



Australian
Human Rights
Commission

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

[2023] AusHRC 151

November 2023

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[2023] AusHRC 151

Report into a failure to treat a person deprived of their liberty with humanity and respect for their inherent dignity

Australian Human Rights Commission 2023

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

Mr Anees complains that the Department breached his human rights by using mechanical handcuffs on him to escort him to and from medical appointments while he was in detention, in contravention of article 10 of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the requirement that Mr Anees be handcuffed when escorted to and from medical appointments was inconsistent with his right to be treated with humanity and with respect for his inherent dignity, contrary to article 10 of the ICCPR.

Pursuant to s 29(2)(b), I have included four recommendations to the Department in this report.

On 18 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 8 September 2023. That response can be found in Part 9 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission
November 2023

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr Nauroze Anees against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of his human rights.
2. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. Since 5 October 2016, Mr Anees has been held in closed detention in various immigration detention facilities. The Commission has reported on Mr Anees' period of immigration detention in *Mr Nauroze Anees v Commonwealth of Australia (Department of Home Affairs)* [2019] AusHRC 133.
4. Mr Anees complains that while he was detained at Perth Immigration Detention Centre (PIDC) and Brisbane Immigration Transit Accommodation (BITA), he was required to wear mechanical handcuffs when escorted to and from medical appointments. Mr Anees claims that from in or around May 2019, detention staff stopped handcuffing him following medical advice from the Royal Perth Hospital. He claims that in late July 2019, the practice of handcuffing him when escorted to and from medical appointments was reintroduced without explanation, despite recommendations from medical professionals not to handcuff him.
5. Mr Anees complains that the Department's use of mechanical handcuffs on him to escort him to and from medical appointments while he was in detention, was inconsistent with article 10 of the *International Covenant on Civil and Political Rights* (ICCPR).¹ Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
6. This report is issued pursuant to s 29(2) of the AHRC Act setting out the findings and recommendations of the Commission in relation to this complaint.
7. Having considered in detail Mr Anees' security assessments conducted by Serco Australia Pty Ltd (Serco) and the Department, and the incidents he was involved in while in detention, my view is that the requirement that Mr Anees be handcuffed when escorted to and from medical appointments was not reasonable in the circumstances or proportionate to relevant risks.
8. As a result of this inquiry, I have found that the requirement that Mr Anees be handcuffed when escorted to and from medical appointments was

inconsistent with his right to be treated with humanity and with respect for his inherent dignity, contrary to article 10 of the ICCPR.

9. My recommendations to the Department are set out in Part 8 of this report.
10. I note that the Commission has previously undertaken an inquiry into the use of force in immigration detention (Thematic Inquiry report).²
11. While the Thematic Inquiry will be referred to as necessary, Mr Anees' complaint concerns distinct circumstances which I considered appropriate to inquire into as a separate use of force incident.

2 Background

12. Mr Anees is a national of Pakistan. He arrived in Australia on 20 May 2007 on a Student (Temporary) (Class TU) visa.
13. On 15 April 2011, his student Visa was cancelled for non-compliance because he was no longer enrolled as a student.
14. Between January 2011 and October 2013, Mr Anees was convicted of several offences. In August 2011, he served a 3-month prison sentence. On 25 October 2011, he was released from prison and detained under s 189(1) of the *Migration Act 1985* (Cth) (Migration Act) because he was an unlawful non-citizen.
15. On 20 January 2012, Mr Anees lodged an application for a partner visa. On 30 January 2012, he was granted a Bridging Visa E and released into the community.
16. On 21 September 2016, Mr Anees' partner visa application was refused under s 501(1) of the Migration Act. His associated Bridging Visa E was cancelled under s 501F (3) of the Migration Act.
17. Since 5 October 2016, Mr Anees has been held in closed detention in various immigration detention facilities.
18. While detained at PIDC, mechanical restraints were used when Mr Anees was escorted to and from the following medical appointments. The Department has provided the Commission with the following table:

10 December 2018	Dentist	Mechanical Restraints (MR) used as
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		requested by Serco due to detainee risk rating
14 January 2019	Hospital	Emergency hospital visit outside of normal business hours – Planned Use of Force based on detainee risk rating
23 March 2019	Hospital	Emergency hospital visit outside of normal business hours – Planned Use of Force based on detainee risk rating

19. While detained at BITA, mechanical restraints were used when Mr Anees was escorted to and from the following medical appointments. The Department has provided the Commission with the following table:

30 May 2019	Optometrist	Mechanical Restraints (MR) were used as requested by Serco due to detainee risk rating
26 July 2019	IHMS appointment	Mechanical Restraints (MR) were used as requested by Serco due to detainee risk rating
8 August 2019	IHMS appointment	Mechanical Restraints (MR) were used as requested by Serco due to detainee risk rating

3 Conciliation

20. The Department indicated that it did not wish to participate in conciliation of this matter.

4 Procedural history of this inquiry

21. On 20 October 2022, I issued a preliminary view in this matter and gave the Department the opportunity to respond to my preliminary findings.
22. On 20 January 2023, the Department responded to my preliminary view and provided additional information regarding Mr Anees' circumstances.

23. On 18 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.
24. On 8 September 2023, the Department provided its response to my findings and recommendations.

5 Legislative framework

5.1 Functions of the Commission

25. 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.
26. 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.
27. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

5.2 What is an 'act' or 'practice'

28. 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.
29. 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.
30. 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.³

5.3 What is a human right?

31. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
32. Article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

5.4 The Right of detainees to be treated with humanity and dignity

33. General Comment 21 on article 10(1) of the ICCPR by the United Nations Human Right Committee (UNHRC) states:

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

34. The above comment supports the conclusions that:

- article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons
- the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR
- the article may be breached if the detainees' rights, protected by one of the other articles in the ICCPR, are breached unless that breach is necessitated by the deprivation of liberty.

35. The above conclusions about the application of article 10(1) are also supported by the jurisprudence of the UNHRC,⁵ which emphasises that there is a difference between the obligation imposed by article 7(1) not to engage in 'inhuman' treatment and the obligation imposed by article 10(1) to treat detainees with humanity and respect for their dignity. In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,⁶ the Supreme Court of New Zealand explained the difference between these two concepts as follows:

A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment ... the words 'with humanity' are I think properly to be contrasted with the concept of 'inhuman treatment' ... The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts

to denial of humanity. That is I think consistent with modern usage which contrasts 'inhuman' with 'inhumane'.⁷

36. The decision considered provisions of the New Zealand Bill of Rights which are worded in identical terms to articles 10(1) and 7(1) of the ICCPR.
37. The content of article 10(1) has been developed with the assistance of a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty, including:
 - the *Standard Minimum Rules for the Treatment of Prisoners*, now known as the Nelson Mandela Rules⁸
 - the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).⁹
38. The UNHRC has invited States Parties to indicate in their reports the extent to which they are applying the above relevant United Nations standards applicable to the treatment of prisoners.¹⁰ At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed regardless of a State Party's level of development.¹¹
39. Rule 82 of the Nelson Mandela Rules provides:

Prison staff shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Prison staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the prison director.
40. 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.
41. Nelson Mandela Rule 121 requires that civil prisoners 'shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order'.
42. States have a responsibility to ensure that the rights guaranteed in articles 7 and 10 of the ICCPR are accorded to detainees in privately run detention facilities.¹²
43. Previous inquiries of the Commission, including the Thematic Inquiry, have found that the use of force by detention service providers on detainees in

certain instances in immigration detention amounted to a breach of their human rights.¹³

5.5 European case law on use of restraints

44. A number of judgments of the European Court of Human Rights (ECtHR) and courts in the United Kingdom have considered whether the use of mechanical restraints on prisoners in certain circumstances was contrary to article 3 of the European Convention on Human Rights (ECHR).¹⁴ Article 3 of the ECHR is the equivalent of article 7 of the ICCPR. It prohibits torture or inhuman or degrading treatment or punishment.
45. There is no equivalent to article 10 of the ICCPR in the ECHR. As noted above, conduct may not reach the standard required for a breach of article 7 of the ICCPR but still amount to a failure to treat a person with humanity and with respect for their inherent dignity as a human person, contrary to article 10 of the ICCPR. As a result, the case law described below is useful when considering minimum standards of treatment. However, it should not be seen as an exhaustive statement of what is required of authorities when considering the use of restraints on detainees. The majority of cases relate to prisoners rather than to people in administrative immigration detention, where different considerations are relevant. People who are administratively detained could usually expect conditions involving less restraint and more freedom of movement than people who are detained following a conviction for an offence.
46. In general, it does not amount to degrading treatment to require a prisoner to wear handcuffs during escorts outside prison if restraints are reasonably necessary in the circumstances: for example, if there is a reason to believe that the prisoner will attempt to escape or cause injury or damage.¹⁵ However, this conclusion is based on such a risk assessment being properly made. Further, the general rule is subject to modification where there is a high level of vulnerability by the prisoner.
47. In *Mouisel v France* (2004) 38 EHRR 34, a prisoner had been sentenced to 15 years imprisonment following his conviction for armed robbery, kidnapping and fraud. While in prison he was diagnosed with leukaemia and he required chemotherapy at a local hospital. As a result of his condition, he was weakened and no longer posed any physical danger. Despite this, he was handcuffed while being escorted to and from hospital. There was a factual dispute about whether he remained restrained while receiving chemotherapy. The ECtHR found that there had been a breach of article 3 of the ECHR in relation to the use of handcuffs. It held that:

In this case, having regard to the applicant's health, to the fact that he was being taken to hospital, to the discomfort of undergoing a chemotherapy

session and to his physical weakness, the court considers that the use of handcuffs was disproportionate to the needs of security. As regards the danger presented by the applicant, and notwithstanding his criminal record, the Court notes the absence of any previous conduct or other evidence giving serious grounds to fear that there was a significant danger of absconding or resorting to violence.¹⁶

48. The ECtHR referred with approval to recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).¹⁷ The CPT has provided guidance on the use of restraints on people detained in immigration detention facilities. The starting point is that the use of restraints needs to be justified in each particular case based on an individualised risk assessment. The CPT said that:

Applying handcuffs as a matter of routine to immigration detainees whenever they leave their detention facility, such as on hospital transfers, is disproportionate; the use of means of restraint should be considered on individual grounds and based on the principle of proportionality.¹⁸

6 Legal framework for use of force in immigration detention

49. Part 3 of the Thematic Inquiry report sets out the applicable legal and policy framework for the use of force in immigration detention.¹⁹ I refer to, and rely on, the applicable aspects of that report, without repeating them here.
50. In summary, Serco's contract with the Department to run immigration detention facilities, and the Detention Services Manual (DSM), are the primary documents that set out the obligations of Serco and departmental staff with respect to use of force, including the use of restraints such as mechanical handcuffs.
51. The Serco contract provides that Serco must ensure that force is not used unless as a measure of last resort, and then only with the reasonable level of force necessary. It further states that all reasonable precautionary measures must be taken to ensure the safety of the detainee. It requires personnel who use force to be properly trained and accredited.
52. As described in the DSM, both the Department and its service providers owe a duty of care to all persons held in immigration detention. This means that they are legally obliged to exercise reasonable care to prevent

detainees from suffering reasonably foreseeable harm. The Department's duty of care is non-delegable.

53. When the Department contracts out the provision of services to people in closed detention to third parties, it has a responsibility to ensure the contracted service providers are qualified and can meet the standards outlined in the contract.
54. While these third parties must also discharge their own duty of care obligations to a detainee in closed detention, this duty is additional to, and is not a substitute for, the Department's duty of care.
55. In addition to the Department's duty of care, the Department recognises that international human rights standards can inform the standard of care a detainee is to receive while detained in an immigration detention facility. These international standards require that detainees are treated fairly and reasonably within the law and that conditions of immigration detention ensure the inherent dignity of the human person.
56. The Department has released, via a freedom of information process, a Redacted version of its DSM, Detention Services Manual – Safety and security management – Use of force, with a document approval date of 10 October 2018. This was the DSM in use during the period that Mr Anees complains about being handcuffed when escorted to and from medical appointments.
57. The Department's DSM provides that:
 - there is a presumption against the use of force, including restraints, during movements within an immigration detention facility, transfers between immigration detention facilities, and during transport and escort activities outside of immigration detention facilities
 - conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force and/or restraint is used
 - reasonable force and/or restraint should only be used as a measure of last resort
 - reasonable force and/or restraint may be used to prevent the detainee inflicting self-injury, injury to others, escaping or destruction of property
 - reasonable force and/or restraint may only be used for the shortest amount of time possible to the extent that is both lawfully and reasonably necessary
 - if the management of a detainee can be achieved by other means, force must not be used

- the use of force and/or restraint must not include cruel, inhumane or degrading treatment
 - the use of force and/or restraint must not be used for the purposes of punishment
 - the excessive use of force and/or restraint is unlawful and must not occur in any circumstances
 - the use of excessive force on a detainee may constitute an assault
 - all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant operational procedures.²⁰
58. The Department's DSM provides that 'reasonable force' means 'no more than the minimum amount of force necessary to achieve legislative outcomes and/or ensure the safety of all detainees, staff and property'.²¹
59. Reasonable force is to be used only if no other reasonable options are available or to protect an officer or other person from injury, or to prevent harm to property. The use of force is considered to be reasonable if it is objectively justifiable and proportionate to the risk faced.²²
60. The DSM sets out the step-by-step actions applicable to uses of force in immigration detention, including the assessments that must be carried out and the approvals required prior to planned use of force commencing, aftercare, use of equipment and reporting.
61. The DSM states that under Serco's contract with the Department, planned use of force includes a requirement for Serco to prepare a risk analysis and consult with the Detention Health Service Provider (DHSP) to ensure that no medical reasons preclude the use of force, including restraints, against a detainee.²³
62. In consulting with the DHSP on a planned use of force, Serco must document the request for information from the DHSP in writing, as well as any advice provided by the DHSP. Serco must include the written advice received from the DHSP in a use of force approval request submitted to the Australian Border Force (ABF) Detention Superintendent.²⁴
63. Further, the DSM states that planned use of force, including the use of restraints, must be approved by the ABF Detention Superintendent prior to the use of force or use of restraints commencing. If approval is not received in time, the use of force must be reported as an unplanned use of force event.²⁵

64. When Serco has used force, or instruments of restraint such as handcuffs on a detainee, it must prepare an incident report for the Department and refer the detainee to the DHSP for a medical examination. The recording and reporting of use of force and/or restraints must be done in accordance with the relevant Detention centre's standard operating procedures.²⁶

Use of restraints

65. The DSM provides that using physical restraints during transport and escort applies to those for whom the risk assessment indicates that they pose a high risk or above, which includes:

- having an adverse behavioural or violent criminal history
- having a history of escape
- a detainee who is in detention for less than 28 days providing officers insufficient information to form a clear understanding of risk.²⁷

66. Instruments of restraint must:

- never be applied as a punishment or for discipline
- never be applied as a substitute for medical treatment
- never be used for convenience or as an alternative to reasonable staffing
- be removed once the threat has diminished and the officer believes that the detainee is no longer a threat to themselves, others or property.²⁸

67. Unless the situation requiring instruments of restraint is an emergency, any planned application first requires a detailed risk-management assessment to be undertaken in accordance with established procedures.²⁹

68. Serco's contract with the Department provides that Serco must 'ensure that restraints are not used in a manner which is likely to cause injury, serious discomfort or potential danger to a Detainee'.³⁰

7 Assessment

7.1 The security risk assessment of Mr Anees

69. Decisions about the use of force in immigration detention, and particularly decisions about when it is appropriate to use mechanical restraints, are dependent on risk assessments conducted by Serco.

70. Part 5 of the Thematic Inquiry report provides details about Serco's security risk assessment tool (SRAT) used to give detainees in closed immigration detention an individual risk assessment. SRAT was the relevant risk assessment tool used by Serco to generate risk assessments of Mr Anees in the December 2018 to August 2019 period. The Thematic Inquiry report also details a number of concerns the Commission has identified with the risk assessment process conducted by Serco. I refer to, and rely on, the applicable aspects of that report.
71. The Department has provided the Commission with each security risk assessment for Mr Anees that informed the Department's decisions to use mechanical restraints on the 6 occasions from 10 December 2018 to 26 July 2019.
72. In that relevant period, Mr Anees' overall risk rating was 'high'. Ratings were also given for various kinds of risk. He was assessed as a 'low' risk of demonstration, escape and self-harm. He was assessed as a 'high' risk of aggression/violence, criminal profile, DSP placement risk and DSP escort risk (where 'DSP' stands for Detention Service Provider).
73. As at 10 December 2018, Mr Anees had been in immigration detention for over 2 years. During that time, he had been involved in 7 incidents categorised as 'abusive/aggressive behaviour'. All 7 incidents are categorised as 'minor' and a brief description provided, for example: 'detainee swore at Serco Officers and IHMS Medical staff', 'detainee walked towards an officer at a fast pace and an aggressive manner', 'two detainees allegedly had a minor disagreement'. He had been involved in 8 incidents categorised as a 'minor' assault. However, in all but one of the assault related incidents, Mr Anees was the 'alleged victim' and the incidents involved him alleging that he had been assaulted either by another detainee or detention staff. The one assault incident where Mr Anees was not the alleged victim was described as, 'detainee made a verbal threat to a Serco officer'.
74. Mr Anees' security risk assessment dated 19 July 2019 lists 5 incidents categorised as 'major'. They are described as follows:
- Assault/Serious Illness – Detainee transported to Royal Perth Hospital after assault incident.
 - Serious Illness – Ambulance requested for detainee with chest pains.
 - Self-Harm – Threatened – Serious Illness – Ambulance required – Detainee advised that he felt like hanging himself following a negative

decision in relation to his immigration case. On the same day an ambulance was requested for detainee presenting with chest pains.

- Food/Fluid refusal – Food/Fluid refusal by detainee in White 2 compound.
- Self-Harm – Threatened – Detainee contacted GFU and threatened self-harm.

75. As mentioned above, Mr Anees was given a ‘high’ risk rating for his criminal profile. The Department’s security risk assessment documents for Mr Anees provide that he committed a single offence of serious violence, a single offence of mild violence, multiple property offences and multiple ‘other’ offences.
76. In these security risk assessment documents, risk indicators are colour coded as follows: white (where there is no relevant data), yellow, orange or red in increasing order of seriousness.
77. Mr Anees’ risk indicators for serious violence and mild violence are coloured yellow, indicating a lower risk on the Department’s scale. His risk indicators for property offences and the ‘other’ category are coloured red, indicating a high risk on the Department’s scale.
78. Mr Anees’ criminal offences are outlined in the table below. I note that this detail is not contained in the Department’s security risk assessment documents but is provided here as an overview of the offences that make up Mr Anees’ criminal record.

Date of conviction	Offence	Sentence
17/01/2011	<ul style="list-style-type: none"> • Various traffic offences including, driving without authorisation, driving an unregistered vehicle, running a red light 	Two months imprisonment, suspended
25/07/2011	<ul style="list-style-type: none"> • Theft (clothing, perfume, sunglasses from department store) • Fail to answer bail • Possess controlled weapon (small knife) without excuse • Possession of property being suspected of being proceeds of crime 	Community based order, 75 hours community service

17/08/2011	<ul style="list-style-type: none"> • Recklessly cause injury • 13 charges obtain property by deception (credit card fraud to purchase goods primarily food and basic items from grocery store) 	Three months imprisonment
17/10/2013	<ul style="list-style-type: none"> • Theft (bed sheets, food, drinks from grocery store, medications from chemist) • Threat to inflict serious injury • Assault with weapon 	12 months community corrections order

79. I acknowledge that, between 2010 and 2013, Mr Anees committed a significant number of offences. His crimes, however, were generally on the lower side of offending and occurred during a period where he says he was without income and homeless. Mr Anees says he stopped studying and did not work in order to care for his then partner who suffered from mental health issues. Sometime in 2010, Mr Anees says he found himself homeless and began living in his car. Mr Anees says the local council towed his car and he started to live on the street.
80. Many of the offences Mr Anees committed appear to be directed to obtaining food, drink and medication and attracted community-based orders.
81. I note that the following convictions can be viewed more seriously:
- Possess controlled weapon (small knife) without excuse
 - Recklessly causing injury, for which (together with 13 charges of obtain property by deception) he was sentenced to 3 months' imprisonment
 - Assault with a weapon, for which he was sentenced to a 12 months' community corrections order.
82. Mr Anees says the weapon conviction was in relation to a small knife he had in his backpack to cut food because he was homeless. Mr Anees says his conviction for recklessly causing injury was in relation to an altercation with a group of youths at a cinema. Mr Anees states the group attacked his girlfriend and he intervened to protect her. Mr Anees says the assault

with a weapon offence arose because Mr Anees pulled out a pocketknife and threatened a supermarket's security officer with it.

83. Mr Anees has not offended since January 2013. Between January 2013 and 5 October 2016, when he was taken into immigration detention, Mr Anees had stable employment and accommodation for almost 4 years.
84. The Department, in its response dated 20 January 2023, provided the following information:

When considering the overall risk rating of a detainee, including their escort risk rating, the Facilities and Detainee Service Provider (FDSP) considers a number of factors. Whilst escape is one of those factors, it is not the sole factor considered. In providing a comprehensive assessment, the FDSP identifies five key risk areas impacting the Immigration Detention Network (IDN). As per risk management protocols, the FDSP provides a Placement Risk Assessment and an Escort Risk Assessment based on the factors identified in the five key risk areas.

The Security and Risk Assessment Tool (SRAT) is designed to help inform decision making by stakeholders on the risks posed by a detainee at a particular point in time. Decisions on the use of mechanical restraints are not only informed by the SRAT but other factors, such as the location of the escort destination, intelligence holdings and the circumstances of the escort.

In this instance, while Mr Anees presented as a LOW risk for escape risk factors, he also presented as a HIGH risk for both violence and criminality. This resulted in the overall risk rating of high for both placement and escort. A high risk rating indicates that mechanical restraints should be utilised when escorting detainees to external appointments. Whilst mechanical restraints serve as a control strategy for the escape risk rating, they also serve as a control strategy for violent behaviours. Mr Anees was involved in several adverse incidents involving violence and aggression directed towards FDSP and Detention Health Service Provider (DHSP) stakeholders.

85. Having considered the Department's response, in my view it remains unclear how this risk rating was calculated or why Mr Anees was assessed as a risk requiring handcuffs for escorts. The Department has provided the Commission with 'Use of Force/Restraints' incident reports, completed after the instances that handcuffs were used to escort Mr Anees in the relevant period. The reports provided have a section titled "Reason for use of force". In each report, the stated reason for the use of handcuffs on Mr Anees is to 'prevent escape'. However, in each SRAT provided, Mr Anees had been assessed as 'low' risk of escape. Further, there have been no attempts to escape throughout his entire period of detention since October 2016.

86. I note that in each SRAT provided, the Department had assessed Mr Anees as 'high' risk for the 'ESP Escort Risk' category. The Department has stated that while Mr Anees presented as a low risk for escape risk factors, he presented as a high risk for both violence and criminality and this resulted in the overall risk rating of 'high' for both placement and escort. However, I note that the incidents identified as 'aggressive behaviour' since his detention in October 2016 do not appear to involve any physical violence and there is no record of Mr Anees behaving aggressively or violently during an escort. Further, as considered in the above analysis, the Department's security risk assessment documentation colour codes Mr Anees' risk indicators for serious violence and mild violence as yellow, indicating a lower risk on the Department's scale. It is therefore unclear why the Department has assessed him as 'high risk' of violence. Mr Anees was also given a 'high risk' rating for criminality. However, with reference to the analysis above, it appears that Mr Anees' crimes were generally on the lower side of offending and Mr Anees has not offended since 2013 (including 3 years where he lived in the community without incident). Further, even if Mr Anees has been reasonably assessed as a 'high risk' of criminality, it is unclear why such an assessment automatically requires that mechanical restraints be used when escorting him to and from medical appointments, particularly when the medical appointments are 5 years after he has engaged in any criminal conduct.
87. Mr Anees claims that from in or around May 2019 he was escorted to appointments without being handcuffed. He claims that the Department stopped handcuffing him after medical advice from the Royal Perth Hospital. He claims that in late July 2019, the practice of handcuffing him when escorted to medical appointments was reintroduced without explanation.
88. Mr Anees has provided the Commission with a report from the Royal Perth Hospital, Department of Gastroenterology & Hepatology dated 1 May 2019 and addressed to IHMS. The report documents that Mr Anees complained of left upper quadrant abdominal discomfort and pain under the ribs which he had been enduring for 4 months. The report states that this pain had begun soon after his transfer by plane from PIDC to BITA where handcuffs had been used. The report further states as follows:

I think if he were to be transferred by plane that he not be put in the same position (crouch position with handcuffs behind) if that is at all possible because he reports that this [is] something that caused the pain.

89. The Commission asked the Department when the use of handcuffs to escort Mr Anees ceased and for the reason behind this change. In a response dated 19 November 2019, the Department responded as follows:
- The approvals for use of mechanical restraints on Mr Anees continued to be considered on a case-by-case basis – notwithstanding the medical advice referenced by Mr Anees from the Department of Gastroenterology & Hepatology – Royal Perth Hospital...
90. The Commission asked the Department whether a decision was made to start handcuffing Mr Anees again while escorting him to medical appointments in or around July 2019, and if yes, how, and why was this decision made. The Department responded as follows: 'The approvals for use of mechanical restraints on Mr Anees continued to be considered on a case-by-case basis'.
91. In my preliminary view, I sought information from the Department about all instances where Mr Anees was escorted without handcuffs being used between December 2018 and September 2019, and the reasons, including documentation, as to why he was assessed as not requiring handcuffs for those escorts.
92. The Department, in its response dated 20 January 2023, stated that there were no instances between December 2018 and September 2019 in which Mr Anees was escorted to an external appointment without mechanical restraints.
93. There appears to be a factual discrepancy between Mr Anees' claim that the practice of handcuffing him ceased for a period before being reintroduced, and the Department's response. I make no finding in relation to this point.
94. The Department's response further stated that:
- A decision to apply restraints is made on a case by case basis taking into consideration the advice of DHSP on each occasion. Advice provided to ABF from DHSP did not indicate that there was any reason that restraints could not be applied taking into consideration available medical information.
95. While I agree that it is important for risk assessments to be conducted on a case-by-case basis, I am concerned about the use of mechanical restraints for medical appointments unless this is clearly necessary to prevent reasonably anticipated escape or violent conduct.

96. I find that the requirement that Mr Anees be handcuffed when escorted to and from medical appointments was not objectively justifiable and proportionate to the risk faced. Mr Anees was consistently assessed as a 'low' risk of escape, and he had a yellow (low risk) rating for serious violence and mild violence. There is no evidence of Mr Anees being physically violent towards detention staff or other detainees during his time in immigration detention. I note also that, so far as it is relevant, his criminal conduct was at the lower end of seriousness and ceased more than 5 years prior to the medical appointments. Therefore, on the information before me, I do not consider the use of handcuffs on Mr Anees on the 6 occasions between December 2018 and August 2019 to be reasonable.
97. In these circumstances, I find that the requirement that Mr Anees be handcuffed when escorted to and from medical appointments amounted to a failure to treat him with humanity and with respect for his inherent dignity, contrary to article 10 of the ICCPR.

7.2 Mr Anees' medical history and the Department's proper process

98. Mr Anees claims that IHMS medical staff advised ABF not to handcuff him when escorted to medical appointments, and he claims that ABF overwrote that advice.
99. In its response to my preliminary view dated 20 January 2023, the Department states that it 'refutes the claim that it overruled DHSP [IHMS] medical advice not to use mechanical restrains on Mr Anees when escorting him to medical appointments'.
100. In a response to the Commission dated 19 November 2019, the Department has stated as follows:

An assessment of whether to approve the use of restraints as a risk mitigation for planned escort tasks is undertaken on a case-by-case basis. IHMS advice is sought in advance of each occasion and the ABF Superintendent is responsible for the final approval, based on all the information provided. IHMS does not recommend or prohibit use of restraints but provides information to guide the ABF and the Facility and Detainee Service Provider (FDSP) in their risk assessment relating to the planned use of restraints and/or force for transfers and escort tasks. These assessments can vary greatly over time depending on the detainee's current medical condition. For this reason, each assessment is only valid for seven days.

101. The Department has provided the Commission with documents titled 'Request For Service' containing the IHMS logo. There is a 'Request For Service' corresponding to each of the 6 instances where handcuffs were used on Mr Anees in the relevant period. My understanding is that these documents are intended to record the advice sought from and provided by IHMS in relation to each instance that restraints are being considered for use. I note, however, that the documents provided in relation to Mr Anees do not contain any substantial details, advice, or information. The documents predominately contain administrative information. I am concerned that if IMHS advice was sought and given in relation to the use of handcuffs on Mr Anees, these documents do not adequately reflect and record that process as required by the Department's DSM.
102. Mr Anees has provided the Commission with a medical report written by a Dr Ibrahim Hanna, neurologist, dated 28 October 2019. This report states that a neurological assessment was conducted on Mr Anees and Dr Hanna undertook 'further investigation and management of 3.5 years of numbness and tingling on the 4th and 5th fingers suggestive of ulnar neuropathy or neuritis'.
103. The report further states the following:

From the history I can conclude that Mr Anees' symptoms are suggestive of ulnar nerve neuritis which could be due to the recurrent compression of the wrist joints from the handcuffs. He does have positive tinel sign for median nerve suggestive of carpal tunnel syndrome ... I agree that continuous handcuffing will worsen his ulnar neuritis plus the carpal tunnel syndrome."
104. According to Dr Hanna's report, Mr Anees had been experiencing numbness and tingling on his 4th and 5th fingers for a period of 3.5 years. I note that this is not mentioned in any of the IHMS documents provided to the Commission by the Department.
105. In its response to my preliminary view dated 20 January 2023, the Department stated that 'Dr Hanna's report describes a discussion with Mr Anees however there is no evidence that the Doctor discussed Mr Anees' medical condition with the DHSP'.
106. The Department's response is unclear as to whether it had acquired a copy of Dr Hanna's report at the time. Dr Hanna's report is dated 28 October 2019. Mr Anees was in closed immigration detention at that time. As such, the Department would have been aware of Mr Anees' appointment with Dr Hanna and would have escorted him to and from that appointment. It is unclear why the Department has no documentation available about this appointment.

107. In my preliminary view, I sought information from the Department about whether Mr Anees had complained of numbness and tingling in his fingers prior to 28 October 2019, and whether the Department was aware of this issue.

108. In its response dated 20 January 2023, the Department stated as follows:

In relation to Mr Anees, advice provided to ABF from the DHSP did not indicate there was any reason that restraints could not be applied taking into consideration Mr Anees' medical records. For instance where Mr Anees reported numbness and tingling in fingers, investigations and assessments conducted showed no significant abnormalities to explain the reported hand symptoms. Based on these results, there was no clinical reasons why mechanical restraints could not be utilised.

109. The Department has provided a document titled "Chronology of complaints of numbness or tingling in fingers" with a chronology date range of 5 October 2016 to 28 October 2019. This document contains a table listing when Mr Anees complained of numbness and tingling in his fingers, the type of medical appointment he attended to address his concern and some detail about each appointment. The document records 25 medical appointments attended by Mr Anees and includes appointments with the IHMS mental health nurse, IHMS primary health nurse (PHN), IHMS GP, IHMS physiotherapist, HIS psychologist, Northam Hospital, and Red Radiology. I note that this document does not list Mr Anees' appointment with Dr Hanna.

110. The detail provided in this document, while outlining Mr Anees' complaints, does not consistently include the assessment made by medical staff in each instance. For example, the entry dated 11 October 2019 when Mr Anees attended an appointment with the IHMS PHN, contains the following detail:

Mr [Anees] was reviewed by an IHMS PHN after being discharged from Liverpool Hospital and he requested to see a GP regarding his nerve pain. Mr [Anees] also reported that the day prior he was placed in handcuffs which were too tight, and he told the officer that they were too tight and that he had a pre-existing condition of nerve damage to his left little finger and ring finger.

No information is provided about the IHMS PHN's review and assessment of Mr Anees' complaint.

111. The entry dated 16 October 2019, when Mr Anees attended an appointment with the IHMS GP, contains the following detail:

Mr ANEES was reviewed by an IHMS GP and reported concerns of pins and needles in his left fourth and fifth fingers. Mr ANEES reported that this issue started three years ago when he was handcuffed and that it became worse when he fell onto his left wrist four months ago.

Again, no information is provided about the IHMS GP's review and assessment of Mr Anees' complaint.

112. The further information provided by the Department makes clear that Mr Anees regularly raised concerns about numbness and tingling in his fingers following the use of handcuffs, and that he regularly engaged with IHMS in relation to these concerns. It is concerning that the 'Requests For Advice' provided by IHMS to ABF to inform their use of force assessment provide no information in relation to this issue. It is also concerning that the Department may have been unaware of Dr Hanna's report that concludes that Mr Anees' symptoms could be due to 'recurrent compression of the wrist joints from the handcuffs' and 'continuous handcuffing will worsen his ulnar neuritis.'

8 Findings and recommendations

113. As a result of this inquiry, I have found that the use of mechanical handcuffs on Mr Anees, when he was escorted to and from medical appointments, was contrary to his rights under article 10 of the ICCPR to be treated with humanity and with respect for his inherent dignity.
114. 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 the reasons for those findings.³¹
115. The Commission may include any recommendation for preventing a repetition of the act or a continuation of the practice.³² The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.³³
116. I make the following recommendations:

8.1 Compensation

Recommendation 1

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

8.2 Security Risk Assessments

117. The Department's SRAT was used to give Mr Anees an overall risk rating of 'high'. The Department's practice is that a 'high risk' security rating automatically indicates that mechanical restraints should be used when escorting a detainee to external appointments.
118. My view is that Mr Anees was given a higher risk rating than a reasonable objective assessment would require.
119. The category of behaviour labelled 'abusive/aggressive behaviour', used by the SRAT to assess risk, covers a broad range of conduct including both 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 (e.g. bad language) may not have any element of physical aggression or violence. I consider that 'abusive' behaviour, if it is to be included in a risk assessment at all, should be separated from 'aggressive' behaviour and not be counted towards the risk of 'aggression/violence'.
120. I am concerned that this category, in Mr Anees' case, has been used for very minor incidents and that the accumulation of a number of these incidents resulted in a more serious risk rating than may have been warranted.
121. One way in which this problem could be addressed would be to remove 'abusive' behaviour from the SRAT altogether. On a day to day level, it appears that there also needs to be a more robust process for assessing whether incidents that are reported by Serco officers warrant inclusion on a person's risk assessment. This would go towards preventing very minor incidents from making their way onto a person's security record.
122. A related problem is that once incidents are recorded on the SRAT, they stay there. It appears that this would have the effect of increasing a person's risk rating over time. My understanding, from having conducted previous inquiries including in the Thematic Report, is that a higher weighting is given to incidents that occurred in the last 3 months, so if a person is incident free for 3 months their risk rating may temporarily drop. However, even if a person is incident free for 3 months, it appears that their rating can only ever drop to the accumulated total of the incidents that are more than 3 months old. It does not appear that there is any process by which incidents that occurred a significant period of time ago

are eventually removed from a risk rating. Similarly, it appears there is no review process that considers the weight to be given to a criminal history – that assesses the seriousness of the offending, the time that has passed since the offences occurred, and any other relevant circumstances.

Recommendation 2

The Commission recommends that the following issues be considered when the Department conducts security risk assessments:

- a) separating incidents of ‘abusive’ behaviour from incidents of ‘aggressive’ behaviour
- b) removing incidents of ‘abusive’ behaviour from inclusion in the security risk assessment process altogether
- c) incorporating a review process for assessing whether incidents are sufficiently material for inclusion on a person’s risk assessment, and for removing incidents from a person’s risk assessment that are not sufficiently material
- d) incorporating a process for removing older incidents from a person’s risk assessment
- e) incorporating a review process to consider the weight to be given to a criminal history in light of the level of seriousness of the offending, the time that has passed since the offences occurred, and any other relevant circumstances.

8.3 The use of handcuffs

123. The application of restraints in immigration detention facilities appears in practice to differ significantly from the impression generated by the Department’s DSM. The manual suggests that use of handcuffs should be the exception, rather than the rule. As stated in the DSM, the use of restraints should generally be a last resort and should be applied for the shortest appropriate period of time. The DSM also states that if the management of a detainee can be achieved by other means, force must not be used. The application of restraints in practice should better comply with this guidance.
124. The manual also provides that ‘using physical restraints during transport and escort applies to those whom the risk assessment indicates that they pose a high risk or above, which includes having an adverse behavioural or violent criminal history, and those having a history of escape...’.
125. The key issue seems to be the ease with which detainees are given a ‘high’ risk assessment, thus requiring the use of handcuffs. I am concerned about the Department’s default practice that a ‘high’ risk security rating automatically indicates that mechanical restraints should be used when

escorting a detainee to external appointments. As noted above, I am also concerned that some detainees are given a higher risk rating than a reasonable objective assessment would require.

126. People in immigration detention are in administrative detention. They are not serving a sentence of imprisonment and they are generally entitled to expect greater freedom of movement and personal liberty than prisoners. The use of restraints on immigration detainees should be limited to circumstances where this is reasonably necessary in the context of the particular operation, based on an individualised risk assessment. It should not be a default setting in the absence of a proper individualised assessment being made. It is important that these principles form part of the instructions given to officers responsible for making assessments about whether restraints should be applied.

Recommendation 3

The Commission recommends that prior to each occasion when the use of restraints is proposed in relation to a detainee, there should be a new individualised risk assessment for that detainee in the context of the particular operation that takes into account:

- a) any general risk assessment prepared by the detention operator based on the relevant incidents that a detainee has been involved in while in immigration detention
- b) the particular requirements of the operation, for example, an escort to a medical appointment
- c) whether that operation can be conducted safely without the need for restraints to be applied.

The Commission recommends that restraints should not be routinely applied to a particular class of detainees, including detainees generally assessed as 'high' risk, without an individual risk assessment of the kind described above being carried out.

8.4 Record keeping

127. It is important that proper records are kept in relation to every use of force incident to allow scrutiny of whether the use of force was appropriate in the circumstances.
128. The complaint considered in this report has revealed a number of poor record-keeping practices.

129. There does not appear to be any formal system of record keeping relating to requests to IHMS for advice, or to advice provided by IHMS, in relation to the use of restraints.
130. As noted above it is not clear if the advice of IHMS was sought about whether there were any medical concerns with Mr Anees being restrained when escorted to and from medical appointments for each of the instances where handcuffs were used in the relevant period. Further, if IHMS advice was sought and given, the documentation provided does not reflect and record that process as required by the Department's DSM.
131. I am also concerned that the Department either wasn't aware of, or didn't take into consideration, the medical assessment made about Mr Anees by Dr Hanna in his report dated 28 October 2019.

Recommendation 4

The Commission recommends that the Department develop a record-keeping protocol to record:

- a) the requests by the detention service provider to medical professionals; and
- b) the advice received by the detention service provider from medical professionals

about whether there are any medical concerns with the use of force or restraints on particular detainees. The Commission does not consider that it is sufficient for the detention service provider to rely on medical notes that merely observe that a client is to be handcuffed without a considered assessment of whether such restraint is appropriate.

9 The Department's response to my findings and recommendations

132. On 18 May 2023, I provided the Department with a notice of my findings and recommendations.
133. On 8 September 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.

Compensation

Recommendation 1: Disagree

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

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

Security Risk Assessments

Recommendation 2: Disagree

The Commission recommends that the following issues be considered when the Department conducts security risk assessments:

- a) separating incidents of 'abusive' behaviour from incidents of 'aggressive' behaviour*
- b) removing incidents of 'abusive' behaviour from inclusion in the security risk assessment process altogether*
- c) incorporating a review process for assessing whether incidents are sufficiently material for inclusion on a person's risk assessment, and for removing incidents from a person's risk assessment that are not sufficiently material*
- d) incorporating a process for removing older incidents from a person's risk assessment*
- e) incorporating a review process to consider the weight to be given to a criminal history in light of the level of seriousness of the offending, the time that has passed since the offences occurred, and any other relevant circumstances.*

The Department disagrees with Recommendation 2. The Department further notes that the Commission made the same recommendation in 2019 in its 'Use of force in immigration detention report' (Recommendation 5 refers).

The Security Risk Assessment Tool (SRAT) is a security tool developed by the Facilities and Detainee Service Provider (FDSP) to assess and calculate the security risk each immigration detainee poses within the Immigration Detention Network.

The SRAT uses a quantitative and qualitative assessment to provide an overall risk assessment in line with ISO31000 (Risk Management – Guidelines) which provides principles, a framework, and a process for managing risk.

All incidents occurring within the detention environment and any criminal history are considered when creating a risk assessment to ensure a holistic approach to providing a security risk assessment and in keeping with the ‘likelihood versus consequence’ principles.

Some incidents carry a greater weighting than others, dependant on their severity and frequency. Incidents of abusive and aggressive behaviours only constitute one piece of the risk assessment and carry a minor weighting in comparison to other incidents, however, assist in providing a holistic approach to a detainees overall assessment.

Recommendation 3: Accepted and already addressed

The Commission recommends that prior to each occasion when the use of restraints is proposed in relation to a detainee, there should be a new individualised risk assessment for that detainee in the context of the particular operation that takes into account:

- a) any general risk assessment prepared by the detention operator based on the relevant incidents that a detainee has been involved in while in immigration detention*
- b) the particular requirements of the operation, for example, an escort to a medical appointment*
- c) whether that operation can be conducted safely without the need for restraints to be applied.*

The Commission recommends that restraints should not be routinely applied to a particular class of detainees, including detainees generally assessed as ‘high’ risk, without an individual risk assessment of the kind described above being carried out.

The Department accepts Recommendation 3 and reaffirms previous advice to the Commission that the pre-planned use of force, including application of restraints, may only be applied to a detainee where an individual assessment of their risk shows that it is warranted and the relevant Australian Border Force (ABF) Detention Superintendent has provided written approval for such force to be used in the particular circumstances and prior to that force being applied. When planning a transfer or other detention related operations, circumstances of individual detainees including the risk they pose individually and as part of a group, as well as the nature and location of the offsite activity, are taken into account in determining whether the use of reasonable force may be necessary in order to achieve a safe and secure operation.

The Department maintains that a detainee's overall risk profile, which is used to inform how a detainee is managed, is determined through an individual assessment of each detainee's circumstances and is not routinely applied to a particular class of detainees. A detainee's individual security risk assessment must be reviewed and where appropriate, updated, on a monthly basis (minimum) or when events trigger the need to review a detainee's security risk. The security risk assessment is undertaken to determine the security risk a detainee poses to themselves or others and the safe and secure operation of the Immigration Detention Facility (IDF) and is used to inform the circumstances under which pre-approved use of force may be used.

Record Keeping – Accepted and already addressed

Recommendation 4

The Commission recommends that the Department develop a record keeping protocol to record:

- a) the requests by the detention service provider to medical professionals; and*
- b) the advice received by the detention service provider from medical professionals about whether there are any medical concerns with the use of force or restraints on particular detainees. The Commission does not consider that it is sufficient for the detention service provider to rely on medical notes that merely observe that a client is to be handcuffed without a considered assessment of whether such restraint is appropriate.*

The Department accepts Recommendation 4 and reaffirms the Department's response to the Commission's 'Use of force in immigration detention' report in 2019 at which time the Commission made the same recommendation (Recommendation 18 refers).

This requirement was clarified in the updated operational policy instruction '*Detention Services Manual – Safety and security management – Use of force*' which came into effect on 10 January 2019 and is included in the Immigration Detention Facilities and Detainee Services Contract. In the instance of a pre-planned use of force, the FDSP is required to prepare a risk analysis and consult with the Detention Health Service Provider (DHSP). In consulting with the DHSP on a pre-planned use of force, including application of restraints, the FDSP must document the request for information from the DHSP, as well as any advice provided by the DHSP. Advice received from the DHSP must be included in the use of force approval request submitted to the relevant ABF Detention Superintendent.


In this regard, the relevant ABF Detention Superintendent must consider the information from the FDSP and any views submitted by the DHSP,

including where there are divergent views, in order to make an informed decision about the use of force/application of restraints in respect to an individual detainee. This may include undertaking further consultation with the FDSP and/ or DHSP. The Department reiterates that neither the FDSP nor the DHSP is the decision maker in relation to the pre-planned use of force/application of restraints.

Table 1 - Summary of Department's response to recommendations

Recommendation number	Department's response
1	Disagree
2	Disagree
3	Accepted and already addressed
4	Accepted and already addressed

134. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission
November 2023

Endnotes

- ¹ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), [1980] ATS 23 (entered into force for Australia 13 November 1980).
- ² Australian Human Rights Commission, *The Use of Force in Immigration Detention* [2019] AusHRC 130 (May 2019).
- ³ See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212–3 and 214–5.
- ⁴ UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)* 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 April 1992) [3].
- ⁵ UN Human Rights Committee, Views: Communication No 639/1995, 60th sess, UN Doc CCPR/C/60/D/639/1995 (28 July 1997) (*Walker and Richards v Jamaica*); UN Human Rights Committee, Views: Communication No 845/1998, 74th sess, UN Doc CCPR/C/74/D/845/1998 (26 March 2002) (*Kennedy v Trinidad and Tobago*); UN Human Rights Committee, Views: Communication No 684/1996, 74th sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) (*R.S. v Trinidad and Tobago*).
- ⁶ *Christopher Hapimana Ben Mark Taunoa v The Attorney General* [2007] NZSC 70.
- ⁷ *Christopher Hapimana Ben Mark Taunoa v The Attorney General* [2007] NZSC 70, [79].
- ⁸ The Standard Minimum Rules were approved by the UN Economic and Social Council by its resolutions ESC Res 663C (XXIV) 24 UN ESCOR Supp 1 UN Doc E/3048 (31 July 1957) and ESC Res 2076 (LXII) 62 UN ESCPR Supp 1 UN Doc E/5988 (13 May 1977). They were adopted by the UN General Assembly in resolutions *Human Rights in the Administration of Justice*, GA Res 2858 (XXVI), UN GAOR, 3rd Comm, 26th sess, 2027th plen mtg, Agenda Item 12, UN Doc A/8588 (20 December 1971) and UN Doc A/CONF/611, Annex 1.
- ⁹ The Body of Principles were adopted by the UN General Assembly in *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 6th Comm, 43rd sess, 76th plen mtg, Agenda Item 138, UN Doc A/43/49 (9 December 1988).
- ¹⁰ UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)* 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 April 1992) [5].
- ¹¹ UN Human Rights Committee, Views: Communication No 458/1991, 51st sess, UN Doc CCPR/C/51/458/1991 (21 July 1994) 11 [9.3] (*Mukong v Cameroon*); UN Human Rights Committee, Views: Communication No 632/1995, 60th sess, UN Doc CCPR/C/60/D/632/1995 (18 August 1997) 6 [6.3] (*Potter v New Zealand*). See also, UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United States of America*, UN GAOR, 50th sess, Supp No 40, UN Doc A/50/40 (3 October 1995) 55 [285], 57 [299].
- ¹² UN Human Rights Committee, Views: Communication No 1020/2001, 78th sess, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003) 15 [7.2] (*Cabal and Bertran v Australia*).
- ¹³ See for example, Australian Human Rights Commission, *The Use of Force in Immigration Detention* [2019] AusHRC 130 (May 2019); Australian Human Rights Commission, 'Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention' (Report No. 35, April 2006).
- ¹⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, commonly referred to as the European Convention on Human Rights, opened for signature by the member States of the Council of Europe 4 November 1950, entered into force 3 September 1953.

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- ¹⁵ *Raninen v Finland* [1997] 3 Eur Court HR [55]-[56]; quoted with approval in *The Queen on the application of Vaclavas Faizovas (proceedings by Inga Faizovaite) v Secretary for State of Justice* [2009] EWCA Civ 373 at [3] (Arden LJ).
- ¹⁶ *Mouisel v France* [2004] 38 Eur Court HR 34 [47].
- ¹⁷ *Mouisel v France* [2004] 38 Eur Court HR 34 [47].
- ¹⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Factsheet on Immigration Detention*, (Factsheet, March 2017) 7 <<https://rm.coe.int/16806fbf12>>.
- ¹⁹ Australian Human Rights Commission, *The Use of Force in Immigration Detention* [2019] AusHRC 130 (May 2019) 22.
- ²⁰ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Use of force* (October 2018), 4-5.
- ²¹ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Last resort principles* (October 2018), 5.
- ²² Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Last resort principles* (October 2018), 5.
- ²³ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Planned use of force* (October 2018), 5.
- ²⁴ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Planned use of force* (October 2018), 5.
- ²⁵ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Planned use of force* (October 2018), 5.
- ²⁶ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Planned use of force* (October 2018), 5.
- ²⁷ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Transport and escort* (October 2018), 8.
- ²⁸ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Instruments of restraint* (October 2018), 8.
- ²⁹ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Transport and escort* (October 2018), 8.
- ³⁰ Department of Home Affairs, *Detention Services Manual – Chapter 4 – Procedural Instruction – Transport and escort* (October 2018), 8.
- ³¹ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- ³² *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- ³³ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).