision on 8 November 2023 in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S28/2023)* [2023] HCA 37 (*NZYQ*) and were released from immigration

detention as soon as reasonably practicable following the decision. At no point before Mr TZ's and Mr UA's release did their detention become arbitrary. The Department does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). The Department maintains that Mr TZ's and Mr UA's placement in held immigration detention was reasonable, necessary and proportionate in the individual circumstances of their cases.

**Recommendation 1 – Noted**

*The Commission recommends that the Australian Government should introduce a formal statelessness status determination procedure. The Commission recommends that, in formulating such a procedure, the Department should take the following steps:*

- *draft a proposed policy and procedure:*
- *consult on the draft with civil society;*
- *ensure that the policy and procedure and available on LEGEND.com.*

This recommendation is noted.

Australia takes very seriously its obligations under the two statelessness related international conventions to which it is a Party (the *Convention relating to the Status of Stateless Persons* and the *Convention on the Reduction of Statelessness*) and relevant provisions of other human rights instruments. Australia's obligations under the *Convention on the Reduction of Statelessness* have been part of Australian citizenship legislation since 1973. The *Australian Citizenship Act 2007* sets out the eligibility of persons in different circumstances of statelessness for citizenship.

There are processes in place to identify stateless persons though the Protection visa process and to grant them protection if they engage Australia's *non-refoulement* obligations in relation to certain types of harm under the *Convention relating to the Status of Refugees* (and its 1967 *Protocol relating to the Status of Refugees*), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the ICCPR *(and its Second Optional Protocol)* to which Australia is a party.

The *Protection Visa Processing Guidelines Procedural Instruction Annexure 3: Assessing claims of statelessness guidelines* helps Protection visa officers make findings in relation to claims of statelessness for the purpose of a protection visa assessment. These instructions are available on LEGEND.com.

**Recommendation 2 – Noted**

*The Commission recommends that a clear visa pathway to permanent residency should be established for stateless persons who are found not to be refugees or otherwise owed protection.*

This recommendation is noted.

Those who do not engage Australia's protection obligations and do not hold a valid visa are expected to return to their country of origin or former habitual residence, or another country that may accept their return or entry. Where this is not possible, the person's case may be referred to the relevant Minister for consideration of whether it is in the public interest to allow lodgement of a further Protection visa application or to grant a visa.

**Recommendation 3 – Partially Agree**

*The Commission recommends that the Minister consider issuing a new direction pursuant to s 499 of the Migration Act to replace Direction No. 99, and that the new direction:*

- list, as a primary consideration, Australia's international obligations under the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness;

- ensure that decision makers make an assessment of, or obtain advice about, the applicant's statelessness status and the implications of this in the event of their visa refusal or cancellation.

The Department partially agrees with recommendation three.

Ministerial Direction 110 commenced on 21 June 2024, replacing Ministerial Direction 99. The Department will provide the Commission's recommendations for the Minister's consideration in any briefing on future policy settings concerning character-related visa decision-making under section 501 of the *Migration Act 1958* (Cth) (the Act).

**Recommendation 4 – Partially Agree**

*The Commission recommends that statelessness should be included as a specific consideration in the guidelines for Ministerial Intervention under ss 351, 417, 501J and 195A of the Migration Act.*

The Department partially agrees with recommendation four.

The Department is preparing new ministerial instructions for the Minister following the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 10*.

Further information about the Department's approach will be made available in due course.

**Recommendation 5 – Disagree**

*The Commission recommends that any non-citizen who is, or is reasonably suspected of being, stateless should automatically be referred to the Minister for consideration of their intervention powers.* The Department disagrees with recommendation five.

In November 2022, the Minister for Immigration, Citizenship and Multicultural Affairs agreed to the Department conducting a Detention Status Resolution Review. This review involves a streamlined referral of submissions for possible Ministerial Intervention under sections 195A and 197AB of the Act for long-term detainees in held detention and those who will likely be subject to protracted detention due to complex removal barriers. This review includes individuals who are confirmed to be stateless. The Department may continue to refer individuals for Ministerial Intervention consideration through this review.

If an individual's statelessness claim has been assessed and not supported through a process such as assessment of a Protection visa application, this does not result in an automatic referral for Ministerial Intervention consideration. It is open to the individual to lodge a request for Ministerial Intervention consideration. A Status Resolution Officer may also decide to refer a case for Ministerial Intervention consideration, due to the individual's particular circumstances. Alternatively, the individual may fall in scope of the review (discussed above) and would be referred for Ministerial Intervention consideration through this review. In cases which are referred to the Minister and an assessment of statelessness claims has been undertaken, details of that assessment would be included in the submission to the Minister.

The Department is preparing new ministerial instructions for the Minister following the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10.

Further information about the Department's approach will be made available in due course.

155. I report accordingly to the Attorney-General.

Hugh de Kretser
**President**
Australian Human Rights Commission
June 2025

## Endnotes

[1] Decision Record by Refugee Review Tribunal, 15 November 2010, Case number redacted.
[2] *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71.
[3] United Nations Working Group on Arbitrary Detention, Opinion No.44/2023 concerning Mr. Khaled El-Ali, *A/HRC/WGAD/2023/44* (13 September 2023).
[4] United Nations Working Group on Arbitrary Detention, Opinion No.44/2023 concerning Mr. Khaled El-Ali, *A/HRC/WGAD/2023/44* (13 September 2023), at [114].
[5] Ibid.
[6] United Nations Working Group on Arbitrary Detention, Opinion No.44/2023 concerning Mr. Khaled El-Ali, *A/HRC/WGAD/2023/44* (13 September 2023), at [122].
[7]See Secretary, Department of Defence v HREOC, Burgess & Ors (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212–3 and 214–5.
[8] Peter McMullin Centre on Statelessness, *Factsheet: An Overview of Statelessness* (Web Page, October 2021) <https://law.unimelb.edu.au/__data/assets/pdf_file/0010/3937168/Statelessness_overview_factsheet_Oct_2021.pdf>, 3; UNHCR, *UNHCR and* De Facto *Statelessness* (April 2010).
[9] UNHCR, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais de Nations, 7 – 8 Decembre 2011)* (2012) 51.
[10] *NZYQ v Minister for Immigration*, Citizenship and Multicultural Affairs [2023] HCA 37.
[11] *NZYQ v Minister for Immigration*, Citizenship and Multicultural Affairs [2023] HCA 37, [59]-[60].
[12] Department of Home Affairs (Cth), Australian Border Force, *Immigration Detention and Community Statistics Summary,* (April 2023), <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf>.
[13] UN Human Rights Committee, General Comment No 35: Article 9 (Liberty and security of person), 112th sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, Communication No. 560/1993, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('A v Australia'); UN Human Rights Committee, Communication No 900/1999, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('C v Australia'); UN Human Rights Committee, Communication No 1014/2001, 78th sess, CCPR/C/78/D/1014/2001 (2003) ('Baban v Australia').
[14] United Nations Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
[15] *Manga v Attorney-General [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee, Communication No. 305/1988, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('Van Alphen v The Netherlands'); A v Australia, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, Communication No. 631/1995, 67th sess, UN DocCCPR/C/67/D/631/1995 (1999) ('Spakmo v Norway').*
[16] *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).
[17] United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
[18] United Nations Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].

[19] 8 C v Australia, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (2007) ('Shams & Ors v Australia'); Baban v Australia, CCPR/C/78/D/1014/2001; UN Human Rights Committee, Communication No 1050/2002, 87th sess, CCPR/C/87/D/1050/2002 (2006) ('D and E and their two children v Australia').
[20] UN Human Rights Committee, General Comment No 35: *Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014) [18].
[21] UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).
[22] Department of Home Affairs, PAM3: Act – Compliance and Case Resolution – Case resolution – Minister's powers – Minister's detention intervention power, November 2016, accessed through LEGEND.com.
[23] Department of Home Affairs, PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers (s351, s417 and s501J).
[24] *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs* [2023] HCA 10, [38].
[25] Department of Home Affairs, PAM3: Act – Compliance and Case Resolution – Case resolution – Minister's powers – Minister's detention intervention power, November 2016, accessed through LEGEND.com.
[26] *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497,[64].
[27] United Nations Working Group on Arbitrary Detention, Opinion No.44/2023 concerning Mr. Khaled El-Ali, *A/HRC/WGAD/2023/44* (13 September 2023) at [116].
[28] Australian Human Rights Commission, *Community arrangements for asylum seekers, refugees and stateless persons: Observations from visits conducted by the Australian Human Rights Commission from December 2011 to May 2012*, (Report, July 2012) <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/community-arrangements-asylum-seekers-refugees>.
[29] *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(a) ('AHRC Act')
[30] *AHRC Act*, s 29(2)(b).
[31] *AHRC Act*, s 29(2)(c).
[32] UNHCR, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons* (Geneva, Palais des Nations, 7–8 December 2011) (2012) 49.
[33] Foster, McAdam and Wadley; 'Part One: The Protection of Stateless Persons in Australian Law-the Rationale for a Statelessness Determination Procedure', 2016. <https://law.unimelb.edu.au/__data/assets/pdf_file/0008/2369582/01-Foster,-McAdam-and-Wadley-Part-One-402-Post-Press.pdf>.
[34] NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs [2023] HCA 37, [72].
[35] Foster, McAdam and Wadley; 'Part One: The Protection of Stateless Persons in Australian Law-the Rationale for a Statelessness Determination Procedure', 2016.
[36] Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019) <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_lives_on_hold_2019.pdf>.
[37] *Direction No. 99: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*.
[38] *Direction No. 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*.