



Australian
Human Rights
Commission

Mr Jdid v Commonwealth of Australia (Department of Home Affairs)

[2024] AusHRC 157

February 2024

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Report into the use of force

Australian Human Rights Commission 2024

The Hon Mark Dreyfus KC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

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

Mr Jdid complains that, as a result of a use of force by staff of Serco Australia Pty Ltd (Serco) while Mr Jdid was detained at Melbourne Immigration Transit Accommodation (MITA), he suffered a fracture to his right elbow and extreme pain to his left shoulder where he had a pre-existing collarbone fracture. Mr Jdid complains that the force used against him contravened article 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the use of force was excessive and inconsistent with or contrary to Mr Jdid's right to be treated with humanity and respect for his inherent dignity under article 10(1) of the ICCPR.

On 13 November 2023, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 18 January 2024. That response can be found in Part 9 of this report.

I enclose a copy of my report.

Yours sincerely,



Emeritus Professor Rosalind Croucher AM FAAL
President
Australian Human Rights Commission
February 2024

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1 Introduction

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr Mustapha Jdid against the Commonwealth of Australia, Department of Home Affairs (Department) alleging a breach of his human rights. The inquiry was undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr Jdid complains that force was used against him by staff of Serco Australia Pty Ltd (Serco) – being a detention service provider of the Department – while detained at Melbourne Immigration Transit Accommodation (MITA).
3. Mr Jdid complains that on 9 December 2019, 8 Serco Emergency Response Team (ERT) officers restrained him, forced him to the ground, handcuffed his wrists behind his back, causing pain and injury. Mr Jdid complains that as a result of the force used, he suffered a fracture to his right elbow and extreme pain to his left shoulder where he had a pre-existing collarbone fracture. Mr Jdid complains that the use of force against him contravened article 10 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
4. Mr Jdid also complains that following the use of force incident, he was locked in a cell without food, water or adequate medication. He claims that this period of solitary confinement was extended after he complained about his treatment by staff. Mr Jdid complains that this treatment contravened article 7 of the ICCPR.
5. This report is issued pursuant to s 29(2) of the AHRC Act setting out the findings and recommendations of the Commission in relation to Mr Jdid's complaint.

2 Summary of findings and recommendations

6. As a result of this inquiry, I find the following:
 - (a) excessive force was used by ERT officers on Mr Jdid – the manner in which he was restrained was disproportionate to the need to protect him, the safety of staff and to maintain good order at the detention centre
 - (b) the injury sustained to Mr Jdid's right elbow and the pain to his left shoulder was a result of the excessive use of force

- (c) the level of force was not used as a last resort and escalated the physicality of the situation – further communication, negotiation and conflict de-escalation strategies could and should have been attempted.
- 7. These actions are contrary to Mr Jdid’s rights under article 10 of the ICCPR, to be treated with humanity and with respect for his inherent dignity when deprived of liberty.
- 8. I make the following recommendations:

Recommendation 1

The Commonwealth pay to Mr Jdid an appropriate amount of compensation to reflect the loss and damage he suffered as a result of the breach of his human rights identified by this inquiry, being the pain and suffering he experienced as a result of the use of force against him.

Recommendation 2

The Department and Serco ensure that officers who may be required to use force in their roles be appropriately and periodically trained on how to select and properly deploy use of force techniques, so as to avoid harm to the person against who force is used.

Recommendation 3

The Department and Serco ensure that officers who may be required to use force in their roles be appropriately and periodically trained on communication, negotiation and conflict de-escalation strategies as alternatives to the use of force.

3 Background

3.1 Immigration detention

- 9. On 7 July 2013, Mr Jdid arrived at Christmas Island and was detained under s 189(3) of the *Migration Act 1958* (Cth) as an unauthorised maritime arrival. On 5 September 2013, he was released from immigration detention. On 26 August 2016, he was re-detained after his Bridging Visa E was cancelled as a result of criminal charges. A series of merits and judicial reviews followed in connection with visa applications lodged by Mr Jdid. On 17 August 2018, he was transferred to MITA. On 15 May 2019, the High Court of Australia dismissed his application for special leave and Mr Jdid was removed from Australia on 27 February 2020.

3.2 Use of force and High Care accommodation

10. At approximately 10.35am on 9 December 2019, Mr Jdid was in the Ford compound day room at MITA.
11. He had asked to see a mental health nurse from International Health and Medical Services (IHMS) but was informed by Serco staff that he would need to submit a medical request form as IHMS were currently busy and could not see him immediately.
12. At this time, departmental records show that Mr Jdid had been in immigration detention at MITA for approximately 1 year and 4 months. Before that, he had been transferred to various immigration detention centres over a 2-year period before being transferred to MITA on 17 August 2018. Mr Jdid had been on a Psychological Support Program since 13 July 2019, following the death of a co-detainee in custody at MITA. Individual management plan reviews provided by the Department, show self-harm incidents by Mr Jdid on two occasions. On 16 August 2019, he placed a rubbish liner over his head and on 19 August 2019, he tied a shoelace around his neck.
13. The circumstances leading up to the subsequent use of force by Serco ERT officers are not contested between the Department and Mr Jdid rather the dispute is in relation to the level of force used and whether this was excessive.
14. The Department and Serco allege that Mr Jdid was behaving aggressively and abusively towards detention staff after being informed that he would need to submit a medical request form. They allege he struck two telephone receivers in the Ford Compound day room and made threats to 'smash up the compound' if he didn't see a mental health nurse. They also allege that Mr Jdid kicked over several rubbish bins in the day room.
15. The force included Mr Jdid's right arm being rotated and used to push his body to the ground and being physically restrained by up to 4 ERT officers holding down his arms, legs and body. Handcuffs were applied to Mr Jdid and a Sure Lock body belt restraint.
16. Following the incident, Mr Jdid complained of a 'broken right hand' and extreme pain to his left shoulder.
17. Medical records provided by the Department show a CT scan of Mr Jdid's right elbow was conducted the next day and revealed 'extensive soft tissue oedema overlying the elbow' and 'a number of bony fragments noted

adjacent to the coronoid process of the elbow, which are suggestive of avulsion fractures’.

18. An IHMS clinical record dated 11 December 2019 shows Mr Jdid was reviewed by the GP who diagnosed a right elbow fracture and referred him to the Northern Hospital Emergency Department where he stayed overnight.
19. The hospital discharge summary refers to Mr Jdid being diagnosed with ‘swelling/post pain fracture’. He was referred to the fracture clinic and a back slab case was placed on his right arm. A hospital script indicates he was prescribed the strong analgesia, Oxycodone.
20. Mr Jdid subsequently lodged a complaint with Serco stating that he had been subject to excessive use of force by Serco staff. After an investigation of the incident, Serco found that the Detention Services Officer followed all appropriate de-escalation techniques and that the application of the use of force was appropriate.
21. On 12 December 2019, Mr Jdid lodged a complaint with the Commission. In his complaint to the Commission, Mr Jdid also complains that following the use of force incident, he was locked in a cell for approximately 48 hours without food, water or adequate medication.

4 Legal framework for human rights inquiry

4.1 Functions of the Commission

22. Section 11(1) of the AHRC Act identifies the functions of the Commission. Section 11(1)(f) gives the Commission the function ‘to inquire into any act or practice that may be inconsistent with or contrary to any human right’.
23. Section 20(1)(b) of the AHRC Act requires the Commission to perform its function under s 11(1)(f) when a complaint is made in writing alleging that an act or practice is inconsistent with or contrary to any human right.
24. Section 8(6) of the AHRC Act provides that the functions of the Commission under s 11(1)(f) are to be performed by the President.
25. The rights and freedoms enumerated in the ICCPR are ‘human rights’ within the meaning of the AHRC Act.²

4.2 Scope of 'act' and 'practice'

26. 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.
27. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an 'act' includes a reference to a refusal or failure to do an act.
28. 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,³ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

4.3 Rights of detainees

29. Persons subject to immigration detention enjoy all of the human rights protected by the ICCPR, including special protections as persons deprived of their liberty by the state.
30. Article 7 of the ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
31. Further, article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
32. General Comment No 21 of the United Nations Human Right Committee (UN HR Committee) concerns article 10(1) of the ICCPR, and states:

Article 10, paragraph 1, imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons.⁴

33. This General Comment supports the conclusions that:
- article 10(1) imposes a positive obligation on State parties to take action to prevent the inhumane treatment of detained persons
 - the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR
 - article 10(1) may be breached if a detainees' rights under other articles of the ICCPR are breached, unless that breach is necessitated by the deprivation of liberty.
34. The above conclusions are also supported by the jurisprudence of the UN HR Committee, which emphasises the difference between the article 7(1) obligation not to engage in 'inhuman' treatment and the article 10(1) obligation to treat detainees with humanity and respect for their dignity.⁵
35. In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,⁶ the Supreme Court of New Zealand further explained the difference between these two concepts as follows:
- A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment ... the words 'with humanity' are I think properly to be contrasted with the concept of 'inhuman treatment' ... The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts 'inhuman' with 'inhumane'.⁷
36. The content of article 10(1) has been developed through a number of UN instruments that articulate minimum international standards in relation to people deprived of their liberty, including:
- the *Standard Minimum Rules for the Treatment of Prisoners* (Nelson Mandela Rules)⁸
 - the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).⁹
37. The UN HR Committee invites State Parties to indicate in their periodic reports the extent to which they are applying the Nelson Mandela Rules and the Body of Principles.¹⁰ At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed, regardless of a State Party's level of development.¹¹

38. Rule 82(1) of the Nelson Mandela Rules provides:

Prison staff shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Prison staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the prison director.

39. This rule provides limits on the circumstances in which force may be used, and limits the use of force in those circumstances to what is necessary.

40. Rule 121 of the Nelson Mandela Rules requires that civil prisoners 'shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order'.

41. The prohibition in article 7 of the ICCPR is absolute and non-derogable. A person's treatment in detention must not involve torture or cruel, inhuman or degrading treatment or punishment.

42. In the case of *Wilson v Philippines*, the UN HR Committee found a breach of article 7 of the ICCPR where a prisoner was treated violently in detention:

The Committee considers that the conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7.¹²

43. States have a responsibility to ensure that the rights guaranteed in articles 7 and 10 of the ICCPR are accorded to detainees in privately run detention facilities.¹³

5 Legal and policy framework for use of force and restraints in immigration detention

5.1 Use of force

44. I note that the Commission has previously undertaken an inquiry into the use of force in immigration detention (the Thematic Inquiry report).¹⁴

45. Part 4 of the Thematic Inquiry report sets out the applicable legal and policy framework for the use of force in immigration detention.¹⁵ I refer to and rely on the applicable aspects of that report, without repeating them here.
46. In summary, Serco's contract with the Department to run immigration detention facilities, and the Department's Detention Services Manual (DSM), are the primary documents that set out the obligations of Serco and departmental staff with respect to use of force.
47. The Serco contract provides that Serco must ensure that force is not used unless as a measure of last resort, and then only with the reasonable level of force necessary. It further states that all reasonable precautionary measures must be taken to ensure the safety of the Detainee. It requires personnel who use force to be properly trained and accredited.¹⁶
48. When Serco has used force or instruments of restraint such as handcuffs on a detainee, it must prepare an incident report for the Department and refer the detainees to the Detention Health Services Provider for a medical examination immediately after the use of force or restraints.¹⁷
49. As described in the Department's DSM, both the Department and its service providers owe a duty of care to all persons held in immigration detention. This means that they are legally obliged to exercise reasonable care to prevent detainees from suffering reasonably foreseeable harm.¹⁸ The Department's duty of care is non-delegable.¹⁹
50. When the Department contracts out the provision of services to people in held detention to third parties, it has a responsibility to ensure the contracted service providers are qualified and can meet the standards outlined in the contract.
51. While these third parties must also discharge their own duty of care obligations to a detainee in held detention, this duty is additional to, and is not a substitute for, the Department's duty of care.²⁰
52. In addition to the Department's duty of care, the Department recognises that international human rights standards can inform the standard of care a detainee is to receive while detained in an immigration detention facility.²¹
53. The Department's DSM provides that:
 - conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force and/or restraint is used

- reasonable force and/or restraint should only be used as a measure of last resort
- reasonable force and/or restraint may be used to prevent the detainee inflicting self-injury, injury to others, escaping or destruction of property
- reasonable force and/or restraint may only be used for the shortest amount of time possible to the extent that is both lawfully and reasonably necessary
- if the management of a detainee can be achieved by other means, force must not be used²²
- the use of force and/or restraint must not include cruel, inhumane or degrading treatment
- the use of force and/or restraint must not be used for the purposes of punishment
- the excessive use of force and/or restraint is unlawful and must not occur in any circumstances
- the use of excessive force on a detainee may constitute an assault
- all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant FDSP operational procedures.²³

54. The Department's DSM provides that 'all use of force and/or restraint should be proportionate to the situation, objectively justifiable and only used as a measure of last resort' and that the 'level of force must be proportionate to the threat being faced and always at the minimum level required to achieve legislative outcomes'.²⁴

5.2 Restraints

55. The policies applicable to the use of mechanical restraints are discussed in Part 5 of the Thematic Inquiry report.²⁵ I refer to and rely on the applicable aspects of that report, without repeating them here.

56. In summary, the Department's DSM provides that instruments of restraint must:

- never be applied as a punishment or for discipline
- never be applied as a substitute for medical treatment
- never be used for convenience or as an alternative to reasonable staffing
- be removed once the threat has diminished and the officer believes that the detainee is no longer a threat to themselves, others or property.²⁶

57. Serco's contract with the Commonwealth provides that Serco must 'ensure that restraints are not used in a manner which is likely to cause injury, serious discomfort or potential danger to a Detainee'.²⁷

5.3 High Care Accommodation

58. The Department's DSM provides guidance on the use of High Care Accommodation (HCA) for the closer supervision and engagement of high-risk detainees:

- separating high-risk detainees from the general population (high-care accommodation) in an immigration detention facility should only be used as a last resort and for the shortest practicable time,
- under no circumstance can a detainee be relocated to high-care accommodation as a punitive measure,²⁸
- placement of detainees in high-care accommodation, regulating their movement within the facility and their access to activities or services, should only be used as a last resort and when other strategies to manage their vulnerabilities, behaviour and the risk they pose have not succeeded,²⁹
- detainees must not remain in high-care accommodation for more than 24 hours without review, including a health review by the Detention Health Services Provider and the Commander Detention Operations.³⁰

59. High-risk detainees include those who 'pose a significant risk to the good order and security of the immigration detention facility and the safety of people within the facility'.³¹

5.4 Solitary confinement

60. The Nelson Mandela Rules provide the following rules regarding solitary confinement:

Rule 43

1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

- (a) Indefinite solitary confinement;
- (b) Prolonged solitary confinement;
- (c) Placement of a prisoner in a dark or constantly lit cell;
- (d) Corporal punishment or the reduction of a prisoner's diet or drinking water;
- (e) Collective punishment.

2. Instruments of restraint shall never be applied as a sanction for disciplinary offences.

3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.

Rule 44

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

Rule 45

1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving

women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply.

6 Consideration of records of incidents

61. Although there are some short delays in the commencement of audio, bodycam footage from ERT officers captures the use of force incident in part or whole and Mr Jdid's subsequent placement into HCA.
62. There is an absence of footage however in relation to the following events alleged by the Department:
 - Mr Jdid striking the two telephone receivers in the lead up to the use of force incident
 - Mr Jdid kicking an ERT officer in the groin during the use of force incident.
63. The Department has also provided copies of incident reports, service provider reports, use of force records and medical records, that record the key events on 9 December 2019.
 - (i) Lead up to the use of force
64. Serco's Post Incident Review Use of Force report dated 9 December 2019 states that at approximately 10.32am that day, Mr Jdid was informed by a Detention Services Officer (DSO) that he would need to wait to see the IHMS mental health nurse as they were currently busy. The report states that:

Mr Jdid did not appear happy with this response and proceeded to strike the 2 telephone receivers in the FORD compound. DSO Emergency Response Team attended the area and entered into a conversation with Mr Jdid in order to deescalate the situation and ascertain if there was anything that he could do to assist him.

During the conversation DSO/ERT advised Mr JDID that if he had a paper stating that he had an appointment he would be seen and that the officer had already made a phone call to IHMS to find out when he could be seen. DSO/ERT advised Mr JDID that there were meetings that were being held in the morning and that could be the reason why IHMS hadn't responded yet. Mr JDID stated that he knew that all of the meetings had concluded as he had seen everyone walk back.

DSO/ERT asked Mr JDID if he would accompany him to see the Facility Operations Manager (FOM) who was on shift to further explain the situation to him but Mr JDID refused and stated that he did not like him.

DSO/ERT returned to the Ford officer station and was informed by DSO that he had called IHMS to find out when they would be able to see him and was waiting for a call back from them, DSO/ERT also informed FOM of the situation.

DSO/ERT returned to the FORD compound and recommenced engaging with Mr JDID, informing him that he had to wait for IHMS to inform the officer when they would be able to see him. Mr JDID was also informed that this would not happen immediately as per his request. Mr JDID stated that he was not happy and he didn't know what he was doing, DSO/ERT advised him that he shouldn't take it out on or damage the property. DSO/ERT asked Mr JDID if was going to do anything, Mr JDID responded "maybe, if you don't take me down maybe. It's out of my hands" Mr JDID also made statements "You can take me by force" several times, DSO/ERT stated "I wont take you by force. I don't want you to break anything, just wait for the officer replies back to you"

65. At approximately 10.34 am, bodycam footage shows Mr Jdid arguing with an ERT officer near a telephone receiver about his request to see a mental health nurse and the conversation that followed. The bodycam footage mostly supports the description of events as set out in Serco's Post Incident Review Use of Force report.
66. In response to being told to wait, the footage records Mr Jdid stating 'I'm not happy, I'm not happy, I'm stressed, I don't know what I'm doing', as he points to his forehead.
67. The Serco officer's report alleges that during this conversation, Mr Jdid also stated, 'I want to see mental health now or I am going to smash this place up' and that 'they better come because I'm going to smash this place badly', however the footage does not support these statements being made by Mr Jdid at the time.
68. The bodycam footage does record the ERT officer asking Mr Jdid if he will 'do anything' to which he replies 'maybe ... maybe if you don't take me down, I don't know, it's out of my hands'. Mr Jdid appears annoyed at this point but his arms are folded and he is not speaking in an aggressive manner. The ERT officer then leaves the Ford compound day room.
69. Serco's Post Incident Review Use of Force report states that:

Following this at approximately 1044 hours DSO informs Mr JDID that IHMS have requested that he complete a request form, Mr JDID proceeded to kick over several rubbish bins in the common area, which

spread litter and food scraps across the room and also began to shout in an aggressive manor.

70. A still image provided from CCTV footage in Serco's Post Incident Review Report purports to capture Mr Jdid kicking rubbish bins over in the Ford Compound. I note that Mr Jdid does not dispute kicking the bins.

(ii) Use of force

71. At approximately 10.44am, bodycam footage shows two ERT officers entering the common room and approaching Mr Jdid swiftly from behind. Three medium sized black rubbish bins are seen toppled over (Figure 1). Mr Jdid is seen walking away from the scene with his back to the officers. It appears he is wearing earpods and looking down at his mobile phone. Up to 6 officers are seen in the surrounding background with other detainees.



Figure 1: Rubbish bins are toppled over as ERT officers enter the Ford compound

72. ERT officer 1 yells out 'hey', as he approaches Mr Jdid. Mr Jdid turns his head in response. ERT officer 1 and ERT officer 2 proceed to grab Mr Jdid's shoulders either side of him (Figure 2). Mr Jdid resists. The video turns shaky, and it is unclear how many officers are involved in restraining Mr Jdid at this point. Mr Jdid yells to the other detainees to video the incident and ERT officer 1 is heard telling him to walk with him several times.



Figure 2: Mr Jdid is approached by 2 ERT officers from behind

73. Notably, at approximately 10.46am, ERT officer 2 who is on the right side of Mr Jdid is seen to rotate Mr Jdid's right arm over to his front, pull it back and then use it to push Mr Jdid's body forcefully towards the ground (Figures 3 and 4). As Mr Jdid falls, both officers go with him to the ground (Figure 5).



Figure 3: The ERT officer rotates Mr Jdid's arm over to his front torso



Figure 4: Mr Jdid's arm is pulled back and used to lever his body to the ground



Figure 5: Mr Jdid falls to the ground together with the ERT officers

74. The officers pull his arms behind his back and mechanical handcuffs are applied (Figure 6). Mr Jdid can be heard screaming out in pain. A third ERT officer is seen lying on Mr Jdid's legs to secure them (Figure 7). Mr Jdid yells out 'you broke my hand'. ERT officer 1 replies 'no one touched you'.



Figure 6: Mr Jdid's arms are pulled back forcefully, his right arm is held at almost a 90 degree angle



Figure 7: An ERT officer secured Mr Jdid's legs in a four lock leg position

75. ERT officer 1 then advises Mr Jdid to get on his knees. ERT officers 1 and 2 hold him either side whilst ERT officer 3 places his hand under Mr Jdid's chest. It appears at this point that ERT officer 2 goes to lift Mr Jdid up under his right shoulder but then gently lowers him to the ground (Figure 8). While Mr Jdid remains face down on the ground, he yells out, 'I have injury in my hand, you can't put handcuffs in my hand, I have injury in my shoulder ... anyone take photo for me, please detainees'.



Figure 8: An ERT officer attempts to lift Mr Jdid up, gripping firmly under his right shoulder

76. ERT officer 1 asks Mr Jdid several times which shoulder is injured. He does not respond, insisting that other detainees take videos of the incident. Officers in the background are seen to usher the other detainees out of the room. ERT officer 1 asks for a body belt to be brought to them. While they wait, he asks Mr Jdid if he will get up on his knees and stand up by himself to which Mr Jdid replies 'go fuck yourself'. ERT officer 1 says 'let's get a body belt'.
77. At approximately 10.50am, an officer is heard directing the ERT officers to stand Mr Jdid up, despite their previous attempt. It appears that up to 4 officers are then involved in attempting to lift Mr Jdid onto his knees. Mr Jdid resists, the video turns shaky and officers are seen forcing Mr Jdid to the ground again. An officer is heard yelling 'stop resisting'. ERT officer 1 shouts, 'you tried to fucking knee me, that's why I said get a body belt ... do you know that you kneed me, you know that's considered assault ... you tried to knee me, don't forget that'. Mr Jdid replies, 'you broke my shoulder' and 'you assault me'. The officers continue to wait for the body belt as Mr Jdid is heard crying (Figure 9).



Figure 9: ERT officers monitor Mr Jdid as they wait for the body belt to be brought

78. Over the next 5 minutes, officers keep asking Mr Jdid which shoulder is hurting and whether it is his left shoulder. He replies, 'you already know which shoulder ... 18 October, you broke me ... August ... you broke me 2 times now, please take me to MRI'. Mr Jdid then begins to smack his head loudly on the ground. An officer quickly brings a blanket which is laid under his head.
79. At approximately 10.55am, the body belt arrives and as the officers proceed to install it, Mr Jdid objects stating, 'don't put anything, I'm not animal, don't need this one'.
80. ERT officer 1 responds, 'you tried to knee me ... you gonna walk with us? You're not gonna try to knee me again?' Mr Jdid answers, 'yes, yes,' and the officers discard the belt. Mr Jdid is still handcuffed at this point. ERT officer 2 on the right of Mr Jdid tries to lift him up under his right shoulder, however he is stopped by the Facilities Operations Manager (FOM) who says, 'you can't be lifting him by his shoulders'. The FOM directs the body belt to be placed on Mr Jdid to allow him to get up and walk by himself.
81. Mr Jdid is rolled onto his right shoulder while the body belt is placed under his abdomen. ERT officer 1 states, 'we will put this on you and you stand up by yourself'.
82. At approximately 10.57am, the body belt restraint system is attached with straps tethered to the system's own handcuffs. The mechanical handcuffs are removed. Mr Jdid is instructed to bring his knees up and is turned to his front into a seated position.
83. At approximately 10.59am, two IHMS nurses arrive at the scene. At this point, ERT officers 1 and 2 are preparing to assist Mr Jdid to stand up until one of the nurses instructs them to stop due to the injury. The same nurse then assesses Mr Jdid's shoulder and tells him that he will be x-rayed

immediately. She also directs ERT officer 2 to loosen the right handcuff which is still tightly tethered to the body belt. The nurse asks Mr Jdid to tell her where it is sore and he points to his right elbow and looks to his left shoulder, on which the nurse places her hand. The nurse asks him to squeeze the other nurse's hand, but he winces in pain and says he can't.

84. At approximately 11.04am, Mr Jdid is assisted to his feet and escorted to the onsite mobile x-ray van by the officers and nurses. As the radiologist enters his details, she indicates that she has 'done him before' and that 'we know he's got a broken clavicle'.
85. As the x-ray is conducted, the IHMS nurse can be heard faintly in the background saying, 'with somebody like him with his shoulders – like my shoulders couldn't take it either' and 'cuff him here somehow'.
86. At approximately 11.17am, following the x-ray, Mr Jdid is escorted into an interview room. Mr Jdid has his mobile phone with him and tries to call someone who is not available. The FOM enters the room and advises Mr Jdid that he will be going to Shaw HCA for the night because of his behaviour in the compound and that he would be seen by IHMS the next day.

(iii) Placement in High Care Accommodation

87. At approximately 11.33am, Mr Jdid is placed into room 6 at Shaw. Bodycam footage shows Mr Jdid talking on his mobile phone to someone he claims is his lawyer. ERT officer 1 states, 'tell him you'll call back', then takes the phone from him and places it on the bed in the room. Another officer repeats, 'you can call him back'. ERT officer 1 asks Mr Jdid to follow his direction to enter the room. Mr Jdid replies, 'fuck your direction'. ERT officer 1 pulls the mattress off the bed, places it on the floor and directs Mr Jdid to get on it. The officers attempt to push Mr Jdid forward to his knees before Mr Jdid willingly lowers himself and lies down on the mattress. Officers proceed to unlock the handcuffs.
88. While Mr Jdid is still face down, ERT officer 1 asks him to remove the contents of his pockets. Mr Jdid is heard reciting words in his language and appears to ignore the direction. He starts crying. A metal wand detector is waved over him and he is briefly pat searched on his backside and in his pockets.
89. At approximately 11.46am, the officers retreat backwards out of the room and lock the door.

90. In its response to Mr Jdid's complaint to the Commission, the Department states that:

As a result of the incident, Serco requested Mr Jdid be placed into High Care Accommodation (HCA) for a period of up to 24 hours on a 'closed door' policy which was approved by the Australian Border Force (ABF) Superintendent. IHMS were supportive of a 24 hour placement in Shaw HCA. Mr Jdid was placed in Shaw HCA from around 1130hrs on 9 December 2019, to around 1100hrs on 11 December 2019, to give him the opportunity to calm down.

91. An email from IHMS at 2:55pm the same day provides an update to the ABF Superintendent that although Mr Jdid displayed no immediate physical concerns, he continued to 'display behaviour that was unacceptable'.
92. An email update from Serco at 5:07pm sets out that Mr Jdid was not engaging with Serco staff when checked upon, was blaming IHMS and Serco and 'not taking responsibility or believing that he has done anything wrong'.
93. The next day, 10 December 2019, an email update from IHMS at 8:28am states:

Mr. Jdid was reviewed this morning in Shaw. He is trying to self-sabotage his care. He refused to sleep on the mattress, instead slept on the corrugated hard base of the bed. It is well documented that he will not take any responsibility for his behaviors and continues to lack insight. When engaging with Mr. Jdid, he refuses to accept the chain of events leading to his Shaw admission. Directing Mr. Jdid back to reality orientation of the facts of the event, Mr. Jdid started to escalate, refuse to listen and dominated the interaction. The conversation was ceased, due to further escalate of behavior and to ensure his safety in a state of emotional dysregulation. Considering the circumstances, his previous physical injuries, it would be advisable to keep Mr. Jdid in Shaw for his own safety at the present.

94. An email from Serco at 11:30am requests an extension for Mr Jdid to remain in HCA for up to 24 hours:

Mr JDID is not accepting any responsibility for his actions yesterday and is maintaining a negative attitude with both Serco and IHMS staff. Although he is not being abusive or aggressive, during each interaction with staff he is stating that Serco and IHMS do not know how to do their jobs and is very vocal about his perception of how he is being treated at the MITA by all stakeholders. Serco agree with IHMS that Shaw would be the best place to manage Mr JDID currently due to how his current negative state of mind may effect the smooth running and good order of Ford (or another

compound) if he were to go back to regular accommodation at this present time.

95. An email update from Serco at 9:31pm shows that Mr Jdid attended his medical appointment that day without incident. He was observed to have his evening meal in the Shaw day room and his behaviour was compliant, allowing for him to watch TV.
 96. The next day, 11 December 2019, an email update from IHMS at 8:49am states that Mr Jdid was more settled and 'able to demonstrate some responsibility and insight into the event which led to his current Shaw admission'.
 97. An email update from IHMS at 11:05am refers to the CT results showing an avulsion fracture of the elbow to be discussed further with the radiologist. IHMS states that 'for purposes of remaining in Shaw clinically there are no reason for him to remain in HCA'.
 98. An email from Serco at 3:41pm refers to Mr Jdid exiting the Shaw unit at around 11.12am and being housed in the Eskrine compound. In total, Mr Jdid spent approximately 48 hours in HCA.
- (iv) Medical treatment
99. Directly after the use of force incident, Mr Jdid's right elbow and left shoulder were x-rayed onsite. IHMS clinical records from 9 December 2019 show Mr Jdid was seen by a primary health nurse at approximately 2.02pm and then by the GP at approximately 3.30pm who noted 'abnormal fragments seen anterior aspect of elbow' and referred Mr Jdid for a CT scan. He was also prescribed Panadol/Nurofen.
 100. The next day, 10 December 2019, IHMS clinical records show that Mr Jdid was reviewed by the primary health nurse at approximately 10.57am and then by the mental health nurse at approximately 2.51pm.
 101. On 11 December 2019, an IHMS clinical record shows Mr Jdid was reviewed by the GP at approximately 3.30pm who noted the CT scan findings and diagnosed a right elbow fracture. The GP referred Mr Jdid to the hospital emergency department for orthopedic assessment and management. Mr Jdid was admitted to the Northern Hospital Emergency Department that day and was referred to the hospital's fracture clinic. It is unclear exactly what time he was admitted but he remained overnight and was discharged on 12 December 2019. He was diagnosed with

swelling/pain post fracture, given a back slab cast for his arm and prescribed stronger analgesia, Oxycodone, for 2 days.

102. IHMS clinical records dated 24 December 2019 and 2 January 2020 show that Mr Jdid continued to complain of ongoing pain to his right elbow. He continued to receive further analgesia of Panadeine Forte and was reviewed by the GP and the Northern Hospital Fracture Clinic for ongoing pain management and care until being deported on 27 February 2020.

7 Findings

7.1 Acts or practices relevant to this inquiry

103. I consider the following acts or practices of the Department and Serco as relevant to this inquiry:
- the decision to use force to restrain Mr Jdid on 9 December 2019
 - the decision to place Mr Jdid in Shaw HCA for 48 hours following the use of force incident on 9 December 2019.

7.2 Use of force incident

104. I find, on balance, that excessive force was used on Mr Jdid in a manner that was not reasonable, necessary or proportionate to the risk he posed to himself or others.
105. At the time of the use of force incident, Mr Jdid had been asking to see a mental health nurse and had kicked the rubbish bins in frustration. In his complaint to the Commission, his authorised representative describes that he was 'experiencing isolation and loneliness as a result of being placed in a different part of the MITA complex'. He was also 'experiencing hopelessness at his situation, traumatic flashbacks and his mood had significantly worsened'. His complaint also states that on the morning of the use of force incident, he was 'feeling stressed and worried about his parents in Lebanon'. A Serco email record dated 9 December 2019 requesting Mr Jdid's placement in the Shaw unit, makes reference to Mr Jdid being aware of his pending removal from Australia.
106. I consider that Serco staff reasonably believed that Mr Jdid was at risk of further damaging property and disrupting other detainees in the compound and it was reasonable to remove him from the compound. However, Mr Jdid was behaving in a disorderly manner in response to being told that he would have to wait to see a mental health nurse. I consider that the primary risk was of harm to property and possibly to

himself, as opposed to a serious or imminent threat to others. The footage shows he may have been making verbal threats, but it does not show Mr Jdid engaging in physical aggression towards Serco staff or to other detainees.

107. In its response to my preliminary view dated 18 July 2023 (preliminary view), the Department stated:

The Department reiterates its advice that prior to the application of force, Mr Jdid was demonstrating unacceptable and aggressive behaviour, including damaging handsets to a number of communal telephones, kicking over rubbish bins and engaging in verbal aggression with words to the effect of "I am going to smash the compound up" and "if you want to move me, you will have to use force".

The Department disagrees with the Commission's preliminary finding that Mr Jdid did not present a serious or imminent threat to others. Further, the Department refutes any suggestion that Mr Jdid's behaviour was a valid response to being advised he would need to wait for an appointment with the Detention Health Services Provider (DHSP).

108. In his response to my preliminary view, Mr Jdid rejected the Department's allegation that he had struck two telephone receivers in the lead up to the use of force incident. As previously stated, the bodycam footage does not support Mr Jdid using 'words to the effect' - 'I am going to smash the compound up' and 'if you want to move me, you will have to use force' prior to him kicking over the bins. By the time ERT officer 1 returns to the day room, Mr Jdid has already kicked the rubbish bins over and is seen walking away. He is not exhibiting any physical aggression towards Serco staff or other detainees.

109. I find that force was not used as a last resort. According to the bodycam footage, ERT officer 1 was present with Mr Jdid in the day room for a period of approximately 5 minutes in apparent attempts to de-escalate the situation. ERT officer 1 then left the room. When he re-entered with ERT officer 2, in response to Mr Jdid kicking the rubbish bins, they swiftly approached Mr Jdid from behind and seized him before affording him an opportunity to respond. I consider that further in-person communication, negotiation and conflict de-escalation strategies could, and should, have been attempted at this point before seizing him.

110. In its response to my preliminary view, the Department stated:

Noting the FDSP's unsuccessful efforts to de-escalate Mr Jdid by verbally engaging with him, including offering him the opportunity to speak with

FDSP management and requesting his removal from the compound into an interview room to discuss his grievances, FDSP officers withdrew from the area to liaise with management to seek advice on an alternative resolution. FDSP officers commenced their return to further communicate and engage with Mr Jdid, however, prior to reaching the area a loud crashing noise was heard and a code black (officer needs assistance) was called over the radio by other FDSP officers. Upon entering, Mr Jdid was observed striking several rubbish bins, toppling them over and spreading rubbish and food scraps across the room while concurrently, shouting in an aggressive manner.

At this time, verbal de-escalation tactics were no longer considered reasonable and the FDSP responded by restraining Mr Jdid and utilising the Enhanced Escort Position (EEP), during which time Mr Jdid continued to react in a non-complaint manner, reportedly kicking his legs as well as moving his elbow and fists aggressively toward FDSP officers. The actions of Mr Jdid were such that FDSP officers reported of having been in fear and danger of being imminently assaulted by Mr Jdid, coupled with his high level of aggression and strong non-compliant demeanour.

111. It is unclear however why verbal de-escalation tactics were no longer considered reasonable upon entry by Serco officers. As ERT officer 1 re-enters the room, he can be heard initially yelling out to Mr Jdid but after this, there is no further attempt to gain Mr Jdid's attention before the officers seize him from behind. I accept that ERT officer 1 made attempts to de-escalate the situation in his interaction with Mr Jdid before leaving the day room, however I consider there was a further opportunity for ERT officers to attempt de-escalation strategies, upon 're-entering' the day room.
112. In his response to my preliminary view, Mr Jdid rejected the Department's allegation that he kicked one of the ERT officers in the groin during the use of force incident. I note that while bodycam footage does not capture Mr Jdid doing so, Serco Use of Force reports from the ERT officers involved in the incident, make reference to this occurring. Contemporaneous bodycam footage also records ERT officer 1 shouting out, 'you tried to fucking knee me' to which Mr Jdid replies, 'you broke my shoulder'. I accept that by this time, Mr Jdid was resisting officers' attempts to restrain him.
113. I find that the 'control and restraint' technique used on Mr Jdid, whereby his right arm was rotated and pushed forward with such significant force to propel his body to the ground, was not necessary and appropriate in the circumstances. This technique was highly forceful and hostile and resulted in Mr Jdid being held down on the floor by up to four ERT officers, his arms pulled back and his legs secured in a 'figure of four' leg lock.
114. In its response to my preliminary view, the Department stated:

The FDSP reports that during the transition from EEP to ground stabilisation, Mr Jdid's arm required rotating. Multiple FDSP officers were present and assisting with the transition and the FDSP advises that Mr Jdid was transitioned in a controlled manner, consistent with the FDSP's training method.

115. I do not accept the Department's statement that Mr Jdid's arm required rotating during the transition from 'Enhanced Escort Position' to ground stabilisation or that Mr Jdid was transitioned in a controlled manner. I consider that in the moment, ERT officer 2 chose to use this particular method of restraint in order to ground stabilise Mr Jdid as quickly as possible.
116. I note there is some disagreement between the Department and Mr Jdid in his complaint regarding the number of officers directly involved in the use of force incident. Bodycam footage shows that there were 2 officers involved in the initial seizing of Mr Jdid and then up to 4 officers involved in stabilising him on the ground.
117. I find that the number of ERT officers that restrained Mr Jdid appears reasonable in light of his resisting following the initial use of force. However, I consider the manner in which the ERT officers first apprehended him and used force may have escalated the physicality of the situation and the risk of harm to Mr Jdid and others.
118. Mr Jdid also complains that Serco staff were aware of his pre-existing shoulder injury and that he was not to be handcuffed. Given this was an unplanned use of force incident, I consider this information may not have been known to the ERT officers involved in the use of force incident and is of less significance in these circumstances.
119. I find that the application of mechanical handcuffs for approximately 15 minutes was reasonable, necessary and proportionate given Mr Jdid's resisting and lack of compliance with directions once force was used. However, I consider there may have been more appropriate ways in which the handcuffs could have been applied to better protect Mr Jdid from further injury, particularly when it was clear he was suffering extreme pain after the use of force incident.

7.3 Injuries and conclusion

120. I find that the injuries complained of by Mr Jdid were caused by the use of force, most likely from the manner in which Mr Jdid's right arm was

rotated and used to push his body to the ground and the application of handcuffs thereafter.

121. In particular, the injury to his right elbow is consistent with it having occurred during the ERT response. The bodycam footage shows Mr Jdid screaming out in pain directly after ERT officer 2 rotates his arm, at approximately 10.46am. As he is on the ground, he is also heard screaming out in pain and yelling, 'you broke my hand', as his arms are pulled back forcefully and handcuffs applied. In the moment, Mr Jdid could not have known that his right elbow had been fractured and I accept that his hand was in the vicinity of the pain region. Later footage shows Mr Jdid continuing to yell out that his hand and shoulder are injured. When IHMS nurses arrive at the scene, Mr Jdid is seen cradling his right arm and wincing as he talks to the nurses. When asked by the nurse where he is sore, Mr Jdid points to his right elbow and looks to his left shoulder.
122. Immediately after the use of force incident, he is taken to the onsite mobile x-ray van and the corresponding x-ray record of his right elbow shows 'abnormal bone fragments seen on the anterior aspect of the elbow'. The CT scan conducted the next day, 10 December 2019, shows 'extensive soft tissue oedema overlying the elbow' and a number of bony fragments suggestive of avulsion fractures. On 11 December 2019, Mr Jdid is seen by the IHMS GP who notes the results of the CT scan and refers Mr Jdid to the emergency department for orthopedic assessment and management. I find it concerning that it took 2 days after the use of force incident for Mr Jdid to be taken to hospital.
123. In relation to his left shoulder injury, although the medical records do not appear to show further damage to his pre-existing shoulder injury, I find that the pain to his left shoulder was also aggravated by the use of force. I also consider that the use of handcuffs contributed to Mr Jdid's left shoulder pain. I otherwise consider that the application of mechanical handcuffs and later the Sure Lock body belt, and the periods for which they were used, were reasonable, necessary and proportionate.
124. In its response to my preliminary view, the Department states:

The Department disagrees with the Commission's preliminary view that the injury sustained to Mr Jdid's left shoulder was a result of excessive use of force, however, the Department notes the Commission's view with regard to Mr Jdid's right elbow to the extent that it maintains the use of force was reasonable and appropriate in the circumstances. The Department refers to its advice with respect to Mr Jdid's increasingly non-complaint behaviour while applying force and the increased risk associated to Mr Jdid and others where non-compliant behaviour is displayed in the activation of utilising force.

The DHSP notes Mr Jdid had a documented history of left shoulder pain since 19 August 2019. On 21 August 2019, Mr Jdid was diagnosed with a clavicle fracture for which he was regularly administered pain relief. On 26 August 2019, an orthopaedic specialist recommended that Mr Jdid attend for surgical intervention to address the clavicle fracture and subsequent shoulder pain, however, Mr Jdid declined.

125. In his response to my preliminary view, Mr Jdid states that on 19 August 2019, he sustained a fractured collarbone to his left shoulder as a result of Serco officers using force in response to his attempts to self-harm. Mr Jdid provided a letter from Northern Hospital dated 22 January 2020, which records his presentation to their emergency department on 20 August 2019, 'having suffered a significant closed fracture to his left clavicle'. The letter notes:

The history obtained from the MITA staff indicated Mr Jdid had become very agitated the previous night and was placed in seclusion. MITA staff had attempted to restrain Mr Jdid with this involving approximately seven staff; no documentation was made of the exact mechanism of the injury and none of the MITA staff attending with Mr Jdid were able to provide those details.

126. Mr Jdid complains that he continues to experience issues associated with his fractured collarbone. Although the alleged use of force on 19 August 2019 is not the subject of this inquiry, I find that the use of force and handcuffs on 9 December 2019, only 4 months later, likely aggravated the pain to Mr Jdid's left shoulder. I have not been provided with sufficient evidence to show that Mr Jdid's ongoing issues were caused by the use of force incident on 9 December 2019.
127. Overall, I find that the techniques used to restrain Mr Jdid may have been disproportionate and not properly executed so as to prevent injury. Further de-escalation techniques should have been used before resorting to force.
128. I find that the use of force may be regarded as inconsistent with and contrary to Mr Jdid's right under article 10 of the ICCPR to be treated with humanity and with respect for his inherent dignity.

7.4 Use of High Care Accommodation

129. I find that the use of HCA was reasonable, necessary and proportionate to allow Mr Jdid a period of time to calm down and ensure his safety in a heightened emotional state, particularly in light of his physical injuries. The

Department describes the use of force incident as 'major' and alleges that Mr Jdid assaulted an ERT officer by kicking him in the groin/leg area, although I note this is not captured in the footage provided by the Department. Mr Jdid's 'current risk information' also sets out prior incidents of concern while in immigration detention and that he previously had a risk rating of 'HIGH' for self-harm and aggression/violence.

130. I am concerned however about the emphasis in the Department and IHMS records on Mr Jdid's failure to take responsibility himself for the use of force incident as a reason to extend his time in HCA by another 24 hours. Despite specifically noting Mr Jdid as not being abusive or aggressive, Serco and IHMS records describe him as 'refusing to accept the chain of events leading to his Shaw admission', and that he 'seems to be in denial in relation to his behaviour' and is 'very vocal about his perception of how he is being treated'. In my preliminary view, I expressed concern that the extension may have been used as a means to punish Mr Jdid for his negative attitude regarding the use of force incident, rather than being based on a more detailed risk assessment of harm to himself and others.

131. In its response to my preliminary view, the Department stated that it:

... further wishes to clarify that it does not employ the use of solitary confinement in immigration detention. Closer supervision and engagement refers to the close control and intensive approach in the management of high-risk detainees, irrespective of placement location or arrangement. It is applied while maintaining the respect for, and the dignity of, the detainee within a safe and secure environment. ... The Department rejects the Commission's view that Mr Jdid's placement in Shaw Compound under closer supervision and engagement arrangements was used "as a means to punish Mr Jdid for his negative attitude regarding the use of force incident, rather than being based on a more detailed risk assessment of harm to himself or others" as evidenced by the decision record and supporting documentation previously provided to the Commission.

132. I accept the Department's use of HCA as a way in which to closer supervise high-risk detainees, however this does not prevent an inquiry into a complaint alleging that the placement in and conditions of HCA have the effect of 'solitary confinement' in restricting the movement of and access to activities or services by detainees. Solitary confinement should only be used as a last resort and for as short a time as possible.

133. In his response to my preliminary view, Mr Jdid provided further medical records highlighting his mental health issues. These record multiple presentations at the emergency department of Northern Hospital during 2019, including for a 'pseudoseizure' after witnessing the collapse of his

room-mate at MITA who subsequently died from a cardiac arrest, for 'visual and auditory hallucinations', a reported 2 year history of headaches and increased stress and safety concerns at MITA. An IHMS clinical record on 19 July 2019 also describes Mr Jdid as an 'Extremely distressed young man - Severe shock at the recent passing of co -detainee. Manifesting in physical stress and pain to his body' and describes his mental state as 'fragile'. I note that in recommending an extension of Mr Jdid's placement in HCA for a further 24 hours, IHMS referred to the need to ensure his own safety.

134. It appears that Mr Jdid was not placed in HCA in the conditions he alleges for the entire 48 hours. IHMS clinical records show he was seen by the primary health nurse and GP on 9 December 2019 after the use of force incident and again the next day, by the primary health nurse and the mental health nurse. As stated, on 10 December 2019, he also attended an external medical appointment. Bodycam footage and CCTV footage shows he had access to his mobile phone and was observed to be eating, drinking and watching TV in the Shaw day room. I note that the threshold for establishing 'cruel, inhuman or degrading treatment', within the meaning of article 7 of the ICCPR, is higher than a breach of article 10(1).
135. I find Mr Jdid's placement in HCA for approximately 48 hours is insufficient to amount to a breach of article 7 of the ICCPR.

8 Recommendations

136. As a result of this inquiry, I find that the decision of the Department to use force on Mr Jdid was inconsistent with or contrary to his rights under article 10 of the ICCPR to be treated with humanity and with respect for his inherent dignity.
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.³²
138. The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.³³ The Commission may also recommend the payment of compensation to, or in respect of, a person who has suffered loss or damage and the taking of other action to remedy or reduce the loss or damage suffered by a person.³⁴

139. I make the following recommendations:

Recommendation 1

The Commonwealth pay to Mr Jdid an appropriate amount of compensation to reflect the loss and damage he suffered as a result of the breach of his human rights identified by this inquiry, being the pain and suffering he experienced as a result of the use of force against him.

Recommendation 2

The Department and Serco ensure that officers who may be required to use force in their roles be appropriately and periodically trained on how to select and properly deploy use of force techniques, so as to avoid harm to the person against who force is used.

Recommendation 3

The Department and Serco ensure that officers who may be required to use force in their roles be appropriately and periodically trained on communication, negotiation and conflict de-escalation strategies as alternatives to the use of force.

9 The Department's response to my findings and recommendations

140. On 13 November 2023, I provided the Department with a notice of my findings and recommendations.

141. On 18 January 2024, the Department provided the following response to my 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 acknowledges the Commission's findings and recommendations in respect of the use of force against Mr Jdid on 9 December 2019.

Recommendation 1 -Disagree

The Commonwealth pay to Mr Jdid an appropriate amount of compensation to reflect the loss and damage he suffered as a result of the breach of his human rights identified by this inquiry, being the pain and suffering he experienced as a result of the use of force against him.

The Commonwealth can only pay compensation to settle a monetary claim against the Department if there is a meaningful prospect of legal liability within the meaning of the Legal Services Directions 2017 and it would be within legal principle and practice to resolve this matter on those terms. Based on the current evidence, the Department's position is that it is not appropriate to pay compensation in this instance.

Recommendation 2

The Department and Serco ensure that officers who may be required to use force in their roles be appropriately and periodically trained on how to select and properly deploy use of force techniques, so as to avoid harm to the person against who force is used.

Recommendation 3

The Department and Serco ensure that officers who may be required to use force in their roles be appropriately and periodically trained on communication, negotiation and conflict de-escalation strategies as alternatives to the use of force.

The Department **accepts and is already addressing recommendations 2 and 3.**

The Department contracts the provision of garrison, facilities management, security, transport and escort and detainee welfare and engagement services to the Facilities and Detainee Service Provider (FDSP). FDSP officers hold and maintain a security accreditation provided by a registered training organisation and are trained in maintaining the safety and security of detainees, staff and visitors and the immigration detention facility.

All FDSP officers in detainee facing roles undertake a mandatory Initial Training Course (ITC) on commencement of their employment with the FDSP. The ITC covers all aspects of use of force utilising theory sessions and practical application of use of force techniques. Following the ITC, officers complete annual Ongoing Security Training. This training ensures that FDSP officers understand that use of force and/or restraint should be proportionate to the situation, objectively justifiable and only used as a measure of last resort. The current training package encompasses communication, negotiation and conflict de-escalation strategies which is assessed annually.

All officers working in the Immigration Detention Network must abide by a code of conduct. Allegations of staff misconduct are investigated and any cases that may involve criminal, corrupt and/or serious misconduct are referred to Police, or to the Department's Integrity and Professional Standards.

142. I report accordingly to the Attorney-General.

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

Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

February 2024

Endnotes

- ¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) articles 7 and 10.
- ² See the definition of 'human rights' in s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth).
- ³ See *Secretary of the Department of Defence v Human Rights and Equal Opportunity Commission, Burgess & Ors* (1997) 78 FCR 208.
- ⁴ UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (10 April 1992) 1 [3].
- ⁵ UN Human Rights Committee, *Views: Communication No. 529/1993*, 60th sess, UN Doc CCPR/C/60/D/639/1995 (19 August 1997) (*Walker and Richards v Jamaica*); UN Human Rights Committee, *Views: Communication No 845/1998*, 74th sess, UN Doc CCPR/C/74/D/845/1998 (*Kennedy v Trinidad and Tobago*); UN Human Rights Committee, *Views: Communication No 684/1996*, 57th sess, UN Doc CCPR/C/74/D/684/1996 (*R.S. v Trinidad and Tobago*).
- ⁶ [2007] NZSC 70.
- ⁷ [2007] NZSC 70, [79]. This decision considered provisions of the New Zealand Bill of Rights which are worded in identical terms to articles 10(1) and 7(1) of the ICCPR.
- ⁸ United Nations Office on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) (*The Nelson Mandela Rules*).
- ⁹ The Body of Principles were adopted by the UN General Assembly in *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 6th Comm, 43rd sess, 76th plen mtg, Agenda Item 138, UN Doc A/43/49 (9 December 1988) Annex.
- ¹⁰ UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (10 April 1992) [5].
- ¹¹ UN Human Rights Committee, *Views: Communication No. 458/1991*, 51st sess, UN Doc CCPR/C/51/458/1991 (21 July 1994) 11 [9.3] (*Mukong v Cameroon*); UN Human Rights Committee, *Views: Communication No. 632/1995*, 60th sess, UN Doc CCPR/C/60/D/632/1995 (18 August 1997) 6 [6.3] (*Potter v New Zealand*). See also, UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United States of America*, UN GAOR, 50th sess, Supp No 40, UN Doc A/50/40 (3 October 1995) 55 [285], 57 [299].
- ¹² UN Human Rights Committee, *Views: Communication No. 868/1999*, 79th sess, UN Doc CCPR/C/79/D/868/1999 (30 October 2003) 12 [7.3] (*Wilson v Philippines*).
- ¹³ UN Human Rights Committee, *Views: Communication No. 1020/2001*, 78th sess, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003) at 15 [7.2] (*Cabal and Bertran v Australia*).
- ¹⁴ Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHR 130. Available at: <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>.
- ¹⁵ Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHR 130, p 28.
- ¹⁶ Immigration Detention Facilities and Detainee Services Contract between the Commonwealth and Serco, 10 December 2014, Sch 2 (Statement of Work), Section 4 (Security Services) clause 3.8.

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- ¹⁷ Immigration Detention Facilities and Detainee Services Contract between the Commonwealth and Serco, 10 December 2014, Sch 2 (Statement of Work), Section 4 (Security Services) clause 3.10.
- ¹⁸ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [4].
- ¹⁹ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [5].
- ²⁰ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [5].
- ²¹ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [7].
- ²² Department of Immigration and Border Protection, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [4].
- ²³ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [5].
- ²⁴ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [5].
- ²⁵ Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHR 130, p 32.
- ²⁶ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [7].
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- ³⁰ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 2.6 – Detainee placement – Closer supervision and engagement of high-risk detainees (High care accommodation)* (31 July 2018) [10].
- ³¹ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 2.6 – Detainee placement – Closer supervision and engagement of high-risk detainees (High care accommodation)* (31 July 2018) [6].
- ³² *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- ³³ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- ³⁴ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).