



Australian  
Human Rights  
Commission

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**Ms PQ and Ms PR v**

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**Commonwealth of Australia**

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**(Department of Home Affairs)**

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**[2021] AusHRC 142**

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7 June 2021

# **Ms PQ and Ms PR v Commonwealth (Department of Home Affairs)**

[2021] AusHRC 142

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

Australian Human Rights Commission 2021

Senator the Hon. Michaelia Cash  
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 complaint by Ms PQ and Ms PR alleging a breach of their human rights by the Department of Home Affairs (Department).

Ms PQ and Ms PR arrived in Australia on tourist visas on 6 January 2018. After being interviewed at the airport for a number of hours, their visas were cancelled and they were subsequently transferred to Adelaide Immigration Transit Accommodation (AITA) where they were detained before being transported back to the airport on 8 January 2018 to depart Australia. They complain that their treatment by the Department while detained was inconsistent with or contrary to article 10(1) and article 17(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the use of restraints by the Department in circumstances where no risk assessment was conducted, as well as the use of restraints and subsequent delay in providing access to bathroom facilities, constituted a failure to treat Ms PQ and Ms PR with humanity and respect for their dignity, contrary to Article 10 of the ICCPR. Further, I have found that the Department's decision to deny the complainants access to their mobile phones, in circumstances where other methods of communication were at times inaccessible and only available in common areas offering little to no privacy, amounts to an arbitrary interference with privacy in breach of article 17(1) in conjunction with article 10(1) of the ICCPR.

On 15 March 2021, 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 16 April 2021. That response can be found in Part 11 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  
7 June 2021

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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 joint complaint by Ms PQ and Ms PR against the Commonwealth of Australia, Department of Home Affairs (Department), alleging a breach of their human rights.
2. Ms PQ and Ms PR arrived in Australia on tourist visas on 6 January 2018. They were interviewed at the airport for a number of hours. Their visas were cancelled and they were subsequently transferred to Adelaide Immigration Transit Accommodation (AITA) where they were detained before being transported back to the airport on 8 January 2018 to depart Australia.
3. Ms PQ and Ms PR complain that their treatment by the Department (through the Australian Border Force (ABF) and Serco) while detained was inconsistent with or contrary to article 10(1) and article 17(1) of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup>
4. This inquiry is being undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
5. This report is issued pursuant to s 29(2) of the AHRC Act setting out the findings of the Commission in relation to this complaint.
6. Ms PQ and Ms PR have requested that their names not be published in connection with this inquiry. I consider that the preservation of their anonymity is necessary to protect their human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and will use pseudonyms in this final public report.

# 2 Summary of findings and recommendations

7. As a result of this inquiry, I find that the use of restraints, in circumstances where no assessment of their risk was conducted, constituted a failure to treat Ms PQ and Ms PR with humanity and respect for their dignity, and was contrary to article 10 of the ICCPR.
8. I find that the use of restraints and the subsequent delay in providing access to bathroom facilities constituted a failure to treat Ms PQ and Ms PR with humanity and respect for their dignity, contrary to article 10 of the ICCPR.
9. I find the Department's decision to restrict individual privacy and autonomy by denying Ms PQ and Ms PR access to their mobile phones in circumstances

where other methods of communication including landline phones were at times inaccessible and only available in common areas offering little to no privacy appears to amount to an arbitrary interference with privacy in breach of article 17(1) in conjunction with article 10(1) of the ICCPR.

10. I make the following recommendations:

#### **Recommendation 1**

The Commonwealth consider paying to Ms PQ and Ms PR an appropriate amount of compensation to reflect the distress suffered as a result of being placed in restraints.

#### **Recommendation 2**

The Commonwealth provide a formal apology to Ms PQ and Ms PR for the breach of their human rights identified in this inquiry.

#### **Recommendation 3**

The Department instruct Serco to cease the practice of restraining all physically fit detainees for the first 28 days of their detention where Serco has not conducted an individual assessment of the detainee's risk that shows that the use of restraints is warranted.

### **3 Background**

11. Ms PQ and Ms PR are nationals of Scotland and citizens of the United Kingdom. They intended to travel within Australia for 39 days and then spend 10 days in Bali before returning home to Edinburgh. While in Australia, they say they were keen to continue their hobby of writing and performing songs for friends at 'house concerts' and local pubs in Adelaide. At house concerts, a hat is often passed around at the end of the night for anyone attending to voluntarily contribute some money to be shared among those that have performed during the evening. The organiser of the pub performances offered to cover Ms PQ and Ms PR's expenses and drinks.
12. Ms PQ and Ms PR arrived at Adelaide airport on 6 January 2018 at 17:30 on tourist visas. Their visas were cancelled at approximately 23:30 pursuant to s 116(1)(g) of the *Migration Act 1958* (Cth) (Migration Act) on the grounds that they intended to work while in Australia. As a result, Ms PQ and Ms PR were transferred from the airport into immigration detention at AITA pursuant to

s 189(1) of the Migration Act pending removal from Australia. They boarded a plane and were removed from Australia on 8 January 2018 around 23:00.

13. Shortly after returning to Scotland, Ms PQ and Ms PR lodged a complaint with the Commission alleging that the treatment they received at the airport and AITA breached their human rights. The treatment they complain of includes:
  - airport interview conditions and procedures
  - the use of handcuffs while being transferred between the airport and immigration detention
  - the removal of their mobile phones, limited access to other forms of communication for a majority of their detention and consequent inability to contact friends and family, and
  - restrictions around attending to their personal hygiene needs.

## **4 Conciliation**

14. The Commonwealth indicated that it did not want to participate in conciliation of the matter.

## **5 Procedural history of this inquiry**

15. On 22 July 2020, I issued a preliminary view in this matter and gave the complainants and the Department the opportunity to respond to my preliminary findings. On 25 August 2020, the complainants responded to my preliminary view. On 3 December 2020, the Department responded to my preliminary view.
16. On 15 March 2021, 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 16 April 2021.

## **6 Legislative framework**

### **6.1 Functions of the Commission**

17. 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.
18. 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.



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

## **6.2 What is an 'act' or 'practice'?**

20. 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.
21. 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.
22. 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.<sup>2</sup>

## **6.3 What is a human right?**

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

24. 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.

25. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

# **7 Right of detainees to be treated with humanity and dignity**

26. 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.

27. General Comment 21 on article 10(1) of the ICCPR by the UN HR Committee 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.<sup>3</sup>

28. 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 art 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.

29. The above conclusions about the application of article 10(1) are also supported by the jurisprudence of the UN HR Committee,<sup>4</sup> 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*,<sup>5</sup> 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'.<sup>6</sup>

30. 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.

31. While many of the cases brought under article 10(1) involve physical mistreatment or poor conditions in prison, the decisions of the UNHRC in *Angel Estrella v Uruguay*<sup>7</sup> (*Estrella*) and *Zheludkov v Ukraine*<sup>8</sup> (*Zheludkov*) demonstrate that article 10(1) can be breached by actions that do not involve physical mistreatment or poor prison conditions.

32. In *Estrella*, the UNHRC held that the conduct the subject of the complaint constituted a breach of both articles 10(1) and 17. In this case the breach involved censorship and restriction of Mr Estrella's correspondence with his family and friends to such an extent that the UNHRC considered it to be incompatible with article 17 read in conjunction with article 10(1).
33. In *Zheludkov*, the UNHRC held that the State's consistent and unexplained refusal to provide Mr Zheludkov with access to his medical records constituted a breach of article 10(1). The Committee reached this conclusion even though it was not in a position to determine the relevance of the medical records to an assessment of Mr Zheludkov's health or to the medical treatment afforded to him. In a separate concurring opinion, Ms Cecilia Medina expressed the view that the actions of the State constituted a breach of article 10(1) regardless of whether the refusal to provide access had any consequences for the medical treatment of Mr Zheludkov. In reaching this conclusion, Ms Medina made the following comments:

Article 10, paragraph 1, requires States to treat all persons deprived of their liberty 'with humanity and with respect for the inherent dignity of the human person'. This, in my opinion, means that States have the obligation to respect and safeguard all the human rights of individuals, as they reflect the various aspects of human dignity protected by the Covenant, even in the case of persons deprived of their liberty. Thus, the provision implies an obligation of respect that includes all the human rights recognized in the Covenant. This obligation does not extend to affecting any right or rights other than the right to personal liberty when they are the absolutely necessary consequence of the deprivation of that liberty, something which it is for the State to justify.

A person's right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them. The State has not given any reason to justify its refusal to permit such access, and the mere denial of the victim's request for access to his medical records thus constitutes a violation of the State's obligation to respect the right of all persons to be 'treated with humanity and with respect for the inherent dignity of the human person', regardless of whether or not this refusal may have had consequences for the medical treatment of the victim.<sup>9</sup>

34. It is not possible to identify comprehensively all situations that will constitute a breach of article 10(1). Ultimately, whether there has been a breach of this article will require consideration of the facts of each case. The question to ask is whether the facts demonstrate a failure by the State to treat detainees humanely and with respect for their inherent dignity as a human being.<sup>10</sup>

## 8 Right to privacy

35. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

36. Article 17 includes a requirement that states parties not arbitrarily interfere with a person's private and home life. Privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of individual existence and autonomy, free from government intervention and excessive unsolicited intervention by others.

37. Additionally, for persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons under article 10(1) of the ICCPR. As set out above, article 10 provides extra protection for persons in detention who are particularly vulnerable as they have been deprived of their liberty, and imposes a positive duty on states parties to provide detainees with a minimum of services to satisfy basic needs, including means of communication and privacy.

38. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

## 9 Findings

### 9.1 Conditions during airport interview

39. Ms PQ and Ms PR complain that their human rights were breached while 'detained' at the airport. They allege that:

- after more than 25 hours of travelling they were detained for eight hours
- they were separated, kept in locked rooms, interrogated for over five hours and given inadequate time and resources to make statements explaining why their visas should not be cancelled
- all of their possessions were removed from them (including their mobile phones, snacks, personal hygiene products and medication)
- Ms PQ informed an ABF officer that she was menstruating, but was not offered sanitary products at any point during this time (and did not have access to her luggage)

- their requests to contact friends, family members and to seek legal advice or representation were denied until many hours later – after their visas were cancelled and they were told they were being transferred to a ‘transit centre’
- they were not provided adequate meals or refreshments, and
- Ms PQ’s credit card was missing when her possessions were returned to her and ABF staff refused to document or further investigate this.

40. When the Commission requested a response to this aspect of their complaint, the Department replied stating that Ms PQ and Ms PR were not detained for eight hours, but rather:

Ms PQ and Ms PR were given an opportunity to engage in an interview process, which they consented to. The detention period only commences once the decision has been made to cancel the visa.

41. Ms PQ and Ms PR disagreed, noting:

The [ABF] state that we were asked to engage in an interview process that we consented to. The wording of this is incorrect. To be absolutely clear – We had NO CHOICE in this matter – we had to be compliant at all times otherwise face ramifications and punishment.

42. There is a factual dispute between the parties on this issue. The Department submits that Ms PQ and Ms PR consented to the interview process. Ms PQ and Ms PR say they felt they had little choice about whether or not to participate in the interview process. On the information available, I am concerned that the ABF may not have informed Ms PQ and Ms PR clearly and appropriately as to why they were being questioned, or what their options were. However, in the circumstances, and in light of the submission of the Department, I do not have enough evidence to find that Ms PQ and Ms PR were detained during the interview process at the airport.

43. It is my view that the detention of Ms PQ and Ms PR commenced at 11.30 pm once their visas were cancelled. As a consequence, I am not able to consider whether the treatment they received during the interview process at the airport may have been a breach of article 10, which relates to the right of *detainees* to be treated with humanity and dignity.

## **9.2 Transfers to and from AITA**

44. Ms PQ and Ms PR complain that their human rights were breached during their transfers between the airport and AITA. They allege that they were handcuffed unnecessarily, were not provided any meals or refreshments and were unable to attend to their personal hygiene needs.

## Use of handcuffs

45. Ms PQ and Ms PR allege that they were handcuffed for the half hour journeys between the airport and immigration detention facility on 7 and 8 January 2018, and for a further hour while waiting in the van outside the airport until they boarded their return flight on 8 January 2018.
46. The Department confirms that Ms PQ and Ms PR were handcuffed with their hands in front of their bodies for the duration of the transfers from the airport to AITA and from AITA to the airport until passing through the airport screening area.
47. The Department states that it determined that Ms PQ and Ms PR were 'high risk' in accordance with the ABF Use of Force Directive of 26 February 2016 which provides, relevantly, with emphasis added:

Section 7. Where Serco and the ABF do not have sufficient information on a detainee to form a clear understanding of risk, that detainee *maybe [sic]* considered High Risk if they meet all of the three following criteria:

- a. Is an Adult
- b. Is not accompanying children and
- c. Has no physical impairment that would prevent them from escaping, or causing harm to themselves or others (i.e. frail, injured, physical disability etc.).

Section 8. There is an *accepted inherent risk* stemming from a likely lack of knowledge of *any person who has been in detention for less than 28 days*. Unless the ABF or any service provider provides further information or direction, Serco *may* determine these detainees as a high risk of escape ... Noting the risks, *Serco must consider each instance on a case by case basis* weighing up the risks of escape against the broader reputational risk of the Department.

Section 9. There is broad agreement between Serco and the ABF, that detainees who are rated High or Extreme escort risk, will be restrained using pre-planned use of mechanical restraints. *If there are concerns that a detainee does not warrant mechanical restraints, then the risk rating should be reviewed to more accurately reflect the residual risk.*

48. The Department's Detention Services Manual provides that mechanical restraints such as handcuffs may be approved by the Secretary of the

Department for use in immigration detention facilities. In relation to travel to and from detention, the Manual says:

Restraint during escorted visits and scheduled travels only applies to detainees who have a serious or violent criminal history, those who have a history of escape, and those for whom the risk assessment indicates that they potentially pose a high risk. In practice this means that reasonable force and/or restraint will be determined following risk-management procedures.

49. The Manual further provides that instruments of restraint must be removed once the threat has diminished and the officer considers that the detainee is no longer a threat to themselves, others or property.
50. In my recent report on *Use of Force in Immigration Detention [2019] AusHRC 130*, I considered in detail the use of handcuffs in immigration detention facilities. I recommended that the Detention Services Manual and the manuals for private detention service providers engaged by the Department make clear that:
  - (a) there is a presumption against the use of restraints, including handcuffs, during transfers between detention centres and during escorts to appointments
  - (b) the use of restraints, including handcuffs, should be a measure of last resort
  - (c) 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:
    - (i) 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
    - (ii) the particular requirements of the operation, for example, a transfer between detention centres
    - (iii) whether that operation can be conducted safely without the need for restraints to be applied
  - (d) the risk assessment should consider whether restraints should be applied during transit and, if so, at which point in the journey it may be appropriate to remove them
  - (e) restraints should not be routinely applied to a particular class of detainees, including detainees generally assessed as being 'high' risk, without an individualised risk assessment of the kind described above being carried out
  - (f) restraints should be used only for the shortest period of time necessary in the circumstances
  - (g) the necessity for the continued use of restraints should be regularly re-evaluated during the course of an operation.

51. In that report, I also recommended that the Department instruct Serco to cease the practice of restraining all physically fit detainees for the first 28 days of their detention where Serco has not conducted an individual assessment of the detainee's risk that showed that the use of restraints was warranted.
52. The Commission asked the Department to provide a copy of any individualised assessment undertaken for Ms PQ and Ms PR. In response, the Department confirmed that '[t]here was no individualised assessment undertaken as to the suitability of mechanical restraints application. Ms PQ and Ms PR met the criteria for the application as per the ABF directive.'
53. In response to my preliminary view, the Department provided the following information:
- Serco had no knowledge of the women's background or their propensity for adverse behaviour, their previous immigration history or how they might react while under stress. Consequently Serco could not have prepared a Security Risk Assessment that would have assessed Ms PQ and Ms PR as not requiring restraints.
- Ms PQ and Ms PR were in detention for less than 28 days and were therefore classified as high risk. There is an inherent risk stemming from a likely lack of knowledge of any person who has been in detention for less than 28 days. Unless the ABF or any service provider provides further information or direction, the FDSP may determine these detainees as high risk of escape. Consequently, these detainees may be escorted in mechanical restraints, providing they are an adult, are not accompanying children, or have no physical impairment contradicting the use of restraints.
54. The Department also confirmed in this response that the use of force 'must be justifiable and proportionate to the circumstances, and only used as a measure of last resort'.
55. At the time, Ms PQ was 39 years old and Ms PR was 31 years old. Ms PQ is a financial services project manager and Ms PR is a professional wedding singer. The Department cancelled their tourist visas as it determined that they intended to engage in paid work while in Australia. They were detained following cancellation of their visas pending removal from Australia back to the United Kingdom.
56. Ms PQ and Ms PR were accompanied during the transfers and while waiting in the van by five Serco employees (three male and two female officers from the airport to AITA, and four male and one female officers from AITA to the airport). I have reviewed the escort log reports prepared by Serco that are contemporaneous records of the transfers of Ms PQ and Ms PR. From these reports it appears that Ms PQ and Ms PR were compliant, and the transfer



was conducted without incident. Both reports note that Ms PQ and Ms PR presented 'nil issues' during the transfers.

57. Mr PQ alleges that she requested her handcuffs be removed on the transfer to Adelaide Airport because she was feeling faint, and the handcuffs were hurting her. She alleges the request was denied.
58. On the material before me, it does not appear that Ms PQ and Ms PR posed a threat during the transfers that was sufficient to justify the use of restraints for the journeys, or while waiting in the van and then being escorted through the airport. It also does not appear that the use of restraints was as a measure of last resort, as required by Department policy.
59. Serco says that they could not prepare a security risk assessment because they did not have the requisite background information about the complainants. However, I consider a practical point-in-time assessment could have been conducted to determine whether restraints were required. Factors that could have been considered include: the absence of information to suggest the complainants would be a flight risk, any risk could be mitigated by the presence of six trained Serco officers, and the fact that the complainants were compliant.
60. Accordingly, I find that the use of restraints, in circumstances where no assessment of their risk was conducted, constituted a failure to treat Ms PQ and Ms PR with humanity and respect for their dignity, and was contrary to article 10 of the ICCPR.

#### *Conditions during transfer*

61. Ms PQ and Ms PR also allege that while waiting to board their return flight in a van outside Adelaide airport for an hour and half, they remained in handcuffs and
  - felt faint from lack of food and having their menstrual periods, and were not offered meals or refreshments
  - were not allowed to use toilet facilities without handcuffs so they couldn't attend to their personal hygiene needs
  - as a result of being unable to change her menstrual sanitary products, Ms PR bled through her underwear.
62. The escort log report provided by the Department records that Serco arrived to pick up Ms PQ and Ms PR for transfer to the airport at AITA at 6.45 pm. The van left AITA at 7.02 pm and arrived at the airport at 7.30 pm. Ms PQ and Ms PR were escorted through the airport at 8.30 pm and their handcuffs were

removed before they were escorted through international screening and to the aircraft door at just after 9.00 pm.

63. The escort log report provided by the Department records Ms PQ and Ms PR being offered refreshment at 6.40 pm and 6.52 pm (just prior to leaving AITA) and at 8.41 pm. The report also records a toilet break being offered at 6.40 pm, 6.52 pm and 8.41 pm.
64. On the basis of the contemporaneous material provided by the Department, I find that Ms PQ and Ms PR were offered refreshments at regular intervals.
65. In respect of the complaint regarding access to toilet facilities, the Department says that Ms PQ and Ms PR asked to use the bathroom between 7.29 pm and 8.32 pm while waiting in the Serco van at the airport. The Department does not have records that a bathroom request was made at 7.30 pm, however it does not deny that it could have been made at that time.
66. I accept the complainants' claim that they asked to use the bathroom at 7.30 pm and were told that this would involve walking through the airport and using the bathroom in handcuffs, or that, if they waited 10 minutes, they could use another bathroom without handcuffs once through the screening area. According to the Department, Ms PQ and Ms PR chose the second option and used the toilet at approximately 8.40 pm.
67. In the Department's response, it notes that the requirements of the Escort Operation Order state that 'toilet and refreshment breaks must be offered every two hours'. The Department contends that toilet and refreshment breaks were offered within this timeframe.
68. I note my finding above that the use of handcuffs while Ms PQ and Ms PR were in the van outside the airport was not justified in the circumstances, and amounted to a failure to treat Ms PQ and Ms PR with humanity and respect for their dignity, contrary to article 10 of the ICCPR. I also note my recommendations to the Department following other inquiries that restraints should be used for the shortest period of time necessary, and the need for the continued use of restraints should be regularly reviewed during the course of an operation. I accept that the Department did offer Ms PQ and Ms PR toilet breaks at various intervals. However, at 7.30 pm Ms PQ and Ms PR asked to use the bathroom. Ms PQ and Ms PR say they had previously informed the Department that they were menstruating. I accept that the Department provided Ms PQ and Ms PR the option to access toilet facilities immediately, with handcuffs, or wait 10 minutes to access the toilet facilities without handcuffs. However, what transpired was a delay of one hour and ten minutes in the removal of handcuffs and access to the toilet facilities.

69. In the circumstances, it does not appear that it was reasonable to require Ms PQ and Ms PR to attend to their personal hygiene needs while wearing handcuffs, or to have to wait over an hour to do so without handcuffs. Accordingly, I find that the use of handcuffs and subsequent delay in providing access to bathroom facilities constituted a failure to treat Ms PQ and Ms PR with humanity and respect for their dignity, contrary to article 10 of the ICCPR. Consideration should have been given to removing Ms PQ's and Ms PR's handcuffs to allow them to access the toilet facilities, particularly in circumstances where the Department's records state there were 'nil' incidents during the transfers and there were five Serco officers acting as escorts.

### **9.3 Conditions during immigration detention**

70. Ms PQ and Ms PR complain that their human rights were breached during the period of their detention at AITA, the Adelaide immigration detention facility. They allege that
- they were kept awake until 8.30 am (having landed around 5.30 pm the evening prior and been interviewed and then detained at the airport until 2.00 am that morning) for induction procedures
  - they had very limited means of communication to contact friends and family or to seek legal or diplomatic assistance
  - they were not informed of their rights to legal or migration assistance and were only provided with the opportunity to speak with a migration officer shortly before departing AITA
  - they were placed in a detention facility occupied overwhelmingly by men and were at times fearful for their safety, privacy and wellbeing
  - they were given inadequate notice to collect their belongings, inform family and family and otherwise prepare to leave the detention centre.
71. The Department confirms that induction did not occur immediately, as another priority flight landed that ABF officers needed to attend to, and that due to an IT failure, a good portion of the induction process had to be repeated. The Department also confirms that there was an IT issue with Serco IT that delayed Ms PQ's and Ms PR's internet access beyond the standard 24-hour period required to load a detainee's ID onto the system. It appears from the information available that Ms PQ did not have access to the internet at all during her time in AITA, and Ms PR's access commenced around midday on 8 January.
72. The Department does not dispute that Ms PQ and Ms PR had no access to their mobile phones while in detention at AITA, and does not provide an explanation as to why this was necessary, or the legal basis for doing so. The

Department disagrees, however, that they were denied contact with family members or other contacts, stating:

Ms PQ and Ms PR had access to local phone calls immediately, and access to a phone book to contact a lawyer (in lieu of internet access). ...

Ms PQ and Ms PR were advised during the induction that international phone cards would be provided on request. The phone cards were provided by ... 21:45hrs on 7 January 2018, once requested.

While at the AITA, Ms PQ and Ms PR had unrestricted access to the common area where access to the internet was provided.

73. In response to the Commission asking whether alternative, less restrictive, detention options were canvassed for Ms PQ and Ms PR, the Department stated:

An Alternative Place of Detention (APOD) would only be considered if the AITA was at full capacity, or if detaining a dangerous client group. APODs are presently only considered for families with children or particularly high risk detainees that need to be separated from the AITA population. The AITA is viewed as the least restrictive detention option in the immigration detention network.

74. The Department confirms that the majority of detainees accommodated at AITA, when Ms PQ and Ms PR arrived, were male. The Department explains that AITA does not have a purpose-built female area, and that Ms PQ and Ms PR were accommodated at one end of a unit in a room together, which was lockable from the inside. At the time, there were four males residing in two rooms at the other end of the unit, none of whom – according to the Department – ‘had any alerts for being a risk to females. Men with histories of violence or misogyny are not accommodated in the Platypus unit.’
75. Ms PQ and Ms PR also complain that: they were given only five minutes notice prior to being removed from the detention facility; they could not inform family, friends or legal advisers; they were not provided with adequate food; and that no health assessment was undertaken to ensure they were fit to travel.
76. The Department states that Ms PQ and Ms PR had at least 30 minutes after having their property checked with them prior to leaving the centre. The Department’s escort log report records Ms PQ and Ms PR being offered

refreshments at 6.40 pm and 6.52 pm, just prior to leaving the detention centre.

77. In reply to the Department's response, Ms PQ and Ms PR reiterated their concerns and noted:

We are certain we were given much less time than 30 minutes – there was no time to prepare and eat a meal before we had to endure having photographs taken, go through the leaving process and put on handcuffs to sit in the van before departing for the airport ...

In addition, 30 minutes is still not an adequate amount of notice for a long haul flight home to the United Kingdom, or to make calls to family and friends to put arrangements in place for our arrival.

...

We maintain that being held in a predominantly male IDF [immigration detention facility] without access to our belongings and mobile phones was inappropriate given that we were not ... charged with any crime.

... We felt threatened by some of the behaviours of the males held there in the communal areas – ranging from intellectually disabled men (with anger and aggression issues) to men with criminal convictions. It cannot be disputed that we were placed in an area of considerable discomfort and potential physical danger ...

We were only able to make phone calls using telephones in a multi-purpose communal area. At no time did we have privacy ... On one occasion, we could not use the telephones at all in the communal area due to a group activity going on.

...

[a] lot of our time was spent in the communal areas where all the men were – with some telling us about their criminal pasts. This is not acceptable.

78. In respect of the aspects of the complaint related to the provision of food and the notice period prior to departure, I do not have sufficient information to draw conclusions regarding a breach of article 10. I note the Department's contemporaneous records that refreshments were offered to Ms PQ and Ms PR at 6.40 pm and 6.52 pm just prior to leaving the detention centre.

79. In respect of the aspects of the complaint relating to their detention at a detention centre with a predominantly male cohort, although I am concerned that Ms PQ and Ms PR say they were at times fearful for their safety, I do not have enough information to establish that the Department failed to provide a safe place of detention that may be considered in breach of article 10. I note

that Ms PQ and Ms PR were accommodated in a room together at the detention centre, which was lockable from the inside.

80. On the basis of the information available to me, it appears that Ms PQ and Ms PR were considerably restricted in their ability to contact family and friends and seek legal, migration or consular assistance, for a significant portion of the time they were detained at AITA.
81. The United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules)<sup>11</sup> provide, at rule 58, that prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals. Rule 62 further provides that prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong. I note also that the Commission's *Human rights standards for immigration detention*<sup>12</sup> provide that detainees in immigration facilities should be able to communicate by telephone, mail, email and social media with members of family and friends, should have access to telephones to enable conversations of reasonable length in private and have the right to communicate with a lawyer and national consulates privately and promptly.
82. As the result of both technical difficulties and decisions made by the Department:
  - Ms PQ and Ms PR did not have access to their mobile phones or personal computers for the duration of their detention
  - Ms PR only had internet access for the last six hours of her detention and Ms PQ had no internet access
  - Ms PQ and Ms PR were provided with international phone cards more than 12 hours after their arrival, and
  - Ms PQ's and Ms PR's only access to phones was in a communal space at times inaccessible and otherwise offering little to no privacy.
83. In response to my preliminary view, the Department provided still images taken from CCTV footage showing:
  - Ms PQ using the phone in the Platypus classroom on 7 January 2018 for approximately 45 minutes
  - Ms PQ and Ms PR using the computers in the Computer Room and in the Platypus classroom throughout the day on 8 January 2018
84. In February 2017, the Australian Government introduced a new policy that prohibited the possession and use of all mobile phones and SIM cards in immigration detention facilities. This policy change aimed to respond to concerns that some people in immigration detention were using mobile

phones 'to organise criminal activities, threaten other detainees, create or escalate disturbances and plan escapes by enlisting outsiders to assist them'.<sup>13</sup>

85. In June 2018, the Federal Court of Australia ruled that this mobile phone policy was invalid on the basis that it was not authorised by any provision of the Migration Act.<sup>14</sup>
86. I note that it was Department policy at the time of the complainants' detention that detainees could not have access to their mobile phones.
87. As set out above, article 10 provides protection for persons in detention who are particularly vulnerable as they have been deprived of their liberty, and imposes a positive duty on States Parties to provide detainees with a minimum of services to satisfy basic needs, including means of communication and privacy.
88. As noted above, other methods of communication including landline phones were at times inaccessible and only available in common areas offering little to no privacy. In these circumstances, the Department's decision to restrict individual privacy and autonomy by denying Ms PQ and Ms PR access to their mobile phones appears to amount to an arbitrary interference with privacy in breach of article 17(1) in conjunction with article 10(1) of the ICCPR.

## **10 Recommendations**

89. 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.<sup>15</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>16</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.<sup>17</sup>
90. The complainants have requested a written apology from the Department and Serco. They also requested compensation for post-traumatic stress disorder (PTSD) trauma, distress and discomfort, money lost on their holiday and lost earnings.
91. I have carefully considered the complainants' written submissions in relation to the recommendations they seek. I acknowledge the distress Ms PQ and Ms PR have suffered as a result of their experience in immigration detention.
92. I consider that it is appropriate to make recommendations directed both at remedying or reducing the loss and damage suffered by Ms PQ and Ms PR,

and at preventing a repetition of the acts or a continuation of the practices that are described in my findings, as set out below.

93. 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.<sup>18</sup> 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.<sup>19</sup>
94. 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.<sup>20</sup> I do not repeat those matters again here.

### **Recommendation 1**

The Commonwealth consider paying to Ms PQ and Ms PR an appropriate amount of compensation to reflect the distress suffered as a result of being placed in restraints.

### **Recommendation 2**

The Commonwealth provide a formal apology to Ms PQ and Ms PR for the breach of their human rights identified in this inquiry.

### **Recommendation 3**

The Department instruct Serco to cease the practice of restraining all physically fit detainees for the first 28 days of their detention where Serco has not conducted an individual assessment of the detainee's risk that shows that the use of restraints is warranted.

## **11 The Department's response to my findings and recommendations**

95. On 15 March 2021, I provided the Department with a notice of my findings and recommendations.



96. On 16 April 2021, the Department provided the following response to my findings and recommendations:

The Department values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings and recommendations made in relation to the alleged breach of Ms PQ and Ms PR's human rights.

The Department notes the Commission's recommendations, and does not agree that the use of restraints and the subsequent delay in providing access to bathroom facilities constituted a failure to treat Ms PQ and Ms PR with humanity and respect for their dignity, contrary to article 10 of the International Covenant on Civil and Political Rights.

The Department notes recommendation one and two regarding payment of compensation and the provision of a formal apology to Ms PQ and Ms PR.

The Department is required to manage claims for compensation in accordance with Appendix C of the Legal Services Directions 2017. Appendix C stipulates that claims can only be resolved in accordance with legal practice and principle, which requires at least the existence of a meaningful prospect of liability. It would not be within legal principle and practice to resolve this matter on the basis of the information currently available.

In cases where there is no legal liability to pay compensation, the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme is a discretionary compensation scheme, which provides a mechanism for the Commonwealth to compensate persons who have experienced financial detriment as a result of the defective administration of certain Commonwealth entities, as outlined in Resource Management Guide 409 (the guide). The CDDA Scheme is generally an avenue of last resort and is not used where there is another viable avenue available to provide redress.

Further information on claiming compensation from the Department can be found on the Department's <https://www.homeaffairs.gov.au/help-and-support/claiming-compensation-from-us>.

It is open for Ms PQ and Ms PR to make a claim for discretionary compensation and their claim will be assessed in accordance with the guide. Making a claim does not guarantee that compensation will be paid.

The Department does not concede there has been any human rights breach by Australia in relation to Ms PQ and Ms PR and therefore it would be inappropriate for the Commonwealth of Australia to act in accordance with recommendation two.

The Department disagrees with recommendation three. The Department considers that there is an inherent safety and security risk to an individual, other detainees and/or the community when a person has been in detention for less than 28 days, stemming from a lack of knowledge about that particular individual. Where information is not available to the Australian Border Force (ABF) or its service providers to indicate a detainee presents or poses a low risk, that individual can be considered high risk. The Department notes that this operational policy does not apply to adults who are accompanying children or have physical impairments that would prevent them from escaping, or causing harm to themselves or others.

In addition, the Department's use of force in immigration detention is extensively documented and governed by the Migration Act 1958, as well as detention operational policies and procedures, including the requirement for each pre-planned use of force to be approved by the ABF Detention Superintendent on a case-by-case basis.

Emeritus Professor Rosalind Croucher AM  
**President**  
Australian Human Rights Commission

7 June 2021

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- <sup>1</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, [1980] ATS 23 (entered into force for Australia 13 November 1980).
  - <sup>2</sup> 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.
  - <sup>3</sup> UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.1 (10 April 1992) at [3].
  - <sup>4</sup> UN Human Rights Committee, *Views: Communication No 529/1993*, 60<sup>th</sup> sess, UN Doc CCPR/C/60/D/639/1995 (2001), (*Walker and Richards v Jamaica*); UN Human Rights Committee, *Views: Communication No 845/1998*, 74<sup>th</sup> 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*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) (*R.S. v Trinidad and Tobago*).
  - <sup>5</sup> *Christopher Hapimana Ben Mark Taunoa v The Attorney General* [2007] NZSC 70.
  - <sup>6</sup> *Christopher Hapimana Ben Mark Taunoa v The Attorney General* [2007] NZSC 70, [79].
  - <sup>7</sup> UN Human Rights Committee, *Views: Communication No 74/1980*, 18<sup>th</sup> sess, UN Doc CCPR/C/18/D/74/1980, (29 March 1983), (*Estrella v Uruguay*).
  - <sup>8</sup> UN Human Rights Committee, *Views: Communication No 726/1996*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/726/1996, (29 October 2002) (*Zheludkova v Ukraine*).
  - <sup>9</sup> *Zheludkova v Ukraine*, UN Doc CCPR/C/76/D/726/1996 (ibid). Mr Rivas Posada, with whom Messrs Bhagwati and Ando agreed, dissented in the case and found that mere obstruction of access to medical records per se did not breach article 10(1).
  - <sup>10</sup> See discussion on the meaning of the word 'dignity' in a different context in *A, R (on the application of) v East Sussex County Council* [2003] EWHC 167 [86]-[89].

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- <sup>11</sup> UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), GA Res 70/175, UN GAOR, 70th sess, UN Doc A/RES/70/175, (17 December 2015).
- <sup>12</sup> Australian Human Rights Commission, *Human rights standards for immigration detention*, (Standards, 11 April 2013).
- <sup>13</sup> Australian Border Force, 'New Measures to Combat Illegal Activity within Immigration Detention Facilities,' *Parliament of Australia* (Media Release, 21 November 2016) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/4950103%22>>.
- <sup>14</sup> *ARJ17 v Minister for Immigration and Border Protection* (2018) 250 FCR 446, [103–104].
- <sup>15</sup> *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- <sup>16</sup> *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- <sup>17</sup> *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
- <sup>18</sup> *Peacock v The Commonwealth* (2000) 104 FCR 464 at 483 (Wilcox J).
- <sup>19</sup> *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- <sup>20</sup> For example, see *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth of Australia (DIBP)* [2016] AusHRC 110 at [196]-[205], <<https://www.humanrights.gov.au/our-work/legal/publications/ms-ar-behalf-mr-master-and-miss-au-v-commonwealth-dibp>>.