Australian Human Rights Commission

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

[2023] AusHRC 150

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Report into arbitrary detention and a safe place of detention

Australian Human Rights Commission 2023

Australian Human Rights Commission

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Australian Human Rights Commission

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 EK, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr EK complains that the Department breached his human rights by detaining him arbitrarily, failing to provide him with a safe place of detention, and using excessive force when transferring him between detention centres, and to medical appointments, in contravention of articles 9(1) and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the following acts of the Commonwealth are inconsistent with, or contrary to, articles 9(1) and 10(1) of the ICCPR:

- the Department's decision to place Mr EK in the highest-security detention facility in Australia failed to provide Mr EK with a safe place of detention, contrary to article 10 of the ICCPR. Mr EK was placed in North West Point Immigration Detention Centre with three detainees who were known to have previous serious convictions for violence and in at least one case a history of assaulting other detainees, and who eventually assaulted Mr EK on 19 January 2017.

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- the failure to use force as a last resort and the disproportionate use of force on Mr EK on 29 January 2017 were inconsistent with Mr EK's right to be treated with humanity and with respect for his inherent dignity, contrary to article 10 of the ICCPR.
- Mr EK's detention, from at least February 2017, was arbitrary, contrary to article 9 of the ICCPR. A referral to the Minister for less restrictive alternatives to detention should have been made earlier and at least by February 2017, having regard to the length of his detention, his medical needs following the serious assault on him and the continuing trauma he experienced being in detention following the assault. In making this finding, it should not be inferred that his detention up to that point was appropriate.

Pursuant to s 29(2)(b) of the AHRC Act, I have included seven recommendations to the Department in this report.

On 4 May 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 4 August 2023. The Department accepted five of the seven recommendations either in whole or in part. The Department's full response can be found in Part 6 of this report.

I enclose a copy of my report.

Yours sincerely

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

September 2023

1. Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) is conducting an inquiry into a complaint made by Mr EK against the Commonwealth of Australia, specifically the Department of Home Affairs (Department). Mr EK alleges that the Department breached his human rights by detaining him arbitrarily, failing to provide him with a safe place of detention, and using excessive force when transferring him between detention centres, and to medical appointments.

2. It is the function of the Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right, pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). This document comprises a report of my findings in relation to this inquiry and my recommendations to the Commonwealth.

3. Mr EK is a refugee. He is a national of Afghanistan of Hazara ethnicity who arrived alone in Australia on 7 October 2011 as a teenager and sought asylum. Almost 10 years later, on 21 August 2021, he was eventually granted a safe haven enterprise visa (SHEV). During the intervening period, Mr EK spent more than 7 years and 3 months in immigration detention. He was detained from the date he arrived in Australia for just over 7 months until 11 May 2012. He was then detained for 6 years and 8 months between 14 June 2013 and 13 February 2020.

4. When he first arrived in Australia he told the Department that he was 17 years old but was treated by the Department as an adult, apparently on the basis of now discredited age verification techniques. He was held at Villawood Immigration Detention Centre (VIDC) in Sydney with adult male detainees.

5. A number of years later, on 19 January 2017, Mr EK was seriously assaulted by other detainees while he was detained on Christmas Island in a facility for high risk detainees. The District Court of Western Australia later described the assault as a vicious beating. The assault resulted in significant and lasting injuries including a fractured eye socket, tinnitus, permanent loss of some hearing, head pain and double vision. The offenders were prosecuted and Mr EK received some statutory compensation from the Western Australian Government as the victim of a criminal attack. For the reasons described in this report, I find that the risk assessment relied upon to place Mr EK into this environment was flawed. In particular, I am not satisfied that there was sufficient evidence to support the view by the Department that Mr EK had a 'high risk' criminal record or one that demonstrated a 'propensity for violence'. I find that the Department knew that this was a dangerous

environment and that the defects in the risk assessment process meant that his placement amounted to a breach of his right to be treated with humanity and with respect for his inherent dignity under article 10 of the *International Covenant on Civil and Political Rights* (ICCPR).

6. Following the attack, Mr EK was transferred back to mainland Australia to receive treatment at Perth Royal Hospital. After an initial consultation, he was discharged with an appointment to return for surgery on his face in five days time. He was taken initially to Perth Immigration Detention Centre (IDC) and was told that he would be transferred to Yongah Hill IDC. Mr EK expressed concern for his safety at Yongah Hill IDC and said that he did not agree to be transferred there.

7. The Department used force to transfer Mr EK to Yongah Hill IDC. I find that force was used too readily and to an extent that was unreasonable in the circumstances. This included an officer kicking Mr EK in the back of the leg in an attempt to bring him to the ground when initial attempts at force were resisted by him. It also included another officer grappling with Mr EK's head in circumstances where he was recovering from a fractured eye socket that required surgery. I find that the failure to use force as a last resort, and the disproportionate use of force on him were contrary to Mr EK's right to be treated with humanity and with respect for his inherent dignity under article 10 of the ICCPR.

8. Mr EK's detention was reviewed on a regular basis. However, during his second period of detention the Department repeatedly formed the view that his circumstances were not sufficient to justify a referral to the Minister to consider less restrictive forms of detention. The Department decided against referrals to the Minister in March 2014, June 2017 and August 2018. It was not until February 2019, after Mr EK had been continuously detained for more than 5 and a half years, that his case was eventually referred for ministerial consideration along with 87 other long term detainees. On that occasion, the relevant Assistant Minister declined to intervene to grant Mr EK a visa. His case was reviewed again in October 2019 and eventually a decision was made by an Assistant Minister on 13 February 2020 to grant him a visa and release him from immigration detention. I find that Mr EK's case should have been referred much earlier for ministerial consideration, at least by February 2017 following the serious assault on him, and the failure to do so resulted in his detention being arbitrary, contrary to article 9 of the ICCPR.

9. Section 5 of this report sets out the recommendations that I make as a result of this inquiry.

10. Given that Mr EK has been recognised as a refugee and granted a SHEV, I have made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

2. Background

11. Mr EK arrived in Australia on 7 October 2011 on a flight from Austria. On arrival, he said that he was 17 years old and claimed protection as a refugee. He had travelled to Australia on a false passport and told immigration officials that he had destroyed the passport on the advice of an agent. He did not have any other identity documents to prove his identity or his age.

12. Mr EK was denied immigration clearance and was detained under s 189(1) of the *Migration Act 1958* (Cth) (Migration Act). Initially, because he said that he was a minor, he was placed in Sydney Immigration Residential Housing (SIRH), a low security facility adjacent to VIDC that was used to detain families with children, unaccompanied minors and people with particular vulnerabilities.[1]

13. On 24 October 2011, the Department conducted an Age Determination Assessment which concluded that Mr EK was over the age of 18. At that time, the Department relied on x-rays of a young person's wrist to assess whether the person was over 18 years of age. The Commission first raised concerns with the Attorney-General's Department about this age verification technique on 17 February 2011, more than 8 months before it was apparently used on Mr EK. In late 2011, Commonwealth agencies stopped relying on wrist x-ray analysis when there was no other probative evidence of age.[2] This practice was discussed in a 2012 report by the Commission called *An age of uncertainty* which found that by that stage it was 'beyond question that wrist x-ray analysis has been discredited as a means of assessing whether an individual is an adult'.[3]

14. Following the Age Determination Assessment, Mr EK's date of birth was recorded in Departmental records as 31 December 1992, which would have made him 18 years and 10 months. The practice of allocating dates of birth using the first or last day of the year was discussed in the *Age of uncertainty* report.[4] On the basis of this assessment, Mr EK was placed in VIDC with adult male detainees. I am not in a position to make findings about whether Mr EK was in fact 18 years old when he first arrived in Australia, but it is concerning that in the face of his claims to be a minor he was treated as an adult and placed with adult detainees apparently on

the basis of a now discredited assessment process and in the absence of any other evidence that he was an adult.

15. On 24 October 2011, Mr EK applied for a protection visa. On 11 May 2012 he was granted a bridging visa E and released from immigration detention.

16. Mr EK's application for a protection visa was refused on 3 January 2012 and several unsuccessful reviews followed. On 14 June 2013 the Minister decided not to grant Mr EK a further bridging visa E and he was detained at VIDC.

17. On 14 April 2014, Mr EK was transferred to Yongah Hill IDC and on 21 September 2016 he was transferred to North West Point IDC on Christmas Island. After the alleged assault Mr EK was transferred back to Yongah Hill IDC on 29 January 2017, and then Perth IDC on 16 March 2017.

18. In September 2018, the District Court of Western Australia issued a violence restraining order in favour of Mr EK against one of the offenders who assaulted him. According to a report by the Department to the Commonwealth Ombudsman, on 24 October 2018 Mr EK was transferred back to VIDC in Sydney as a result of this violence restraining order being made.

19. On 6 February 2020 the Minister lifted the bar under s 48B of the Migration Act and permitted Mr EK to make a second application for a protection visa. By this stage, Mr EK had been in immigration detention for a cumulative period of more than 7 years. On 13 February 2020, Mr EK was released from immigration detention on a bridging visa. On 21 August 2021, Mr EK was granted a SHEV.

3. Legal framework

3.1 Functions of the Commission

20. 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.

21. 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.

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

23. The rights and freedoms recognised by the ICCPR are 'human rights' within the meaning of the AHRC Act.[5]

3.2 Scope of 'act' and 'practice'

24. 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.

25. 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.

26. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or those acting on its behalf.[6]

3.3 Arbitrary detention

27. 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.

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

    (a) 'detention' includes immigration detention;[7]

    (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system;[8]

    (c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;[9] and

(d) detention should not continue beyond the period for which a State party can provide appropriate justification.[10]

29. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee found detention for a period of 2 months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.[11] Similarly, the Human Rights Committee considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was 'considerably in excess of what is necessary'.[12]

30. The Human Rights Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.[13]

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

> Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[14]

32. Under international law, the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, continuing immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth of Australia) in order to avoid being 'arbitrary'.[15]

33. It will be necessary to consider whether the detention of Mr EK in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system, and therefore 'arbitrary' under article 9 of the ICCPR.

3.4 Safe place of detention and use of force

34. Australia has obligations under articles 9(1) and 10(1) of the ICCPR, respectively, to uphold the right to security of person, and to ensure that people in detention are treated with humanity and respect for the inherent dignity of the human person.

35. The right to security of person protects individuals against intentional infliction of bodily or mental injury, including where the victim is detained.[16] The right to personal security also obliges States parties to take appropriate measures to protect individuals from foreseeable threats to life or bodily integrity from private actors. States parties must take measures to prevent future injury and measures, such as enforcement of criminal laws, in response to past injury.

36. The rights guaranteed in article 10(1) of the ICCPR are afforded to people held in immigration detention centres[17] — both private and State facilities.[18]

37. Article 10(1) imposes a positive obligation on States to ensure that detainees are treated with humanity and respect for their inherent dignity.[19] This is in recognition of the fact that detained persons are particularly vulnerable because they are wholly reliant on a relevant authority to provide for their basic needs.[20] In this case, the relevant authority is the Commonwealth of Australia through the Department and the service providers who act on its behalf.

38. These international law commitments require Australia to ensure that people in immigration detention are treated fairly and reasonably, and in a manner that upholds their dignity.

39. Related obligations are recognised by the common law of Australia and through the common law duty of care that the Department and its service providers owe to people in immigration detention, and contractual obligations imposed by the Department on its service providers.

40. General Comment No 21 of the Human Rights Committee sets out the content of the obligation in article 10(1) of the ICCPR, stating:

> 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. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.[21]

41. Professor Manfred Nowak has commented on the threshold for establishing a breach of article 10(1), when compared to the related prohibition against 'cruel, inhuman or degrading treatment' in article 7 of the ICCPR, as follows:

> In contrast to article 7, article 10 relates only to the treatment of persons who have been deprived of their liberty. Whereas article 7 primarily is directed at specific, usually violent attacks on personal integrity, article 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention. As a result, article 10 primarily imposes on States parties a positive obligation to ensure human dignity. Regardless of economic difficulties, the State must establish a minimum standard for humane conditions of detention (requirement of humane treatment). In other words, it must provide detainees and prisoners with a minimum of services to satisfy their basic needs and human rights (food, clothing, medical care, sanitary facilities, education, work, recreation, communication, light, opportunity to move about, privacy, etc). … Finally it is again stressed that the requirement of humane treatment pursuant to article 10 goes beyond the mere prohibition of inhuman treatment under article 7 with regard to the extent of the necessary 'respect for the inherent dignity of the human person'.[22]

42. These conclusions are also evident in the jurisprudence of the Human Rights Committee, which discusses the positive obligation on relevant authorities to treat detainees with humanity and respect for their dignity.[23]

43. Professors Sarah Joseph and Melissa Castan recognise that article 10(1) obliges State Parties to provide protection for detainees from other detainees.[24] In reaching that conclusion, the authors cited comments made by the Human Rights Committee in its 'Concluding Observations on Croatia' when it stated that the 'Committee is concerned at reports about abuse of prisoners by fellow prisoners and regrets that

it was not provided with information by the State party on these reports and on the steps taken by the State party to ensure full compliance with article 10 of the [ICCPR]'.[25]

44. 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,[26] including:

    - the *Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules),[27] and
    - the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).[28]

45. In 2015, the Mandela Rules were adopted by the United Nations. They provide a restatement of a number of United Nations instruments that set out the standards and norms for the treatment of prisoners, and represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.[29]

46. The Human Rights Committee invites State Parties to indicate in their periodic reviews the extent to which they are applying the Mandela Rules and the Body of Principles.[30] At least some of those principles have been determined to be minimum standards regarding the conditions of detention that must be observed, regardless of a State's level of development.[31]

47. Several of the Mandela Rules are relevant to the safety of detainees in respect of the behaviour of other detainees, and the general security and good order of detention facilities, including the following:

> Rule 1: All prisoners shall be treated with the respect due to their inherent dignity and value as human beings … the safety and security of prisoners … and visitors shall be ensured at all times.
>
> Rule 2: … prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings.
>
> Rule 12: … Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the prison.
>
> Rule 36: Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well ordered community life.

48. Other rules are relevant to the use of force on detainees by detaining officers. Rule 54(1) of the Mandela Rules provides:

> Officers of the institutions 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. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

49. 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.

50. Rule 94 requires that civil prisoners 'shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order'.

51. From the above, the following conclusions may be drawn:

- article 10(1) of the ICCPR imposes a positive obligation on State parties to take action to ensure that detained persons are treated with humanity and dignity;
- the threshold for establishing a breach of article 10(1) of the ICCPR is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR, which is a negative obligation to refrain from such treatment;
- article 10(1) of the ICCPR may be breached if a detainee's rights, protected by one of the other articles of the ICCPR, are breached—unless that breach is necessitated by the deprivation of liberty;
- minimum standards of humane treatment must be observed in detention conditions, including immigration detention; and
- article 10(1) of the ICCPR requires that detainees and prisoners are provided with a minimum of services to satisfy their basic needs.

52. Consistent with past Commission inquiries,[32] I consider that detainees in immigration detention have a basic need for their safety and security to be protected while in detention. Australia must ensure that immigration detainees have this basic need met in order to fulfil the obligations imposed on it by article 10(1) of the ICCPR to treat detainees with humanity and respect for the inherent dignity of the human person.

3.5 Contractual obligations of service provider

53. The Department's Immigration Detention Facilities and Detainee Services Contract with Serco (Contract) in effect during Mr EK's detention recognises the duty of care owed to detainees and requires that Serco complies with a Code of Conduct.[33] The Code of Conduct requires Serco to carry out its duties with care and diligence, maintain a safe working environment and 'be alert for Detainees who are or appear to be, traumatised and/or vulnerable to self-harm and by the actions of others, and manage and report on these'.[34]

54. The Contract enumerates several obligations on Serco which are relevant to ensuring the safety of detainees. Under the Contract, Serco is required to:

    - provide and maintain a safe and secure environment for detainees,[35] which also supports their individual health and safety needs[36]
    - in exercising its responsibility to allocate accommodation:
        - take into consideration the individual welfare, cultural, family and security related needs and circumstances of the detainee and requests of the detainee[37]
        - participate in reviews and notify the Department where it believes that an existing placement is inappropriate for a detainee, including where it believes the Detainee should be moved within the existing Facility or should be transferred to another Facility[38]
    - 'immediately report to the Department any concerns that it may have regarding a Detainee's safety and security'[39]
    - establish processes to:
        - promote the welfare of Detainees and create a safe and secure environment at each Facility[40]
        - prevent detainees being subjected to illegal, anti-social or disruptive behaviour by detecting and managing those behaviours in other detainees[41]
        - manage and defuse tensions and conflicts before they become serious or violent[42]
        - identify if a detainee is emotionally distressed or at risk of self-harm or harm to others, ensuring the system accounts for advice from the

Detention Health Services Provider and includes risk identification and mitigation strategies[43]

- in responding to incidents,
  - ensure the safety and welfare of detainees and others at the facility[44]
  - 'immediately inform the Department of any Incidents it believes may have a significant adverse impact on the welfare of any person, or the security and safety of the Facility'[45]
- upon identification or suspicion of a detainee having engaged in behaviour that is illegal, breaches detainee rights or is anti-social, including bullying, harassment, and assault, immediately notify the Department with recommendations for dealing with the perpetrator and preventing any recurrence[46]
- 'ensure that Detainees identified as victims of anti-social behaviour are supported by Service Provider Personnel'.[47]

55. The Department has also issued a Detention Services Manual dealing with the use of force. The manual is a procedural instruction that gives policy and procedural guidance to Australian Border Force and Serco officers on the use of force in immigration detention facilities (IDFs). The following principles, taken from the manual, are consistent with the Commonwealth's human rights obligations in relation to the use of force on detainees in their care:

- there is a presumption against the use of force, including restraints, during movements within an IDF, transfers between IDFs, and during transport and escort activities outside of IDFs
- conflict resolution through negotiation and de-escalation, where practicable, must be considered before the UoF and/or restraint is used
- UoF and/or restraint should only be used as a last resort
- the amount of force used and the application of restraints must be reasonable.[48]

[emphasis in original]

4. Findings

4.1 Placement in high risk security facility and assault on 19 January 2017

56. During his second period of detention, Mr EK was detained on the Australian mainland for three years and three months, from 14 June 2013 until 21 September 2016. He was then transferred to North West Point IDC on Christmas Island. On 19 January 2017, around four months after being transferred to Christmas Island, Mr EK was violently assaulted by three other detainees.

57. The Department states that Mr EK's placement on Christmas Island was considered appropriate due to his 'propensity for violence and subsequent high-risk placement rating'. I consider below whether these conclusions about Mr EK were well-founded based on evidence provided by the Department.

58. The Department says that when considering the overall risk rating for a detainee, Serco considers a number of factors. It says: '[t]he collection of intelligence is completed utilising numerous avenues and analysed to compare collected information against known intelligence on a detainee. The intelligence is then disseminated and a qualitative assessment of the detainee's information is provided for the purpose of the SRAT [Security Risk Assessment Tool]'.

59. In 2019, the Commission produced a report titled *Risk management in immigration detention*, based on its inspections of immigration detention centres in 2017 and 2018.[49] During the course of those inspections, the Commission identified a number of trends that adversely impacted the effectiveness and accuracy of the then risk assessment process. These trends included the following:

    - *The risk assessment process appeared to be disproportionately influenced by a person's offending history.* Information provided to the Commission by facility staff and people in detention suggested that a person who has committed a crime would generally be considered 'high risk', even if the crime was relatively minor and/or non-violent, or was committed some time ago. In addition, criminal history did not appear to be sufficiently balanced against potential mitigating factors, such as lack of reoffending or genuine efforts at rehabilitation.

- *The risk assessment process may not adequately take into account the severity of relevant incidents.* For example, a number of people interviewed by the Commission indicated that they had been involved in incidents in detention categorised as 'abusive and aggressive behaviour'. This broad category appears to encompass a range of behaviours, from swearing or shouting through to threats of violence. The Commission does not suggest that such behaviour should be condoned. However, the use of broad categories may lead to some individuals who have been involved in incidents on the more minor end of the scale receiving a disproportionately high risk rating.
- *Facility staff conducting risk assessments may not consider or have access to all information relevant to a person's risk profile.* This includes information about good behaviour while in the prison system, or information contained in sentencing remarks and risk assessments conducted for bail or parole decisions.
- *Positive behaviour may not lead to a person's risk rating being downgraded.* Based on discussions with facility staff and people in detention, the Commission understands that a person's offending history and involvement in incidents in detention will continue to be taken into account as part of the risk assessment process, even if the relevant incidents occurred some time ago. A person may therefore continue to be treated as 'high risk' even if their more recent behaviour suggests that they do not pose a significant risk to themselves or others.

60. The Commission has been provided with two risk assessments of Mr EK conducted by Serco using the Security Risk Assessment Tool (SRAT) on 28 December 2016 and 21 November 2018. The Commission considered the SRAT in detail as part of its inquiry into the *Use of force in immigration detention*.[50] I do not repeat that analysis here. One of the key points made in that report was that the quality of the ultimate risk rating calculated by the tool is reliant on the quality of information entered into it. If the information entered is inaccurate, then the risk rating will also be inaccurate.

61. In the 2016 SRAT, Mr EK was categorised as a 'HIGH DSP placement risk' and was given risk ratings of high for 'Aggression/Violence' and 'Criminal profile'. The list of incidents on the 2016 assessment appears incomplete, so I have also had regard to the incidents listed in the 2018 SRAT when reviewing the risk assessment allocated to him. In each SRAT, some information has been redacted under Intelligence Comments and Additional Comments.

62. In terms of Mr EK's criminal profile, I have had regard to a criminal history check obtained by the Department from the Australian Criminal Intelligence Commission in relation to the time spent by him in the Australian community. I have also had regard to information in ministerial submissions about Mr EK prepared by the Department and in reports by the Department to the Commonwealth Ombudsman dealing with the period spent by him in Austria as a teenager before coming to Australia.

63. Mr EK has no criminal record in Australia. He was in the community for just over a year between 11 May 2012 and 14 June 2013. On 18 June 2013 Mr EK appeared at Burwood Local Court after being charged with a non-violent offence, but that charge was dismissed.

64. It appears that the conclusions drawn about Mr EK's 'criminal profile' are based on information received by the Department from Austrian authorities in relation to the time that he spent in Austria prior to arriving in Australia. While in Austria, he would have been in his mid to late teens. The Department's records of what it was told by Austrian authorities are vague, confusing and contradictory. For the reasons described below, I am not satisfied that they provide a proper basis for concluding that Mr EK had been convicted of any offence. There is certainly no evidence that he has ever been convicted of an offence involving violence. I am also concerned by the Department's responses to my requests for clarification about Mr EK's criminal record.

65. According to these records, Austrian authorities told the Department that they had matched Mr EK's fingerprints to the fingerprints of a person with a different name in Austria. I am not in a position to assess the veracity of this analysis. The strongest claims about the criminal record of this person in any of the documents that the Commission has been provided are set out in a ministerial submission prepared by the Department in June 2013. Those claims were in the following form:

> On 4 May 2012 the Department received confirmation from the Austrian authorities that [Mr X] was fingerprinted in Austria for the first time on 6 December 2006 and was fingerprinted several times afterwards as an illegal alien and after drug offences and burglar crimes. He was convicted after theft in January 2010 and after drug offences in May 2010 in Austria. There is an existing search request for detection of his whereabouts because of running criminal procedures after bodily injury, dangerous threat and document forgery, issued by Prosecution Vienna.

66. However, a later International Treaties Obligations Assessment (ITOA) conducted by the Department on 2 September 2015 cast doubt on whether Mr EK had actually been convicted of any offences. It set out in some more detail the advice received from Austrian authorities including quoting directly from this advice:

> The department obtained the claimant's consent and fingerprints and initiated an Effective Protection Check on him. A response from the Austrian Criminal Intelligence Service, dated 4 May 2012, in relation to the Effective Protection Check revealed the following:
>
> - The fingerprints provided matched the records of a person on their database in the identity of [Mr X], an Afghan national whose place of birth was … and whose parents' first names were … .
> - Their records also indicated the following aliases for the above mentioned person … .
> - The identity of the above mentioned person has not been confirmed by them.
> - [Mr X] was fingerprinted in Austria for the first time on 6 December 2006, when he applied for asylum. After this, he was fingerprinted several times as 'illegal alien' and 'after crimes (drug offences and burglar case)' under different alias identities.
> - [Mr X] is wanted in Austria for theft committed in January 2010, for drug offences committed in May 2010 and for other criminal offences involving bodily injury, dangerous threat and document forgery. A 'national search request for detection of his whereabouts' has been issued by the local criminal court and by Prosecution Vienna.
> - [Mr X] presently has no permission to remain in Austria.

67. Significantly, this summary differs from the previous summary in that it does not say that Mr X was convicted of theft in January 2010 or of drug offences in May 2010. Instead, it appears to say that Mr X was wanted in connection with alleged offences said to have been committed at those times.

68. An internal departmental document dated 20 June 2017 says that on 9 January 2017 the Department requested further details of Mr EK's alleged offences, presumably from the Austrian authorities. The Department has redacted the advice that it received, but in a summary later in the same document it says: 'Mr EK is alleged to have committed a number of offences over a 23 month period in Austria, however

he is not the subject of an alert or extradition request regarding these matters'. There is no record in the summary that he was convicted of any offences in Austria.

69. The most recent statement of Mr EK's criminal record in the documents provided by the Department is in a ministerial submission prepared in August 2019:

> [Mr EK] … arrived in Australia on 7 October 2011 as an unauthorised air arrival on a fraudulent passport. A fingerprint check matched him with an alias of [Mr X] who was first finger printed in Austria on 6 December 2006 as an asylum seeker. Austrian authorities advised that he was finger printed several times following this as an illegal alien and for crimes (drug offences and a burglary case) under different aliases. He is also connected with a theft case from January 2010 and further drug offences in May 2010. There is a warrant for his arrest in Austria relating to bodily injury, dangerous threat and document forgery and he has no permission to stay in Austria. **[Mr EK] has not as yet been tried or convicted of any of these crimes**. At the time these offences were committed, [Mr EK] was a minor.
>
> [emphasis added]

70. The Commission sought to clarify these matters with the Department. In February 2022, the Commission asked the Department to provide details of Mr EK's criminal antecedents, including any documentation of criminal convictions. More than 8 months later, the Department provided the following response:

> During an identity verification process, the Department sought advice from Austrian authorities for the period that [Mr EK] resided in Austria. In response, they advised that [Mr EK], as a minor, was fingerprinted a number of times as an illegal alien for crimes under different identities. It was also advised that [Mr EK] is wanted by the Austrian authorities for criminal charges relating to theft, injury, threats and document fraud. Austrian authorities advised that [Mr EK] is wanted in relation to these offences on a trace/locate basis at national level and is not the subject of an extradition request.

71. No documents were provided in response to this request other than Mr EK's Australian Crim Trac record confirming that he had no convictions in Australia. The Department did not provide the Commission with copies of any of the advice it had received from Austrian authorities. The response from the Department set out above is unsatisfactory, particularly given the period of time it took for it to be provided which included a review by legal officers in the Department. The response indicates that Mr EK had his fingerprints taken, but does not confirm: (a) that he was in fact convicted of any offence, or (b) if so, the nature and seriousness of any offence.

72. Taking all of the above information at its highest, there is no evidence that Mr EK has ever been convicted of an offence of violence. The information provided by Austrian authorities (as summarised in the ITOA) gives no indication of the degree of seriousness of any of the allegations made against him. I am not satisfied that the 2013 departmental submission was accurate in suggesting that Mr EK had convictions recorded in January 2010 and May 2010. However, even if this were the case, it would tend to suggest that any offending was at the lower end of the scale of seriousness and attracted either no custodial sentence or a short one, because by October 2011 he was already in Australia. It appears that he is suspected of involvement in other offences which may have involved violence, but his role in those alleged offences and their degree of seriousness is unstated. As the Department made clear in its 2019 ministerial submission, Mr EK has not been tried or convicted of any of these alleged crimes.

73. I note that if Mr EK's report of his age when he arrived in Australia was correct, the events of January and May 2010 would have occurred when he was 15 and 16 years old. Even if the date of birth allocated to him by the Department were correct, he would only have just turned 18 in January 2010.

74. Based on the above analysis, there is insufficient evidence for me to be satisfied that in 2016 Mr EK had a 'high risk' criminal record or one that demonstrated a 'propensity for violence'.

75. In November 2022, I provided the Department with a written document containing my preliminary views in relation to this inquiry. In response to my preliminary views, the Department acknowledged the concerns I had raised about the appropriateness of relying on information from the Austrian authorities to inform Mr EK's risk assessment. The Department agreed that the information from Austrian authorities in relation to Mr EK's alleged criminal offending 'may not have been sufficient evidence to support the view that [Mr EK] was a "high risk" detainee in 2016'.

76. Nevertheless, the Department said that the information from Austrian authorities was only one of a number of factors used to determine Mr EK's placement in immigration detention. I consider below the information contained in Mr EK's SRAT that dealt with his conduct while in immigration detention.

77. The SRAT reports prepared by Serco indicate that at the time he was transferred to Christmas Island he had been involved in eight incidents described either as 'Abusive/Aggressive Behaviour' or 'Assault – Minor'. By this time, Mr EK had been

in immigration detention for a cumulative period of approximately 3 years and 10 months.

78. Six of the eight incidents were categorised as 'Abusive/Aggressive Behaviour' and it appears that most, if not all, of these related to verbal incidents. The SRAT records the following incidents:

    - "2 x Detainees displayed abusive behaviour towards SERCO staff by yelling, shouting and using profanities"
    - "Detainees became abusive on completion of a room search"
    - "Detainee used foul language towards activities officer"
    - "Detainee was Abusive and Aggressive toward Kitchen staff over Lebanese bread"
    - "Detainee Abusive and aggressive to serco staff member"
    - "Aggressive behaviour to [another detainee] who had informed CSM that he had a sharp object in his hand".

79. As noted above, the Commission has previously expressed concerns about the SRAT category of 'Abusive/Aggressive Behaviour'. The *Use of force in immigration detention* report noted:

> a commonly used category is 'abusive/aggressive behaviour' which encompasses both the use of bad language and conduct that is physically aggressive (but that does not amount to an assault). A count of incidents of this type is used as a data point when calculating a risk rating for 'aggression/violence' where the underlying conduct (eg bad language) may not have any element of physical aggression or violence to it and may be an understandable product of long term immigration detention.[51]

80. In that report, the Commission recommended that incidents of 'abusive' behaviour be separated from incidents of 'aggressive' behaviour, and that incidents of 'abusive' behaviour be removed from the SRAT altogether.[52]

81. At the time he was transferred to Christmas Island, there were only two incidents of alleged physical violence included in Mr EK's SRAT over almost 4 years of detention. Both of these were described as 'Assault – Minor'.

82. The first incident was in 2013. The details of this incident changed through a number of drafts of the incident report. The first version of the incident report in relation to this event described an argument between three clients that escalated

into a fight involving five clients. In the first version, Mr EK was not identified as one of the clients involved in the fight. In the second version of the incident report, the number of clients involved in the fight was reduced from five to four, and Mr EK was not identified as one of those involved. The third version of the incident report was 'updated' by a client service manager who said that one of the people involved had been misidentified and was actually Mr EK. The report records that none of the people involved reported any injury and there were no visible signs of injury. Given the inconsistencies in reporting of this event, it is difficult to draw any conclusions from it.

83. The only other allegation of violence was three years later in 2016 while Mr EK was detained at Yongah Hill IDC. The incident report describes a complaint by Mr EK to a Detention Service Manager that another detainee 'had hit him in his room after talking rubbish about the Islamic religion'. It appears from the incident report that Mr EK was trying to remove himself from the situation. The report records that Mr EK was leaving the accommodation compound and heading towards the green heart recreational area. Another detainee reportedly pursued Mr EK and the two of them got into an argument in which punches were thrown by both of them. According to the report, as a result of the fight Mr EK sustained minor abrasions and a slight swelling around his left eyebrow and cheek. The other detainee reportedly had no visible injuries. Both declined medical attention.

84. In between these two incidents, in 2014 Mr EK was identified as the victim of a minor assault by another detainee.

85. Based on a close examination of the incidents recorded on Mr EK's SRAT, I am not satisfied that the Department's description of Mr EK as a person with a 'propensity for violence' is accurate. As noted above, there is no evidence that he had been convicted of any offences involving violence, and the two incidents described above which occurred over more than 3 years of immigration detention appear insufficient to justify such a strong conclusion. I have formed the view that, in all the circumstances, I am not satisfied that Mr EK was a high risk detainee in 2016 or that the decision to place Mr EK into North West Point IDC on Christmas Island was a reasonable one.

86. North West Point IDC is considered the highest-security detention facility in Australia and is therefore used to detain people who are considered to pose significant risks.

87. In August 2017 the Commission conducted an inspection of North West Point IDC as part of its regular monitoring of immigration detention facilities.[53] At the time of the Commission's inspection, almost all of the people detained there were assessed as posing either a 'high' or 'extreme' risk. More than half of the detainees had had their visas cancelled on character grounds under s 501 of the Migration Act. In the Commission's inspection report the following relevant observations were made:

    - Due to its remoteness, the nature of its security infrastructure, and the limited access to facilities and services on Christmas Island, the [North West Point IDC] is not an appropriate facility for immigration detention, particularly for people who are vulnerable or have been detained for prolonged periods of time.[54]
    - Several people described the atmosphere of the facility as volatile — for example, two people in separate interviews described the atmosphere as one in which 'anything can happen'. Some specifically highlighted the co-location of people seeking asylum with people whose visas had been cancelled on character grounds as a factor affecting their perceptions of safety. At the same time, a number of people indicated that they did feel safe in detention.[55]

88. In the Commission's 2017 report, it made the following comments about the wide range of circumstances of people detained at North West Point IDC that appeared to qualify them as 'high' risk:

> The Commission has previously expressed concern that the risk rating system may not be sufficiently nuanced to prevent unnecessary use of restrictive measures, or ensure the safety of people in detention. This concern was reinforced during the Commission's inspection of [North West Point IDC]. While the Commission appreciates that it does not have access to all information relevant to a person's risk rating, there appeared to be a significant degree of variation in the circumstances of people deemed to present a 'high' risk.
>
> For example, the Commission met with people who had had visas cancelled following conviction for serious violent offences (such as assault and child sex offences), as well as people who have had their visas cancelled following conviction for less serious, non-violent crimes (such as traffic offences and non-violent drug offences). The Commission also met with people who had had their visas cancelled and been detained due to criminal charges, but who had not been convicted of a crime. In some cases, it was reported that the relevant charges had been withdrawn or the person had been acquitted, yet they were still considered to present a 'high' risk.[56]

89. Shortly before 8.30pm on 19 January 2017, Mr EK was assaulted by three other detainees in a dormitory in Blue One compound in North West Point IDC. Blue compound was a 'general accommodation' compound.[57] Common areas in immigration detention facilities are monitored by CCTV, but accommodation areas are not. As a result, there is no CCTV footage that shows the assault but there is CCTV footage showing people entering and leaving the dorm.

90. After the assault, two of the offenders were relocated to different accommodation in the 'support' unit in Red compound. This compound was used for single separation of people who were assessed as presenting a risk to themselves or others.[58] Approval for relocation was provided by an Australian Border Force (ABF) supervisor at 9.00pm and the relocation took place at 10.23pm. A third detainee was transferred to the support unit the following day.

91. Mr EK was seen by a primary health nurse from International Health and Medical Services (IHMS), the body contracted to provide medical services to detainees. The nurse reported that Mr EK presented holding the left side of his face and nose, with blood down the left leg of his pants. Mr EK said that he had been punched several times by two other detainees, with a third detainee present. He did not know their names as they had only arrived at North West Point IDC a week earlier, but he could identify them. His left eye was obviously swollen and red with bruising emerging. His nose was bleeding from both nostrils and appeared to be deviated to the right. He had lacerations to his inner lower lips on the right. He reported a numb sensation to the left side of his face and that he could not breathe through his nose.

92. Mr EK was later seen by a GP around 2.00am who administered morphine intravenously and put Mr EK into a hard collar. Mr EK was transferred to Christmas Island Hospital for cervical spine x-rays before being returned to North West Point IDC.

93. On 28 January 2017, Mr EK was transferred from Christmas Island to Perth to attend Royal Perth Hospital for the purpose of an ophthalmology review and possible CT scan. As a result of the assessment, it was determined that the assault had resulted in a fracture to the bones of Mr EK's face around his left eye. This required a bone graft to repair. He also had a number of related medical issues.

94. The Department describes Mr EK's injuries as a result of the assault on him as follows:

> [Mr EK] was admitted to the Royal Perth Hospital after sustaining a left medial orbital wall fracture secondary to the alleged assault. The injury required an orbital wall

> reconstruction and bone graft, which was complicated by ophthalmoplegia and pain. This required further surgery to shorten the graft and for repositioning. As per the discharge summary from the Royal Perth Hospital, [Mr EK] recovered slowly on the ward and required specialist ophthalmology consultations due to ocular nerve palsies and diplopia.

95. After being discharged, Mr EK had ongoing head pain, tinnitus, double vision and some permanent hearing loss in his left ear. The hearing loss was assessed as likely related to his head injury.

96. In July 2018, IHMS reported that post-operatively Mr EK has experienced complications of nerve palsy and optic nerve damage. He has ongoing complaints of double vision which are thought to be due to his partial nerve palsy.

97. The three detainees involved in the assault on Mr EK had a known history of violence including towards other detainees. They were described in a Serco Post Incident Review into the assault on Mr EK in the following way:

> - [Detainee 1] has demonstrated a willingness not to comply with Australian laws and rules due to criminal history while in the community. … Vigilance should be shown to [name] given his charges, possible links to OMCGs [outlaw motorcycle gangs] and various incidents while in prison ranging from contraband to assault on staff and other prisoners. … SIS Intel assess [name] as HIGH risk for placement and escort purposes.
> - [Detainee 2] has a serious propensity for violence as demonstrated through his criminal history. [Name's] involvement with a youth gang (YMK), criminal history and behaviour in detention indicate that he is unable to adhere to Australian community standards, laws, IDF rules and responsibilities. SIS Intel assess [name] as HIGH risk for placement and escort purposes.
> - [Detainee 3] is a 501 case who has transferred into immigration detention from Dawn de Loas Correctional Centre. … [Name] has criminal antecedents that involve violence and other offence types. [Name] has demonstrated a propensity for violence based on his criminal antecedents.

98. Following a request by Mr EK, the incident was referred to the Australian Federal Police. The three detainees were charged and, on 20 July 2018, two of the defendants were convicted in the District Court of Western Australia of assault occasioning actual bodily harm and the other was convicted of assault occasioning grievous bodily harm. In September 2018, the Court issued a violence restraining order in relation to the offender who was convicted of assault occasioning grievous

bodily harm. The order applied for the rest of the offender's life and prohibited the offender from communicating with Mr EK or approaching within 50 meters of him.

99. Mr EK made an application for criminal injuries compensation and in December 2020 he was awarded the statutory maximum in Western Australia of $75,000.

100. I find that Mr EK was incorrectly assessed as being a high risk detainee and should not have been transferred to North West Point IDC. I find that the Department failed to provide Mr EK with a safe place of detention by inappropriately placing him in the highest-security detention facility in Australia with the three detainees who eventually assaulted him who were known to have previous serious convictions for violence and in at least one case a history of assaulting other detainees. I find that this conduct resulted in a breach of Mr EK's rights under article 10 of the ICCPR to be treated with humanity and with respect for his inherent dignity.

4.2 Use of force on 29 January 2017

101. As noted above, on 28 January 2017, Mr EK was transferred from Christmas Island to Perth to be assessed at Royal Perth Hospital. He was discharged from hospital the following day, with an appointment to return for surgery on his face five days later on 3 February 2017. When he was discharged, he was wearing an eye patch secured with tape to protect the injuries to his eye socket, and sunglasses.

102. In his original complaint to the Commission, Mr EK said: 'The doctor told DIBP [Department of Immigration and Border Protection] that I could remain in hospital until my surgery on 3 February 2017, but DIBP said that I could not'. There is some support for this statement in Mr EK's medical records. An IHMS record for Mr EK dated 29 January 2017 at around 3.20pm states:

> Information received from Serco, that client is being discharged into care of IHMS today. Contacted ward 5H spoke to RN [registered nurse] who stated he was seen [by] Dr this morning, however they were unaware of any discharge. Dr stated he needed surgery to eye, and that will not be until Friday [3 February 2017]. However there was no decision made to discharge until next Friday as yet. Have given RN at RPH [Royal Perth Hospital] fax details to send IHMS discharge summary, and will ring later this afternoon again for further update.

103. Just under two hours later, around 5.00pm, an IHMS record states:

> Received discharge summary from RPH. Client will be discharged into the care of IHMS. Client … for elective surgery on [3 February 2017]. Discharge summary scanned into notes. Informed IHMS via email and informed Serco for request for transport.

104. After being discharged, Mr EK was initially taken to Perth IDC. While at Perth IDC, Mr EK was told that he would be transferred to Yongah Hill IDC. Mr EK did not agree to be transferred to Yongah Hill IDC. As a result, force was used on him in order to effect the transfer.

105. I have reviewed CCTV footage of the use of force and written reports from Serco officers about the incident. For the reasons described in more detail below, I find that force was not used as a last resort, and the degree of force used was disproportionate, in that more force was used than was necessary in the circumstances.

106. The reports by Serco officers in relation to the incident are inconsistent, particularly in describing how the use of force incident commenced. Several officers wrongly state in their reports that the use of force commenced in response to aggressive or violent conduct by Mr EK towards Serco staff. A similar comment was made by the Department in its response to my preliminary view in this inquiry. The Department said that the use of force was 'a reaction to the rapid escalation of behaviour exhibited by [Mr EK]'. Based on a review of the CCTV footage, I find that the use of force commenced *before* the escalation of behaviour by Mr EK.

107. Although inaccurate in some respects, I find that the most reliable report, and the one that best accords with the CCTV footage, is the report of the Facility Operations Manager at Perth IDC who first used force on Mr EK. At the time he was one of two officers in the room with Mr EK when the use of force incident commenced. His report relevantly states:

> I, FOM [name] was rostered on at the Perth Immigration Detention Centre on the 29/01/2017 from 0615-1815. At approximately 1624 hours I informed Detainee [Mr EK] that he was required to be transported to Yongah Hill IDF. Detainee [Mr EK] rejected this advise stating that he would not go compliantly. I informed Detainee [Mr EK] that I would need to apply EEP to his person to escort him to the vehicle. I then proceeded to attempt to use EEP on Detainee [Mr EK] on the right arm, at this point Detainee [Mr EK] hit his head twice against the wall in Dorm 9. Myself and fellow Serco DSO's proceeded to use minimal force to prevent further self harm by detainee or harm to others.
>
> Detainee [Mr EK] attempted to headbutt DSO [name] during the incident before being ground stabilized. Detainee [Mr EK] was then assisted to sit on the bed in Dorm 9 where he became non compliant again and had to be ground stabilized again.
>
> After negotiations Detainee [Mr EK] was again sat on the bed in Dorm 9. Detainee [Mr EK] was offered medical assistance to which he declined. Detainee [Mr EK] was

> asked to walk to the transport vehicle for onwards transport to Yongah Hill IDF, Detainee [Mr EK] continued to be non compliant and made threatening statements towards Serco.
>
> Detainee [Mr EK] was then restrained in the Humane body belt due to his heightened level of behaviour and verbal threats, once the body belt was secure he was carried to the transport van. During this process I held Detainee [Mr EK]'s neck as he was attempting to hit it against any items possible.
>
> Detainee [Mr EK] was securely loaded onto the transport van and departed PIDC at 1703 hours.

108. Although I consider this account to be the most reliable, the CCTV footage indicates some inaccuracies in this account as described in more detail below.

109. The CCTV footage does not have sound. The CCTV footage shows a calm discussion between Mr EK and the Facility Operations Manager prior to the use of force on him that lasts for approximately 15 seconds. A second Serco officer is in the room while this discussion takes place. In a submission to this inquiry, Mr EK agrees that he told officers that he did not want to be transferred to Yongah Hill IDC. From the CCTV footage, it does not appear that any alternative options or de-escalation strategies were employed when Mr EK said that he did not want to be transferred. It appears that there were at least two alternatives that could have been considered at this point which would likely have avoided the need to use force. One was returning Mr EK to Royal Perth Hospital to await the surgery on his face. As noted above, it appears that the hospital expected Mr EK to stay with them during this period. Another was permitting Mr EK to stay at Perth IDC until his surgery in five days time. One advantage of allowing Mr EK to stay at Perth IDC was convenience: it was significantly closer to the hospital than Yongah Hill IDC which is located next to Northam, more than 80km away. I note that around six weeks later, on 16 March 2017, Mr EK was in fact transferred from Yongah Hill IDC to Perth IDC where he was then accommodated for the next year and a half. This suggests that there were no security reasons why he could not have stayed at Perth IDC on 29 January 2017.

110. Instead of de-escalating the situation and considering these alternatives, Serco officers proceeded to use force on Mr EK for the purpose of escorting him to a vehicle. I find that force was used as a first and not a last resort.

111. In response to my preliminary view in this inquiry, the Department suggests that it was possible that there was a prior discussion with Mr EK about being transferred to Yongah Hill IDC and invites me to draw the inference that this occurred. However, despite having access to the officers involved in this incident, the Department does

not make a positive allegation that this is what occurred and does not set out the terms of what it suggests may have been discussed. Nor does the Department suggest that Serco considered any alternatives to the transfer of Mr EK to Yongah Hill IDC. In the circumstances, I am not persuaded that any alternatives to transfer to Yongah Hill IDC were seriously considered.

112. At the commencement of the use of force, Mr EK is standing calmly with his arms slightly extended to each side, palms down. He is not acting in an aggressive manner. An officer, who I understand to be the Facility Operations Manager, starts to apply an arm lock on Mr EK's left arm. The other officer appears to remove a pair of handcuffs from his belt.

CCTV footage of incident on 29 January 2017. Officer commences use of force on Mr EK.

113. After the Facility Operations Manager begins grappling with him, Mr EK removes his sunglasses and appears to strike his head against the wall twice. From the video, it is difficult to see how much force is used in these strikes. He does not attempt to strike officers or behave violently or aggressively towards them.

114. Four more officers immediately enter the room and three of them join the Facility Operations Manager in grappling with Mr EK in an attempt to bring him to the ground. Mr EK appears to become more agitated as a result of this escalation.

115. Despite the serious injuries to Mr EK's face from the previous assault on him, the Facility Operations Manager attempts to place Mr EK in a head lock by wrapping his left arm around Mr EK's neck from a position behind him. Although there is no sound on the CCTV, it is clear from the video that Mr EK is crying out in pain and bringing his left hand up to his face.

116. I am not satisfied from the video that Mr EK 'attempted to headbutt' an officer. Instead, it appears that Mr EK is resisting being grappled with. For periods, he has at least one arm free and does not attempt to strike anyone.

117. The officer who was initially in the room with the Facility Operations Manager was standing a metre or so away from the melee. He steps toward Mr EK and swings a kick into the back of his leg as shown in the three CCTV images below, while at least three officers are already grappling with him. I find that the kick delivered to Mr EK was a disproportionate use of force. Strikes of this nature should not be used on detainees. There were sufficient officers in the room to subdue Mr EK without resort to striking him.

CCTV footage of incident on 29 January 2017. Officer on right of frame steps towards Mr EK and commences a swinging kick at him.

CCTV footage of incident on 29 January 2017. Officer on right of frame continues his kicking motion.

CCTV footage of incident on 29 January 2017. Officer on right of frame completes his kick, connecting with Mr EK's leg.

118. A seventh Serco officer then enters the room. The seven officers together eventually wrestle Mr EK to the ground and handcuff his hands behind his back around a minute after the use of force commences. Mr EK is helped back to his feet but is unsteady and cannot find his balance. He resists attempts to lead him out of the room or have him sit on a single bed in the room and is forced back to the floor again face down.

119. Five officers put on rubber gloves and another gets a roll of toilet paper from the toilet in the room. It appears that Mr EK is bleeding from his face onto the floor. An officer mops up some of the blood with toilet paper.

CCTV footage of incident on 29 January 2017. Mr EK is held on the floor with a pool of blood forming next to his face.

120. It appears that the officers are speaking with Mr EK while he is being held on the ground.

121. Around 10 minutes into the use of force incident, Serco officers lift Mr EK back to his feet and sit him on the edge of the single bed. Mr EK's head is unsteady and he slumps forwards. An officer holds him by a shoulder to prevent him falling over. Another officer checks his handcuffs which are still fastened behind his back.

122. The officers then wait for another 3 minutes until two IHMS officers arrive to examine Mr EK. Again, there is no sound on the video but Mr EK can be seen leaning away from one of the officers when she appears to reach up to clean his face. He then shakes his head. The IHMS officers leave after around two minutes.

123. The IHMS report of this interaction is as follows:

> Client was restrained by officers. Asked to see detainee. Some blood evident on face. Detainee refused any assistance to check face unsure refused any assistance to clean blood from face. Offered medication as prescribed. Refused all intervention from nursing staff.

124. Mr EK stays in a slumped position. It is clear that he is not communicating with anyone. I do not accept that during this period Mr EK was making threats towards Serco officers or that this was a reason for the decision to use a body belt on him. The allegation in the report by the Facility Operations Manager described in paragraph 107 above that Mr EK had made threats is not corroborated by any of the five written reports of other officers present that have been provided to the Commission.

125. Two officers continue to hold Mr EK's shoulders to prevent him from slumping onto the floor. Around 10 minutes after the IHMS staff leave, a Serco officer arrives with a body belt. Despite some resistance from Mr EK, he is eventually placed into the body belt and is then carried out of the room by four officers.

126. In response to my preliminary view in this inquiry, the Department provided the following description of the use of force:

> Once in the Observation Room, when the Facility Operations Manager (FOM) informed [Mr EK] he would be returning to YHIDC, [Mr EK]'s behaviour escalated very rapidly from verbal objection to complying with the transfer, to self-harm. Given the rapid escalation, use of force was determined to be the most appropriate action to maintain the safety of all involved parties.
>
> As a result of [Mr EK] initially launching forward and head butting the wall, another Officer attempted to maintain control of [Mr EK]'s head, whilst [Mr EK] was engaging in non-compliant behaviours. Given the rate of escalation by [Mr EK], the speed and physical resistance he exhibited, the Officer, in an attempt to prevent further injury, engaged with the detainee. Noting that this was a rapidly escalating situation and given [Mr EK]'s existing injuries, this engagement was reasonable in an attempt to prevent [Mr EK] from causing further injury to his head.

> It was imperative, due to the conduct of [Mr EK], that the FDSP Officers take action to ensure his safety. [Mr EK], due to his conduct, was a threat to himself. In that context the UoF in an attempt to prohibit further self-harm, was a measured and proportionate response by the FDSP to the risk presented by [Mr EK]'s aggressive behaviour.

127. It is necessary to make a number of observations about this response. First, the Department seems to concede that the transfer to Yongah Hill IDC was being presented as a *fait accompli*. There is no suggestion in this response that any alternatives to immediate transfer were seriously considered which could have avoided the need for force to be used. For the reasons described above, I find that reasonable alternatives were available and should have been considered. Secondly, as noted above, I find that the use of force on Mr EK commenced *before* the escalation of behaviour by him. I accept that once the Department had decided to use force, and Mr EK had responded to that force through escalating behaviour, it became necessary for more force to be used in order to subdue Mr EK. This is of significant concern, especially given Mr EK's pre-existing head injuries and the way that force was applied to that area. Thirdly, the Department makes no direct submissions about the kick delivered to Mr EK, yet it submits that the use of force as a whole was 'a measured and proportionate response'. I reject this characterisation. The strike delivered to Mr EK was unnecessary and disproportionate. It should not have occurred.

128. I find that the failure to use force as a last resort, and the disproportionate use of force on him were contrary to Mr EK's right to be treated with humanity and with respect for his inherent dignity under article 10 of the ICCPR.

4.3 Subsequent treatment in detention

129. Mr EK's surgery went ahead on 3 February 2017 as planned. Following the surgery, he remained in hospital for a further week until he was discharged on 10 February 2017.

130. On 16 March 2017, Mr EK was transferred from Yongah Hill IDC to Perth IDC.

131. On 4 July 2018, Mr EK was involved in an argument with another detainee at Perth IDC. An incident report records that the detainee began punching Mr EK who then attempted to retaliate. Mr EK said that he was hit several times in the face with a plastic cup. The other detainee also kicked out at Mr EK's face as they were being separated by Serco officers. Given his history of facial injuries, Mr EK was referred

to the emergency department at Royal Perth Hospital. He presented with a slightly loose incisor. A CT scan of the face did not show any fractures of the tooth but showed fractures of the nasal bone, which the hospital reported could be new.

132. Mr EK reported to IHMS that he was feeling anxious about the upcoming criminal trial of the men who assaulted him in January 2017 and was fearful of retaliation for giving evidence in court.

133. While at Perth IDC, Mr EK attended a number of counselling session with the Association for Services to Torture and Trauma Survivors (ASeTTS). In July 2018, ASeTTS wrote to the Minister in the following terms:

> [Mr EK] presents with a number of trauma related psychological symptoms with moderate to high levels of anxiety. He also reported that he is progressively deteriorating as a result of his five year[s] of detention and especially so after the assault in Christmas Island IDC.
>
> His psychological functioning is characterised by fear for his safety which is the prominent theme in every session. The assault has been traumatising him psychologically and physically as he perceived the incident as the most traumatising experience he has ever had. After the incident, client has lost his sense of safety. He is constantly hyper-vigilant about further assaults which aggravates his anxiety symptoms. He reported experiencing sleep difficulty, fatigue, excessive worries, chronic headaches, body tension, heart palpitations and panic. He continues to be vulnerable to threats by other detainees and powerless to protect himself.

134. ASeTTS recommended that Mr EK be released into the community.

135. As noted in paragraph 98 above, in September 2018, the Perth District Court issued a violence restraining order in favour of Mr EK against the offender who was convicted of causing him grievous bodily harm. The Department reported to the Ombudsman that, as a result of this restraining order being made, Mr EK was transferred from Western Australia back to VIDC in Sydney. The transfer took place on 24 October 2018.

136. When he was previously at VIDC, Mr EK was mainly accommodated in the Hughes compound. At the time that he arrived in Australia, Hughes was generally used for asylum seekers who had arrived by air and 'compliance cases' (people who had overstayed their visa or had their visa cancelled).[59] When Mr EK was returned to VIDC, an ABF officer from NSW/ACT Detention Operations advised Serco staff at VIDC that he was to be accommodated in Blaxland, the highest security compound.

137. Mr EK complained to the Commission about his placement in Blaxland and said that he did not feel safe there. The Department said that Mr EK's placement in Blaxland was appropriate as a result of his 'serious propensity for violence based on his criminal antecedents and incident reporting history'.

138. Mr EK complained that he was required to wear handcuffs to attend medical appointments. For example, he says that on 12 December 2018 he was required to wear handcuffs for an appointment at the ophthalmologist. This issue was considered in detail in the Commission's report on *Use of force in immigration detention* and I made recommendations at that stage about that practice.[60] I do not repeat that analysis here.

139. Mr EK also complained that he was refused a bottom bunk bed which he required as a result of his double vision. The Department says that 'on becoming aware of Mr EK's vision challenges, Mr EK was offered a lower bunk on multiple occasions however [he] declined the offers'. I am not in a position to resolve these different versions of events and make no findings about them.

140. On 7 March 2019, there was a very serious incident in which Mr EK, according the Department, 'attempted to hang himself in his accommodation'. According to departmental records, Mr EK was admitted to Liverpool Hospital under the *Mental Health Act 2007* (NSW). He was assessed as a continued high risk of suicide and it was recommended that he be placed on suicide watch on return to VIDC. On 18 March 2019, Mr EK was discharged from hospital and returned to VIDC. He was placed in Hotham, following medical advice from IHMS. The Hotham compound is located closest to VIDC's medical facilities and typically accommodates people with significant health conditions.[61] At the same time, he was placed on the IHMS Psychological Support Program.

141. On 3 April 2019, an IHMS psychiatrist reported that Mr EK had adjustment issues due to his long period of detention, movement between sites and the assault in detention in 2017, and that he has post-traumatic stress disorder from homeland trauma. At that time, the psychiatrist assessed Mr EK's risk of suicide as low but warned that this would 'escalate with ongoing detention, particularly if movement in network is not well considered'.

142. On 16 May 2019, Mr EK was eventually placed into a lower security compound at VIDC.

4.4 Consideration of less restrictive alternatives

143. As noted above, Mr EK was returned to immigration detention on 14 June 2013. He was detained for 6 years and 8 months between 14 June 2013 and 13 February 2020. During this period of time, he was unable to make an application for a protection visa unless the Minister lifted the bar to allow an application to be made, because Mr EK had already had an application for a protection visa refused and this application had been finally determined. As a result, there was nothing that Mr EK could do to bring his detention to an end. His continuing detention was entirely at the discretion of the Minister.

144. In response to my preliminary view in this inquiry, the Department said that it did not agree with the last two sentences of the above paragraph. It said that '[t]he detention of an unlawful non-citizen is authorised under the Act and is not a discretionary Ministerial decision'. While that statement is accurate as far as it goes, the release of a person in Mr EK's position could only be effected through the exercise of discretionary ministerial powers.

145. The Minister has the power under s 195A of the Migration Act to grant a visa to a person in immigration detention. Relevant Ministers have issued guidelines to the Department over time indicating the kinds of cases that they expect the Department to refer to them for consideration of the exercise of the s 195A power. Mr EK was assessed against the Minister's s 195A guidelines in March 2014, June 2017 and August 2018. On each occasion, the Department considered that he did not meet the guidelines for referral to the Minister.

146. An assessment on 25 May 2017 found that Mr EK *did* meet the guidelines for referral to the Minister. A significant factor in this decision was a Community Protection Assessment Tool (CPAT) assessment dated 30 January 2017 that assessed Mr EK as being of medium risk to the community. In response to my preliminary view in this inquiry, the Department provided the following description of the CPAT:

> [T]he CPAT is a decision support tool to assist the Department in assessing the most appropriate placement of a non-citizen while status resolution is pursued. In this context, placement refers to whether the non-citizen should reside in the community on a bridging visa or under a residence determination arrangement, or placed in held immigration detention.
>
> The CPAT provides a placement recommendation based on a point in time assessment of the level of risk a person poses to the community, through a set of defined

parameters. Within the CPAT, SROs also consider additional factors as part of the placement assessment, including potential vulnerabilities such as the non-citizen's age, health, if they have been, or are at, a higher risk of being the victim of a crime, and any behaviour impacting their own wellbeing.

147. I note that the 30 January 2017 CPAT was conducted shortly after the serious assault on Mr EK. The reasoning given by the Department in this assessment was as follows:

> In determining whether [Mr EK] meets the section 195A Ministerial Intervention guidelines for referral to the Minister, the following factors must be balanced:
>
> - [Mr EK] has been in held detention for a cumulative period of more than four years and his case has never been referred to the Minister;
> - On 30 March 2016, [Mr EK] lodged an application to the Federal Circuit Court seeking a review of his ITOA assessment. On 11 November 2016, the matter was adjourned to a date to be fixed;
> - [Mr EK] is alleged to have committed a number of offences over a 23 month period in Austria, however he is not the subject of an alert or extradition request regarding these matters;
> - [Mr EK] has been involved in a significant number of offences [sic] while in held detention including assault and aggressive behaviour. The most recent incident was on 10 February 2017, in which he was found with contraband;
> - IHMS have advised that there are no health conditions or issues likely to be exacerbated by remaining in a detention centre environment; and
> - [Mr EK] has been referred for removal action to commence, however obtaining a travel document is likely to be protracted due to identity issues.
>
> Notwithstanding his criminal charges in Austria and behavioural issues while in immigration detention, based on the time that [Mr EK] has been in immigration detention, on balance his case meets the section 195A guidelines for referral to the Minister for consideration of Community Detention or the grant of a temporary visa.

148. I consider that this reasoning is compelling and that it justified a referral of Mr EK's case to the Minister. However, before this May 2017 guidelines assessment could be acted upon, a new assessment was conducted on 20 June 2017 which recommended against a referral. It appears that the reason for this change was an updated CPAT assessment dated 22 May 2017 recommending a Tier 3 (held detention) placement.

149. The Minister also has the power under s 197AB of the Migration Act to make a residence determination in favour of a person, often referred to as 'community detention', which permits a person to reside at a specified place in the community. Again, relevant Ministers have issued guidelines to the Department in relation to the exercise of this power. The Department says that Mr EK was not referred for consideration against the Minister's s 197AB guidelines after being returned to held detention in 2013.

150. While each set of guidelines was amended from time to time, a constant feature of each of them was a provision requiring the Department to refer cases to the Minister where there were 'unique or exceptional circumstances'. In light of the High Court's recent judgment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, there may now be real questions about whether any decision by a departmental officer *not* to refer a case to the Minister because there were no 'unique or exceptional circumstances' was a decision that exceeded the executive power of the Commonwealth. However, notwithstanding the potential invalidity of decisions *not* to refer cases to the Minister, it seems clear during the relevant period that it was open to the Department to refer cases to the Minister when there *were* unique or exceptional circumstances.

151. The phrase 'unique or exceptional circumstances' was not defined in the s 195A guidelines. However, in another set of guidelines dealing with a similar discretionary ministerial power, reissued on 10 October 2015 while Mr EK was in detention, factors that were relevant to an assessment of unique or exceptional circumstances included:

    - circumstances that may bring Australia's obligations as a party to the ICCPR into consideration; and
    - the length of time the person has been present in Australia (including time spent in detention).[62]

152. The length of time that Mr EK had already spent in detention, and the potential for his detention to be arbitrary, contrary to Australia's obligations under article 9 of the ICCPR, are matters that should have been identified as 'exceptional' and weighed heavily in favour of a decision by the Department to prepare a submission to the Minister for them to consider either a bridging visa or a community detention placement.

153. As noted above, these factors *were* taken into account in the May 2017 guidelines assessment that recommended referral to the Minister. The departmental officer conducting that assessment referred to the fact that Mr EK had been in detention for four years without any Ministerial consideration of alternatives and concluded, on balance, that this extraordinary period of administrative detention justified a referral. I note again that this reasoning is compelling. However, before this recommendation could be acted upon, it was replaced by a fresh assessment with the opposite conclusion in June 2017. It would be more than a further 18 months before Mr EK's case was first considered by a Minister.

154. On 13 February 2019, the Department referred Mr EK's case to the Assistant Minister for Home Affairs, the Hon Linda Reynolds CSC MP, as part of a group submission dealing with 88 long term detainees. Significantly, it was the length of detention that was relied upon as justifying the referral of this cohort to the Minister. Paragraph 1 of the submission read:

> The list at **Attachment A** contains summaries of 88 detainees who have remained in immigration detention for more than five years (as at 30 September 2018). The longest period in detention for a detainee in this cohort is over 11 years. The average length of time spent in held detention for this cohort is approximately six years.

155. The submission noted that the Department 'has been criticised over the length of detention and claims of arbitrary detention'. Approximately half of the cohort of long term detainees (46 individuals) had a Tier 1 CPAT recommendation – that is, a recommendation from the Department that they be placed in the community. By inference, there was no such recommendation in relation to the balance of the detainees (42 individuals) but they were nevertheless referred to the Minister for consideration, primarily because of the extraordinarily long period of their administrative detention. At this time, Mr EK had a Tier 3 (held detention) recommendation but this of itself did not prevent the referral of his case to the Minister.

156. The submission invited the Assistant Minister to indicate whether she was willing to consider the exercise of her intervention powers on an individual basis in particular cases. On 26 February 2019, the Assistant Minister indicated that she did not want to consider the exercise of her powers in relation to Mr EK's case.

157. On 7 August 2019, the Department provided a submission to the Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Hon Jason Wood MP asking the Assistant Minister to consider lifting the bar under s 48B of the Migration Act to allow Mr EK to make a further application for a protection visa.

The reason for making this referral to the Minister was because, although Mr EK's original protection visa application was refused, on review by the Department a determination was made that he may be someone to whom Australia had protection obligations. It appears that this determination related to Mr EK's application to the Federal Circuit Court to review the ITOA conducted in relation to him on 2 September 2015. The Department recorded that the result of those proceedings was that 'the Minister withdrew due to legal error in the ITOA'. It appears that the effect of the 'withdrawal' was that the making of the ITOA was remitted to the Department for further consideration according to law. In the submission to the Assistant Minister, the Department recommended that the reassessment of Australia's *non-refoulement* obligations take place through a statutory process rather than the conduct of a further ITOA. The reason for this was that 'the statutory process is quicker and more defensible against litigation or injunction applications and, as such, provides the Department of Home Affairs with more realistic prospects of effecting involuntary removal'. The Assistant Minister was advised by the Department that a further assessment of Mr EK's protection claims was required before he could be considered for removal from Australia. On 6 February 2020, the Assistant Minister lifted the bar to allow Mr EK to lodge an application for either a Temporary Protection Visa or a Safe Haven Enterprise Visa.

158. In parallel to this bar lift submission, on 3 October 2019 a first stage submission was made to Assistant Minister Wood asking him to consider exercising his power under s 195A of the Migration Act to grant a short term Final Departure Bridging Visa E to Mr EK. Significantly, the decision by the Department to make this referral was taken despite Mr EK still having a CPAT recommendation of Tier 3 (held detention). This demonstrates that a Tier 3 assessment is not a barrier to referral to the Minister under s 195A despite the view apparently taken by the Department in June 2017. On 13 February 2020, the Assistant Minister agreed to grant a Final Departure Bridging Visa valid for six months.

159. The factors that were emphasised by the Department in the submission which resulted in Mr EK eventually being granted a bridging visa and released from detention were: the length of time he had spent in detention, the impact that prolonged detention was having on his mental health, the serious injuries that he had sustained as a result of the assault on him by other detainees in 2017, and the suicide attempt in March 2019 that resulted in his hospitalisation. The submission noted a significant decline in Mr EK's mental health since early December 2019 and that at the time of the submission he was on 24 hour suicide watch.

160. It should not take a serious suicide attempt for a person subject to administrative detention to be considered for less restrictive forms of detention. All of the other factors referred to by the Department in 2019 were present two years earlier in 2017. In May 2017, at least one officer of the Department recognised that Mr EK's case should be referred to the Minister for consideration of less restrictive forms of the detention. However, that assessment was overridden before it could be acted upon.

161. Mr EK spent more than seven years and three months in immigration detention. It was only after he had been released on a bridging visa for the second time and permitted to make a further application for protection that he was ultimately assessed as being a refugee and granted a SHEV. No administrative process directed to the assessment of refugee status should take that long, nor should Mr EK have been kept in closed detention facilities for such an extraordinarily long period. A referral to the Minister for less restrictive alternatives to detention should have been made earlier and at least by February 2017, having regard to the length of his detention, his medical needs following the serious assault on him and the continuing trauma he experienced being in detention following the assault. In making this finding, it should not be inferred that his detention up to that point was appropriate. However, his continued detention beyond that point could not be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention.

162. In response to my preliminary view in this inquiry, the Department claimed that Mr EK's prolonged detention for more than seven years was 'appropriate' and it did not agree that his case should have been referred to the Minister any earlier than it was. The Department noted that there was no requirement under domestic law for a detainee's case to be assessed against Ministerial intervention guidelines for possible referral to the Minister. The Department acknowledged that it was aware of the serious assault on Mr EK in February 2017 but said that it was only one 'of a number of factors considered in the guidelines assessment'. In relation to the point about domestic legal requirements, there must now be doubt about the legal validity of the Department's assessments in March 2014, June 2017 and August 2018 that Mr EK did not meet the guidelines for referral. Each such assessment would have necessarily required a conclusion that there were no 'unique or exceptional circumstances' justifying referral. As the High Court has said, decisions of that nature exceeded the executive power of the Commonwealth. However, regardless of the lawfulness of those decisions under domestic law, and despite the lack of any enforceable duty on the Department under domestic law to consider

Mr EK's case for referral, it was open to the Department to make a referral to the Minister. Whether it chose to do so, and when, can be assessed for compliance with international human rights law.

163. For the reasons set out above, I find that Mr EK's detention from at least February 2017 was arbitrary, contrary to article 9 of the ICCPR.

5. Recommendations

164. 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.[63] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[64] The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.[65]

5.1 Support services

165. Mr EK has significant ongoing physical and mental health issues that stemmed from the serious assault on him while in immigration detention on Christmas Island. Mr EK has ongoing head pain, tinnitus, double vision and some permanent hearing loss in his left ear. IHMS reported that Mr EK has experienced complications of nerve palsy and optic nerve damage which are thought to be the cause of his double vision. Mr EK has been diagnosed with trauma related psychological symptoms and moderate to high levels of anxiety. Those symptoms have included sleep difficulty, fatigue, excessive worries, chronic headaches, body tension, heart palpitations and panic. He made a suicide attempt in 2019.

166. In response to my preliminary view in this inquiry, Mr EK says that since being released from immigration detention he does not feel safe and fears further attacks. He says that he continues to experience a range of ongoing physical and mental health issues. He says that the treatment he experienced in detention 'has broken me for the rest of my life'.

167. The key outcome that Mr EK has sought as a result of his complaint to the Commission is access to ongoing health treatment for the injuries that he sustained while in detention. He has also sought access to safe housing.

168. The Department provides some temporary support services for people transitioning into the community from immigration detention through the Status Resolution Support Services (SRSS) program. Support services can include financial support, accommodation, access to health care and case worker support.[66] Support services are provided through contracted service providers. The Department has published details of those contractual arrangements and the SRSS Operational Procedures Manual that were current at the time that Mr EK was released from immigration detention onto a bridging visa in February 2020.[67]

169. From discussions with officers of the Department responsible for the SRSS program, the Commission understands that the duration for which support services are currently provided are more generous than they were at the time that Mr EK was released from immigration detention. The Commission also understands that Mr EK may no longer strictly qualify for SRSS support given that he now has a substantive protection visa. However, the Commission recommends that the Department consider extending further support to Mr EK through the SRSS program, including facilitating transition to supports available to him more generally as a member of the Australian community. The Commission considers that this would be appropriate given the particular nature of Mr EK's vulnerabilities, the link between those vulnerabilities and the serious assault that he sustained while in immigration detention, and the more expansive nature of the current SRSS program in comparison to when Mr EK was first released.

170. The Commission suggests that this support extend to:

- financial assistance, including rental assistance, to the extent that Mr EK is not currently eligible for equivalent welfare payments
- accommodation assistance, to ensure that Mr EK is able to access safe and secure accommodation
- health and wellbeing services, to ensure that Mr EK is able to access health services for his ongoing physical health needs, torture and trauma counselling services, and general psychological services.

171. The Commission recommends that Mr EK be provided with assistance to transition to mainstream services and that SRSS support be provided until that transition has been effected.

Recommendation 1

The Commission recommends that the Department provide Mr EK with financial assistance, accommodation assistance and health and wellbeing services through the Status Resolution Support Services program, and case worker support to transition to mainstream services providing these supports.

172. In his response to my preliminary view, Mr EK expressed concern that he is not currently eligible for the National Disability Insurance Scheme (NDIS) because he does not hold a permanent visa.

173. Mr EK holds a SHEV which is a temporary visa. However, on 13 February 2023, the Australian Government announced that refugees like Mr EK who hold a SHEV would be provided with a pathway to a permanent protection visa.[68] It appears that people in Mr EK's position can now apply for a Resolution of Status (RoS) visa. As part of its announcement, the Government said that it had committed $9.4 million over two years for visa application assistance through specialist legal service providers. A factsheet published by the Department listed specialist community refugee and immigration legal service providers across Australia who could provide free assistance in applying for a RoS visa.[69]

174. Given Mr EK's vulnerabilities, I recommend that the Department provide him with an assisted referral to the relevant community legal service where he lives, so that he can make an application for an RoS, if he has not already done so.

Recommendation 2

The Commission recommends that the Department provide Mr EK with an assisted referral to a relevant community legal service for the purpose of making an application for a Resolution of Status visa.

175. I consider that it is also appropriate to make a recommendation for the payment of compensation to Mr EK, in order to reduce the loss and damage suffered by him as a result of the failure to provide him with a safe place of detention, contrary to article 10 of the ICCPR. Such recommendations for compensation are expressly contemplated in the AHRC Act.[70]

176. While the loss and damage suffered by Mr EK will not be able to be fully addressed by the payment of money, I consider that it is important that he be provided compensation to acknowledge the impact that the treatment by the Commonwealth has had on him.

177. In considering the assessment of a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.[71] I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.[72]

178. The Commission has set out in other inquiries the jurisdictional basis for the Commission to make recommendations for the payment of compensation and the available administrative avenues for the payment of such compensation by the Commonwealth.[73] I do not repeat those matters again here.

179. The compensation paid to Mr EK should take into account the amount that he has already received pursuant to statutory victims of crime legislation referred to in paragraph 99 above.

Recommendation 3

The Commission recommends that the Commonwealth pay to Mr EK an appropriate amount of compensation to reflect the loss and damage he has suffered as a result of the breaches of his human rights under article 10 of the ICCPR identified in the course of this inquiry.

5.2 Use of force

180. During the course of this inquiry, the Department suggested that it was possible that there was a prior discussion with Mr EK about being transferred to Yongah Hill IDC but did not point to any documentary evidence that this had occurred. The Department did not suggest that Serco considered any alternatives to the transfer of Mr EK to Yongah Hill IDC that may have obviated the need for force to be used on a detainee who had only just been discharged from hospital with serious physical injuries that required surgery.

181. The incident reports about the use of force on Mr EK did not record any consideration of alternatives to transferring him to Yongah Hill IDC. I consider that in order to discharge the obligation to ensure that force is only used as a last resort, use of force reports should as a matter of course describe all alternative courses of action that were considered that may have obviated the need for force to be used,

and why these alternatives were not taken. I consider that this is appropriate both for planned and unplanned uses of force.

Recommendation 4

The Commission recommends that use of force reports should set out clearly all alternatives to the use of force that were considered before force was used, and describe why these alternatives were not taken.

182. I am particularly concerned by the officer who kicked Mr EK on 29 January 2017 while he was being restrained by other officers. In its response to my preliminary view in this inquiry, the Department properly did not seek to excuse this conduct. I have found that the kick delivered to Mr EK was a disproportionate use of force. Strikes of this nature should not be used on detainees.

183. While this conduct occurred some years ago, I consider that it would be appropriate for the Department to conduct its own inquiry into whether this officer had complied with the terms of his employment and whether any further disciplinary action is appropriate.

Recommendation 5

The Commission recommends that the Department conduct an internal inquiry into whether the officer who kicked Mr EK on 29 January 2017 was in breach of the terms and conditions of his employment and whether any further disciplinary action is appropriate.

5.3 Alternatives to held detention

184. In August 2022, the Department conducted a stakeholder briefing about its Alternatives to Held Detention (ATHD) program. It subsequently published a briefing note and the slide deck in relation to that briefing.[74] These documents described a range of important initiatives that were being explored by the Department, including:

- **Risk assessment tools:** reviewing current tools and developing a revised risk assessment framework and tools that enable a dynamic and nuanced assessment of risk across the status resolution continuum
- **An 'independent panel':** establishing a qualified independent panel of experts to conduct a more nuanced assessment of a detainee's risk, including risks related to their physical and mental health, and provide advice about

community-based placement for detainees with complex circumstances and residual risk

- **Increasing community based placements:** in particular, by focusing on detainees who pose a low to medium risk to the community, and managing residual risk through the imposition of bail-like conditions and the provision of post-release support services
- **A 'step-down' model:** considering transfer from held detention to a residence determination as part of a transition to living in the community.

185. Those initiatives were prompted by two reviews:

- the Independent Detention Case Review conducted by Robert Cornall AO for the Department in March 2020
- the Commission's report to the Attorney-General titled *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141 in February 2021.

186. The Commission welcomes these initiatives which reflect and build on recommendations it has made in a number of previous reports including the one identified above. Implementation of these initiatives would improve the way in which the risk posed by detainees is assessed. It would increase the prospect that decisions to administratively detain an individual are limited to circumstances where detention is reasonable, necessary and proportionate on the basis of particular reasons specific to the individual, and in light of the available alternatives to closed detention.

187. The Commission encourages further work to be undertaken by the Department in each of the areas identified in the ATHD program.

Recommendation 6

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated
- the establishment of independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement

- increasing community-based placements for low and medium risk detainees, through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

5.4 Referrals for ministerial consideration

188. Following the High Court's recent judgment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, it seems clear that there will need to be amendments made to the guidelines issued by the Minister to the Department about the exercise of ministerial intervention powers, including under ss 195A and 197AB. In particular, it is no longer open to the Minister to give the Department the ability *not* to refer cases on the basis that the Department has formed the view that the cases do not have 'unique or exceptional circumstances' or that it is otherwise not in the public interest for the Minister to exercise these powers.

189. It seems clear that any revised guidelines issued by the Minister should contain clear, objective criteria for referral.[75] It is also clear from the documents published by the Department as part of the ATHD program, identified above, that some intractable cases will only be able to be resolved by the Minister. As a result, there is a real need to ensure that these cases are brought to the Minister's attention so that decisions can be made by the Minister about the potential exercise of the personal intervention powers.

190. The Commission understands from discussions with the Department that it has recently taken steps, in conjunction with the Minister, to ensure that the cases of long term and vulnerable detainees are referred to the Minister for consideration, even if they do not meet previously issued guidelines in relation to referral. The Commission welcomes these steps, which it understands has led to the exercise of intervention powers in a significant number of cases.

191. The Commission reiterates previous recommendations it has made for amendment of the guidelines for referral.[76]

Recommendation 7

The Commission recommends that the Minister's ss 195A and 197AB guidelines should be amended to provide that:

- all people in closed immigration detention are eligible for referral under ss 195A and 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period
- all people in immigration detention are eligible for referral under ss 195A and 197AB, whether or not they have had a visa cancelled or refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501
- where the Minister has previously decided not to consider exercising the powers under either s 195A or s 197AB in relation to a person, or has considered exercising those powers and declined to do so, the Department may nevertheless re-refer that person to the Minister if the person has remained in closed detention for a further protracted period
- if the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the Department include in any submission to the Minister under s 195A or s 197AB:

    (i) a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment

    (ii) an assessment of whether any identified risk could be satisfactorily mitigated if the person were allowed to reside in the community (for instance by the imposition of residence requirements, reporting obligations, sureties or other conditions), including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department informing its assessment.

6. The Department's response to my findings and recommendations

192. On 4 May 2023, I provided the Department with a notice of my findings and recommendations.

193. On 4 August 2023, 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 does not accept the finding of the Commission that Mr EK's detention from at least February 2017 was arbitrary and contrary to Article 9 of the ICCPR. It maintains that Mr EK's placement in held detention was appropriate, reasonable and justified in the individual circumstances of his case.
>
> **Support Services**
>
> *Recommendation 1 – Accepted and already addressed*
>
> *The Commission recommends that the Department provide Mr EK with financial assistance, accommodation assistance and health and wellbeing services through the Status Resolution Support Services program, and case worker support to transition to mainstream services providing these supports.*
>
> The Department has already addressed recommendation one.
>
> The Status Resolution Support Services (SRSS) program provides support to individuals while they engage with the Department to resolve their immigration status, either through the grant of a substantive visa or departure from Australia. People with work rights are expected to work to support themselves and their families, and are able to access relevant government services.
>
> On 13 February 2020, the former Assistant Minister for Customs, Community Safety and Multicultural Affairs intervened under section 195A of the *Migration Act 1958* (the Act) and granted Mr EK a Bridging E visa (BVE).
>
> From 13 February until 26 March 2020, Mr EK was approved for SRSS Band 4 support. Band 4 support is transitional support which assists a recipient leaving detention to settle into the Australian community.
>
> From 26 March 2020 until 22 March 2021, Mr EK was in receipt of SRSS Band 6 support. SRSS services approved included income support and case management.

On 25 August 2021, Mr EK was granted a Safe Haven Enterprise visa (SHEV), subclass 790. As the holder of a substantive visa, Mr EK is no longer eligible for the SRSS program. SHEV visa holders can access government services such as jobactive (now replaced by Workforce Australia), Services Australia Special Benefit payments subject to eligibility, and Medicare.

Recommendation 2 – Agree

The Commission recommends that the Department provide Mr EK with an assisted referral to a relevant community legal service for the purpose of making an application for a Resolution of Status visa.

The Department agrees with recommendation two. Following the recommendation of the Commission, on 17 May 2023, the Department sent Mr EK an email with further information pertaining to the Resolution of Status (RoS) visa application process, and sought his consent for the Department to assist with a referral to Refugee Advice and Casework Service (RACS), as the relevant community legal service for RoS visa application assistance in NSW. Alternatively, he was directed to complete a Form 956, if he wished to appoint another representative.

On 26 May 2023, Mr EK lodged a valid RoS visa application with the assistance of his RACS legal practitioner. The RoS visa application has been assigned for priority processing and remains under active assessment.

Recommendation 3 – Disagree

The Commission recommends that the Commonwealth pay to Mr EK an appropriate amount of compensation to reflect the loss and damage he has suffered as a result of the breaches of his human rights under article 10 of the ICCPR identified in the course of this inquiry.

The Department disagrees with recommendation three. The Department does not accept the Commission's findings of breaches of Mr EK's human rights under article 10 of the ICCPR. The Department also does not accept the Commission's recommendation that the Commonwealth pay to Mr EK an appropriate amount of compensation. 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.

In cases where there is no legal liability to pay compensation, there is the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme. This is a discretionary compensation scheme of last redress, which provides a mechanism for the Commonwealth to compensate persons who have experienced financial detriment as a direct result of the defective administration on the part of

the Department. Claims are assessed against Resource Management Guide 409 (the guide). However, in consideration of applying for compensation, actions of contracted providers are not within the scope of the CDDA scheme. Also, as set out in the guide, compensation is not payable for grief or anxiety, hurt, humiliation, embarrassment, disappointment (no matter how intense the emotion may be) that is unrelated to personal injury.

Based on the current evidence, the Department is not in a position to pay compensation at this time. Further, it is open to Mr EK to seek independent legal advice if he considers his circumstances might give rise to a claim for compensation against the Department. Further information on claiming compensation from the Department is available on the Department's website at the following link: https://www.homeaffairs.gov.au/help-and-support/claiming-compensation-from-us/application-for-compensation-for-detriment.

Use of Force

Recommendation 4 – Accepted and already addressed

The Commission recommends that use of force reports should set out clearly all alternatives to the use of force that were considered before force was used, and describe why these alternatives were not taken.

The Department has already addressed recommendation four.

All officers are accountable and must be able to justify their decision to use force, including restraints. All officers must assess every situation and use all options available that do not involve the use of force to manage any given situation. Planning (where possible) and effective communication are key elements in resolving matters before moving to use of force.

The existing use of force reports require all officers involved in the use of force event to provide a comprehensive narrative of observations and actions taken over the course of the use of force event.

These observations and actions include (but are not limited to):

- Time and place;
- Why officer was there;
- What was said and heard;
- Involvement in use of force;
- Any restraints used;
- How the incident was resolved; and
- The requirement for the officer to list what attempts were made to de-escalate the situation.

The Department continues to work with the Facilities and Detainee Services Provider (FDSP) to ensure these record keeping and reporting requirements are met.

Recommendation 5 – Noted and already addressed

The Commission recommends that the Department conduct an internal inquiry into whether the officer who kicked Mr EK on 29 January 2017 was in breach of the terms and conditions of his employment and whether any further disciplinary action is appropriate.

The Department reiterates that it did not agree with the preliminary views of the Commission provided in the s 27 Notice that the use of force was inappropriate.

The Department notes recommendation five and can advise that the FDSP undertook a review of the incident and determined that the use of force was not excessive, nor was the officer in breach of the terms and conditions of their employment and no disciplinary action was warranted.

ABF accepts the FDSP's account that the use of force was appropriate, noting that this was a rapidly escalating situation and engagement was reasonable to attempt to prevent further injury.

Alternatives to held detention

Recommendation 6 – Partially Agree

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- *the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated*
- *the establishment of independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement*
- *increasing community-based placements for low and medium risk detainees, through necessary conditions and support services*
- *utilising residence determinations as part of a step-down model of reintegration into the community.*

The Department is progressing the Alternatives to Held Detention (ATHD) program to better support the use of community-based placements for individuals at risk of facing prolonged detention.

Under the ATHD program, the Department is considering:

- establishing an independent assessment capability to advise on risk mitigation (including support needs) for detainees being considered for a community placement
- developing a step-down model using residence determination and visa grant with tailored support services and conditions.

The Minister for Immigration, Citizenship and Multicultural Affairs has agreed for the Department to refer detainees in identified cohorts for consideration under sections 195A and/or 197AB of the Act. Consistent with this authority, the Department continues to progress cases for Portfolio Ministers' consideration.

The Department previously considered developing an internal dynamic risk assessment tool as part of ATHD. However, current thinking has progressed towards a revised approach for a future model, which seeks to leverage off existing risk assessment capability within the Criminal Justice System.

Development of longer-term options for ATHD may require changes to legislative and policy settings (and would be subject to policy authority from Government).

Ministerial Intervention (MI)

Recommendation 7 – Partially Agree

The Commission recommends that the Minister's ss 195A and 197AB guidelines should be amended to provide that:

- *all people in closed immigration detention are eligible for referral under ss 195A and 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period*
- *all people in immigration detention are eligible for referral under ss 195A and 197AB, whether or not they have had a visa cancelled or refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501*
- *where the Minister has previously decided not to consider exercising the powers under either s 195A or s 197AB in relation to a person, or has considered exercising those powers and declined to do so, the Department may nevertheless re-refer that person to the Minister if the person has remained in closed detention for a further protracted period*

- *if the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the Department include in any submission to the Minister under s 195A or s 197AB:*

    (i) *a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment; and*

    (ii) *an assessment of whether any identified risk could be satisfactorily mitigated if the person were allowed to reside in the community (for instance by the imposition of residence requirements, reporting obligations, sureties or other conditions), including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department informing its assessment.*

The Department is currently considering the implications of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 for ministerial intervention. Further information about the Department's approach will be made available in due course.

The Department partially agrees to this recommendation, as the Department is not able to amend the Ministerial Intervention guidelines. It is at the discretion of the Minister what criteria they determine should be included in any new Ministerial Intervention guidelines/instructions.

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

The Department notes sub points i) and ii) appear to be detailed recommendations about risk assessment processes that would not necessarily be addressed through the setting of MI guidelines. The Department requests that the Commission consider if these recommendations are better addressed through recommendation six.

Further to the response to the Commission's recommendation above, the Department would like to provide the following additional information in relation to the case of Mr EK.

In April 2017, the Department commenced a Ministerial Intervention process for Mr EK's case to be assessed against the section 195A Ministerial Intervention guidelines. On 25 May 2017, Mr EK's case was assessed as meeting the Minister's sections 195A guidelines.

Following an updated Community Protection Assessment Tool (CPAT) recommendation in May 2017, that held immigration detention was the appropriate

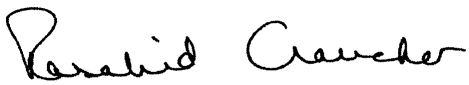
placement for Mr EK, the Department undertook a new assessment against the Ministerial Intervention guidelines. In June 2017, Mr EK's case was assessed as not meeting the sections 195A and 197AB Ministerial Intervention guidelines and the process was finalised by the Department as not referred to the Minister.

Current departmental practice is that a change in a CPAT Tier rating would not require a new guidelines assessment to be undertaken. The Department has implemented a process that once a case has been assessed as meeting the Ministerial Intervention guidelines, a case officer commences drafting a submission for referral to the Minister, rather than re-assessing a case against the guidelines if there is a change in the CPAT Tier rating.

The CPAT could be one but not the only factor taken into consideration by the Department when referring a case for assessment against the Ministerial Intervention Guidelines and when undertaking such assessments.

Recommendation number	Department's response
1	Accepted and already addressed
2	Agree
3	Disagree
4	Accepted and already addressed
5	Noted and already addressed
6	Partially Agree
7	Partially Agree

194. I report accordingly to the Attorney General.



Emeritus Professor Rosalind Croucher AM
President

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