



Australian  
Human Rights  
Commission

# Mr Watt v State of New South Wales (Corrective Services NSW)

[2023] AusHRC 149

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# Mr Watt v State of New South Wales (Corrective Services NSW)

[2023] AusHRC 149

*Inquiry into complaints made by Mr Adam Watt that certain acts and practices during his detention in NSW correctional centres were inconsistent with or contrary to his human rights*

**Australian Human Rights Commission 2023**



**Australian  
Human Rights  
Commission**

# Contents

<b>1</b>	<b>Introduction</b>	<b>9</b>
	Recommendation 1	10
	Recommendation 2	10
	Recommendation 3	11
<b>2</b>	<b>Background</b>	<b>11</b>
2.1	First complaint – failure by CSNSW to notify next of kin following assault	12
2.2	Second complaint – lack of adequate facilities to prepare defence	13
2.3	Third complaint – failure to provide separate treatment – excessive confinement in cell	13
2.4	Fourth complaint – search of cell and prison transfer	14
2.5	Fifth complaint – failure to ensure confidentiality of defence materials	14
2.6	Discontinued and terminated complaints	14
2.7	Procedural history of the complaints	15
<b>3</b>	<b>Legal framework for human rights inquiry</b>	<b>15</b>
3.1	Functions of the Commission	15
3.2	Scope of ‘act’ and ‘practice’	16
3.3	‘By or on behalf of the Commonwealth’	17
<b>4</b>	<b>Relevant Human Rights</b>	<b>18</b>
<b>5</b>	<b>First complaint – failure to inform complainant’s mother of assault</b>	<b>20</b>
5.1	Relevant human rights	26
	(a) Article 10 of the ICCPR and the <i>Standard Minimum Rules for the Treatment of Prisoners</i>	26
	(b) Finding regarding article 10 and the first complaint	29
	(c) Articles 17 and 23 – the right to family and family life	31
	(d) Findings regarding articles 17 and 23 and the first complaint	33
	(e) Concluding remarks regarding the first complaint	34
<b>6</b>	<b>Second complaint – failure to provide ‘adequate facilities’ for the preparation of defence</b>	<b>35</b>
6.1	Relevant human rights	37
6.2	Analysis of Mr Watt’s circumstances regarding his second complaint	38

<b>7</b>	<b>Third complaint – Excessive confinement to cell – failure to provide separate treatment</b>	<b>41</b>
7.1	An ‘act or practice?’	41
7.2	Submissions and evidence relating to the third complaint	42
	(a) Confinement to cell	42
	(b) Security classification	44
7.3	The right to separate treatment in article 10 of the ICCPR	44
	(a) Australia’s reservation to article 10	45
	(b) The second limb of article 10(2)(a) – ‘separate treatment’	45
7.4	Analysis of Mr Watt’s circumstances regarding the third complaint	47
<b>8</b>	<b>Fourth complaint – search of cell and treatment during prison transfer</b>	<b>49</b>
8.1	CSNSW Response	49
	(a) CSNSW’s Operations Procedures Manual (OPM)	51
8.2	Discussion	52
	(a) Strip search	52
	(b) Search of cell	57
	(c) Use of restraints during transfer	58
	Recommendation 1	62
	Recommendation 2	62
8.3	Timing of search	63
<b>9</b>	<b>Fifth complaint – Confidentiality of legal materials</b>	<b>64</b>
9.1	Confidentiality of legal materials while using prison computers	64
	(a) Human rights implications	73
	(b) Discussion	75
9.2	Concluding remarks regarding first limb of fifth complaint	77
	Recommendation 3	78
9.3	Search of legal materials on 9 – 10 March 2010	78
	(a) Discussion	79
9.4	Confiscation and loss of legal materials	80
<b>10</b>	<b>Conclusion</b>	<b>81</b>
<b>11</b>	<b>The Department’s response to my findings and recommendations</b>	<b>82</b>





**Australian  
Human Rights  
Commission**

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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 Watt, alleging a breach of his human rights by the State of New South Wales, while he was remanded in custody in correctional centres administered by Corrective Services NSW (CSNSW).

Mr Watt complains that:

- a. prison authorities failed to notify Mr Watt's mother, being his next of kin, following an assault on Mr Watt by a fellow inmate on 1 October 2009
- b. while in custody, Mr Watt was not provided with adequate access to computer facilities for the preparation of his defence in relation to the charges against him
- c. Mr Watt was not afforded separate treatment appropriate to his status as an unconvicted person, because of the length of the hours during which he was confined to his cell
- d. Mr Watt was mistreated during a search of his cell and a transfer between prisons on the night of 10–11 March 2010
- e. Mr Watt was not provided with sufficient confidentiality in relation to his defence materials including the notes he drafted on computer in relation to his defence.

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Mr Watt's complaints appear to engage the human rights contained in articles 7, 10, 14, 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have formed the view that:

- a. The restraint of Mr Watt by CSNSW using leg shackles, handcuffs and a waist belt while transferred from the MSPC to Parklea on 9–10 March 2010, in the absence of the demonstrated necessity of that form of restraint, was inconsistent with his right to be treated with dignity and humanity under article 10(1) of the ICCPR.
- b. The requirements by CSNSW that Mr Watt save his legal notes to floppy disks, not password protect these disks, and leave these disks for storage with prison staff rather than retain them in his possession, in circumstances where the contents of those disks were subject to routine scrutiny by prison staff, and no adequate protections were in place to ensure that confidential legal materials were not read by staff, was inconsistent with Mr Watt's right to communicate in confidence with counsel of his choosing (protected by article 14(3)(b) of the ICCPR) and his right to privacy (protected by article 17 of the ICCPR).
- c. I am not satisfied that the other acts and practices the subject or Mr Watt's complaints have been established to be inconsistent with or contrary to his human rights.

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

On 23 December 2023, I provided the NSW Department of Communities and Justice (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 14 April 2023. That response can be found in Part 11 of this report.

I enclose a copy of my report.

Yours sincerely,



Emeritus Professor Rosalind Croucher AM

**President**

Australian Human Rights Commission

16 May 2023

# 1 Introduction

1. The Australian Human Rights Commission (Commission) is conducting an inquiry into a number of complaints made by and on behalf of Mr Adam Watt against the State of New South Wales (Corrective Services NSW) and the Commonwealth of Australia. Mr Watt has complained about a number of matters relating to his treatment in correctional centres administered by Corrective Services NSW (CSNSW) while he was remanded in custody on criminal charges for a period of almost two years. The complaints allege that:
  - a. prison authorities failed to notify Mr Watt's mother, being his next of kin, following an assault on Mr Watt by a fellow inmate on 1 October 2009
  - b. while in custody, Mr Watt was not provided with adequate access to computer facilities for the preparation of his defence in relation to the charges against him
  - c. Mr Watt was not afforded separate treatment appropriate to his status as an unconvicted person, because of the length of the hours during which he was confined to his cell
  - d. Mr Watt was mistreated during a search of his cell and a transfer between prisons on the night of 10–11 March 2010
  - e. Mr Watt was not provided with sufficient confidentiality in relation to his defence materials including the notes he drafted on computer in relation to his defence.
2. Mr Watt's complaints appear to engage the human rights contained in articles 7, 10, 14, 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup>
3. This inquiry is being conducted pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
4. As a result of this inquiry, I have formed the view that:
  - a. The restraint of Mr Watt by CSNSW using leg shackles, handcuffs and a waist belt while transferred from the MSPC to Parklea on 9–10 March 2010, in the absence of the demonstrated necessity of that form of restraint, was inconsistent with his right to be treated with dignity and humanity under article 10(1) of the ICCPR.

- b. The requirements by CSNSW that Mr Watt save his legal notes to floppy disks, not password protect these disks, and leave these disks for storage with prison staff rather than retain them in his possession, in circumstances where the contents of those disks were subject to routine scrutiny by prison staff, and no adequate protections were in place to ensure that confidential legal materials were not read by staff, was inconsistent with Mr Watt's right to communicate in confidence with counsel of his choosing (protected by article 14(3)(b) of the ICCPR) and his right to privacy (protected by article 17 of the ICCPR).
  - c. I am not satisfied that the other acts and practices the subject or Mr Watt's complaints have been established to be inconsistent with or contrary to his human rights.
5. This report is issued pursuant to s 11 of the AHRC Act and sets out the Commission's findings, reasons for those findings and makes recommendations to prevent the relevant acts and practices from being repeated.
6. The following recommendations are made in this report:

### **Recommendation 1**

That restraints only be applied to an inmate where an individual assessment of their risk shows that this is warranted. That risk assessment ought to be documented, including the factors that indicate that the use of restraints is warranted.

### **Recommendation 2**

That CSNSW's operating procedures make clear that:

- a. the use of restraints, including handcuffs, should be a measure of last resort in all circumstances
- b. prior to each occasion when the use of restraints is proposed, there should be an individualised risk assessment for that detainee in the context of the particular operation that takes into account:
  - (i) any general risk assessment based on the relevant incidents that an inmate has been involved in whilst imprisoned

- (ii) the particular requirements of the transportation and its need or purpose
  - (iii) whether the inmate can be transported safely without the need for restraints to be applied
- c. 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
- d. restraints should be used only for the shortest period of time necessary in the circumstances, and their use regularly re-evaluated for necessity during their use
- e. restraints should not be routinely applied to a particular class of inmates, including serious offenders or others in maximum security, without an individualised risk assessment of the kind described above being carried out.

### **Recommendation 3**

That CSNSW review their policies and procedures to ensure that adequate safeguards are in place to ensure the confidentiality of inmates' legal documents. These safeguards should ensure that searches of inmate's legal documents are only permitted in exceptional circumstances, where there are reasonable grounds to consider that the contents of the documents endanger prison security or the safety of others or are otherwise of a criminal nature.

## **2 Background**

7. On 25 September 2008, Mr Watt was arrested and charged with a number of offences relating to the alleged importation and supply of pseudoephedrine. Mr Watt was charged with both Commonwealth offences and offences under the law of New South Wales.
8. Mr Watt was remanded in custody and detained in various NSW correctional centres administered by CSNSW. Currently, CSNSW is a division of the NSW Department of Communities and Justice. It has

previously been incorporated within various other NSW government departments, and before that, constituted a department in its own right. At all relevant times, CSNSW has been an organ of the State of NSW. As discussed further below, prisoners held on remand facing Commonwealth charges are detained in State and Territory prisons, as are persons sentenced to terms of imprisonment following conviction for those charges.

9. Mr Watt was held in a number of NSW correctional centres. Documents supplied by CSNSW indicate that the principal places of his detention were:
  - a. from 1 October 2008 to 9 December 2009 – the Metropolitan Remand and Reception Centre (MRRC) at Silverwater
  - b. from 9 December 2009 to 16 December 2009 – Parklea Correctional Centre (Parklea)
  - c. from 16 December 2009 to 9 March 2010 – Metropolitan Special Programs Centre (MSPC) at Long Bay
  - d. from 10 March 2010 to 13 August 2010 – Parklea.
10. On 13 August 2010, Mr Watt was released from custody on bail. None of the charges against him ultimately proceeded to trial. The NSW charges were withdrawn, and the Commonwealth charges did not proceed because, as a result of the assault described later in this document, Mr Watt was found to be unfit to stand trial.<sup>2</sup> For completeness, I note that Mr Watt has submitted that at all times he maintained his fitness and wished for a trial to proceed.

## **2.1 First complaint – failure by CSNSW to notify next of kin following assault**

11. On 1 October 2009, while detained at the MRRC, Mr Watt was the victim of a serious assault by another inmate. He was knocked unconscious, immediately taken to Westmead Hospital, and then returned to the MRRC that evening. He was taken to Auburn Hospital on each of 2 and 3 of October, and on 3 October 2009, was admitted overnight and underwent surgery. On 4 October 2009, he was returned to the MRRC.
12. The assault itself, and the medical consequences it had for Mr Watt, are not the subject of the complaints presently before me. Rather,

Mr Watt complains that his mother was not notified of the assault, of his subsequent transfer to hospital, or of his admission to hospital overnight on 3 October 2009. (This complaint was initially made by Mr Watt's mother, but was later pursued by Mr Watt personally). I have considered whether the failure to notify Mr Watt's mother was inconsistent with or contrary to Mr Watt's right to be treated with dignity and humanity, and his and his mother's right to family life. These rights are protected by articles 10(1), 17 and 23(1) of the ICCPR.

## **2.2 Second complaint – lack of adequate facilities to prepare defence**

13. Mr Watt states that the prosecution brief relating to the charges against him was voluminous, comprising 22 volumes of written materials and 78 compact discs which included audio recordings. (There are some minor discrepancies in descriptions of the size of this brief in submissions made to me over the course of this matter. These have no impact on the substance of Mr Watt's complaint). Mr Watt complains that, while detained, he was not provided with sufficient access to computers to review these materials and so to prepare his defence. In particular, he has complained that he was not provided with access to a computer or a compact disc player for use in his cell, so that he could review relevant materials during the lengthy periods during which he was confined there. I have considered whether the failure to provide a laptop or additional access to computer facilities was inconsistent with or contrary to Mr Watt's right to a fair trial, protected by article 14(3)(b) of the ICCPR.

## **2.3 Third complaint – failure to provide separate treatment – excessive confinement in cell**

14. Mr Watt has complained that throughout his detention, he was confined to his cell for 18 hours per day, and for a stretch of 36 hours once per week. He says that this was inappropriate given that he had not been convicted of any offence at the time. He complains that this violated his right as an unconvicted prisoner to 'separate treatment' — that is, his right to be treated differently from convicted prisoners, in a way appropriate to his status as an unconvicted person. That right is protected by article 10(2)(a) of the ICCPR.

## 2.4 Fourth complaint – search of cell and prison transfer

15. Mr Watt has complained that on or about the night of 10 March 2010, his cell was searched, and he was strip searched. He alleges that, despite having a court hearing the next day, that evening after the searches he was transferred to another correctional centre. He complains about the fact and circumstances of the search, about the transfer and the use of restraints during that transfer, and the timing of these events. I have considered whether these searches and the use of restraints were inconsistent with or contrary to Mr Watt's right to be treated with dignity and humanity, as protected by article 10(1) of the ICCPR. I have considered whether the timing of the prison transfer was inconsistent with or contrary to his right to a fair trial, protected by article 14(3)(b).

## 2.5 Fifth complaint – failure to ensure confidentiality of defence materials

16. Mr Watt complains that CSNSW failed to ensure the confidentiality of his defence materials. He states that during a search of his cell on or about 10 March, prison officers searched legal materials that were in his cell. He also states that he was required to store his defence notes, legal instructions and trial strategy, which were in electronic form, on floppy disks, which were stored in the prison library. Mr Watt was not permitted to keep them in his possession. Further, he states he was on several occasions required to save his materials to a public computer. He was not permitted to password protect these materials. I have considered whether these allegations were inconsistent with or contrary to Mr Watt's right to a fair trial, protected by article 14 of the ICCPR.

## 2.6 Discontinued and terminated complaints

17. Mr Watt initially made two further complaints. The first, which was subsequently withdrawn, related to the length of his detention while on remand. The second related to the assault referred to in paragraph 11 above that took place on 1 October 2009. Mr Watt initially complained that CSNSW failed to take steps to prevent this assault and failed to assist Mr Watt in receiving further and better medical treatment afterwards.

This complaint included an allegation that Mr Watt, as an unconvicted inmate, should not have been detained together with his assailant, who was serving a sentence of imprisonment at the time of the assault. This complaint was terminated under section 20(2)(c)(iv) of the AHRC Act because Mr Watt was then seeking a remedy in relation to these matters in the form of a tort claim in Supreme Court of NSW proceedings. In those proceedings, judgement was entered in favour of Mr Watt on 21 December 2018.<sup>3</sup>

## 2.7 Procedural history of the complaints

18. This inquiry has a long history. Attempts were made over an extended time to conciliate the complaints, but those attempts were ultimately unsuccessful. Both parties have provided numerous lengthy submissions and a significant number of documents. In addition, Mr Watt supplied a written statement addressing aspects of his complaints. Following my issuance of a preliminary view pursuant to section 27 of the AHRC Act, I received written submissions from both the Commonwealth and CSNSW, and oral submissions from Mr Watt. I have taken all these materials into account in forming the views contained in this document.
19. On a number of occasions, submissions and other materials received from Mr Watt have appeared to raise new matters that fall outside the scope of the complaints that are the subject of my inquiry. Mr Watt has confirmed in correspondence that he does not wish to make any additional complaints.

# 3 Legal framework for human rights inquiry

## 3.1 Functions of the Commission

20. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly for present purposes, the Commission has the following functions in relation to these complaints under s 11(1)(f) of the AHRC Act:

to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:

- (i) where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
  - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement—to report to the Minister in relation to the inquiry.
21. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
22. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.
23. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.<sup>4</sup>
24. This matter is not affected by the changes made to the Commission’s complaint-handling functions in 2017.<sup>5</sup>

### 3.2 Scope of ‘act’ and ‘practice’

25. 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.
26. 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.
27. 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.<sup>6</sup>
28. I am satisfied that the acts and practices the subject of this inquiry are ‘acts and practices’ for the purposes of the AHRC Act. The relevant acts and practices are summarised in paragraphs –16 above, and described in more detail in relation to each of the complaints below.

### 3.3 'By or on behalf of the Commonwealth'

29. The alleged acts and practices the subject of this inquiry were done and engaged in by various organs or employees of the State of NSW. Under the AHRC Act, my jurisdiction is limited to inquiring into acts and practices done or engaged in 'by or on behalf of the Commonwealth'. I consider the acts and practices the subject of the present complaints to have been done or engaged in 'on behalf of the Commonwealth' for the purposes of the statute. That is because, at all relevant times, Mr Watt was remanded in custody while awaiting trial on Commonwealth charges. This position has been accepted by the Commonwealth,<sup>7</sup> and CSNSW.<sup>8</sup>
30. In Australia, persons convicted of Commonwealth offences or remanded in custody on Commonwealth charges are detained in prisons operated by the various States and Territories. In 2006, the Commission's then President, the Hon John von Doussa KC considered a complaint under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (as it then was), brought on behalf of a number of federal prisoners.<sup>9</sup> (I will refer to this hereinafter as 'the *Framed* matter', as the inquiry concerned restrictions on the distribution of a magazine called 'Framed' in correctional centres in NSW). The then President considered the constitutional and legislative basis for the detention of federal prisoners in State prisons (and in particular those in NSW), and concluded that:
- decisions made by State or Territory correctional authorities concerning the treatment and conditions of federal prisoners are being done on behalf of the Commonwealth and therefore come within the Commission's jurisdiction under s 11(1)(f) of the HREOC Act.<sup>10</sup>
31. I respectfully agree with the analysis of the former President. I make several brief observations arising from the complaints presently before me.
32. First, in the *Framed* matter, Mr von Doussa KC considered a complaint made on behalf of prisoners serving sentences of imprisonment for Commonwealth offences. The present matter involves a complainant who was remanded in custody pending trial. This distinction does nothing to change my conclusion that the detention of Mr Watt by the State of NSW was done on behalf of the Commonwealth. There is an equivalent basis in federal law for the imprisonment of both categories of prisoner (in the case of those held on remand, in s 120 of the *Constitution* and s 68(1) of

the *Judiciary Act 1903* (Cth)). The benefit to the Commonwealth is in each case the same.<sup>11</sup>

33. Secondly, I note that Mr Watt was charged both with State and Commonwealth offences, and at all relevant times was held on remand in relation to both sets of charges. It follows that, throughout that time, Mr Watt was detained on behalf of both the State of NSW and the Commonwealth. I am satisfied that the fact that Mr Watt was also held by the State of NSW on its own behalf does not change the fact that he was held on behalf of the Commonwealth within the meaning of the AHRC Act.
34. For completeness, I note that at an earlier time CSNSW indicated that it objected to the Commission's jurisdiction in this matter on the basis that the acts and practices complained of were not done by or on behalf of the Commonwealth. CSNSW was provided with an opportunity to make submissions on that point, and subsequently advised the Commission that it did not maintain its objection to jurisdiction.

## 4 Relevant Human Rights

35. Mr Watt's complaints engage a number of rights set out in the ICCPR. The most relevant of these are set out below.

### *Article 7*

36. Article 7 of the ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

### *Article 10*

37. Article 10 of the ICCPR relevantly provides:

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

38. There is significant overlap in the prohibitions on mistreatment contained in articles 7 and 10 of the ICCPR. The jurisprudence of the UN Human Rights Committee makes clear that 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.<sup>12</sup>

39. In considering those of Mr Watt's complaints that involve allegations of inhuman or degrading treatment, I have considered first whether the alleged acts and practices, to the extent made out, were inconsistent with or contrary to article 10(1). Where they were, I would proceed to consider whether those acts or practices were also inconsistent with or contrary to article 7. If the acts and practices are not inconsistent with or contrary to article 10(1), they will not rise to the threshold required to establish a breach of art 7.

*Article 14*

40. Article 14 of the ICCPR relevantly provides:
1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...  
...
  3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:  
...
    - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;  
...
41. Article 14(1) of the ICCPR contains a general protection for the right to a fair trial in civil and criminal proceedings. The remaining clauses of the article, including clause 3(b), set out in more detail some specific aspects of the right.

*Article 17*

42. Article 17 of the ICCPR provides:
1. 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.
  2. Everyone has the right to the protection of the law against such interference or attacks.

### *Article 23*

43. Article 23 of the ICCPR relevantly provides:
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
44. The relationship between articles 17 and 23 is discussed in more detail later in this document.
45. Some human rights, including the rights protected by articles 14, 17 and 23, may in some circumstances be subject to legitimate limitations. For a restriction on a right to be permissible, it must meet certain criteria. Most importantly, it must be prescribed by law, be directed towards a pressing legitimate purpose, be necessary to achieve that purpose, and be proportionate to the importance of the aim being pursued.<sup>13</sup>
46. The interpretation of these rights and their application are assisted by jurisprudence from international bodies such as the UN Human Rights Committee and international courts interpreting equivalent human rights treaties, as well as sources of soft law such as UN General Assembly resolutions and the opinions of leading legal scholars.
47. Further discussion of the scope and content of each of the rights set out above is contained in the discussion of each of the complaints below.

## **5 First complaint – failure to inform complainant’s mother of assault**

48. On 1 October 2009, Mr Watt was the victim of a serious assault by another inmate at the MRRC.
49. CSNSW has provided CCTV footage of the incident, which shows it clearly. Approximately 12 minutes and 43 seconds into the CCTV footage, it shows Mr Watt seated at a table in a MRRC common area, and a fellow inmate approaching him from behind with what later emerged to be a sandwich press concealed in a pillowcase, and striking Mr Watt with this object forcibly in the head. The footage shows Mr Watt immediately falling to the ground motionless, and the inmate then appears to hit Mr Watt a second time with the same object while Mr Watt was lying on the ground. Medical records establish that Mr Watt had at this time been knocked unconscious. Fellow inmates intervened, including with a chair,

to separate the assailant from Mr Watt before prison officers arrived. Staff attended to provide first aid within a short period.

50. Mr Watt was immediately transferred by ambulance to Westmead Hospital. A Justice Health/CSNSW form was completed by a nurse in support of this transfer. That form recorded, by the marking of check boxes, an assessment that Mr Watt required transfer to Westmead Hospital 'immediately by ambulance', because he had 'a life-threatening condition'.
51. Medical records from Westmead Hospital record that Mr Watt was assessed to have sustained lacerations to the right temporal region and right ear, neck tenderness, and a haematoma to the right forehead. At admission he was assessed as being alert, but confused as to what day it was. No other injuries were detected. A CT scan taken at that time showed no abnormalities in his brain or cervical spine. At 5.38pm that day, Mr Watt was discharged and returned to the MRRC. An appointment was made for him to be admitted to Auburn Hospital the next day for surgery to repair the lacerations to his ear. Mr Watt has stated that when he was transferred back to the MRRC on the evening of 1 October, he did not require the use of a wheelchair or trolley-bed. Rather he was restrained and walked under escort from the hospital to the vehicle which took him back to the MRRC.
52. On 2 October 2009, Mr Watt was transferred from the MRRC to Auburn Hospital, but returned to the MRRC the same day without the scheduled procedure having been performed. Mr Watt states that this was because he had not been informed that he was required to fast before the surgery, and so had not done so.
53. On 3 October 2009, Mr Watt was again transferred from the MRRC to Auburn Hospital, where he was admitted overnight. The surgical procedure was performed, and Mr Watt was returned to the MRRC on 4 October 2009.
54. It later emerged that the assault had significant long-term consequences for Mr Watt that were not apparent by 4 October 2009. Those consequences are discussed in the judgment issued in Mr Watt's civil claim against the State of NSW relating to the incident.<sup>14</sup> While serious, they are not relevant to the determination of this complaint. Mr Watt's first complaint is limited to his allegation that CSNSW failed to inform his mother of the assault and the injuries occasioned by it, and that it failed

to inform her of his transfers to hospital, including when he was admitted overnight on 3 October 2009.

55. On 9 July 2019, Mr Watt provided a statement in which he stated that on each occasion he was returned to the MRRC between 1 and 4 October 2009, he was kept in a 'hospital cell' in a part of the MRRC that is separate from the area in which he was normally detained. He was detained on his own in this cell, which he describes as being very like an ordinary prison cell. He does not recall seeing any medical monitoring equipment. He is unsure if he received visits from nurses or doctors during this period.
56. In that same statement, Mr Watt further stated that he was kept in this hospital cell for around two weeks following the assault, and that throughout that time he repeatedly requested access to a telephone to contact his family, but that access to a telephone was denied. This statement is caveated by an acknowledgment that he is not certain 'exactly when all the events in the hospital cell occurred', and that he was still affected by the concussion. A complaint that a person in Mr Watt's position was refused access to facilities for a period of two weeks to inform immediate family of a serious assault would be a serious matter. However, this was not an allegation made in Mr Watt's original complaints, and Mr Watt has confirmed that he does not wish to make further complaints.
57. These aspects of Mr Watt's statement are contradicted by his mother's account of when she spoke to him following the assault, as discussed below. Because that account was recorded much closer in time to the events in question, and because of Mr Watt's acknowledgement that his recollection of the sequence of events from the relevant period is (quite understandably in the circumstances) imperfect, I prefer the account of his mother to the extent it departs from that in Mr Watt's written statement. I would not be satisfied on the materials before me that Mr Watt was denied access to facilities to contact his family for a period of two weeks following the assault.
58. For completeness, I note that Mr Watt's account of his placement in a 'hospital cell' within the MRRC in the period immediately following the assault is not contradicted by CSNSW, which did not supply any substantive response to the Commission's request that it provide relevant documentary records about that matter.

59. In a letter dated 11 August 2011, Mr Watt's mother gives an account of how she learned of the assault, the injuries it occasioned, and Mr Watt's subsequent hospitalisation. In that letter she stated that on 1 October 2009, she:

... received a phone call from [name redacted] at around 6pm, he had heard from someone that had been visiting an inmate at Silverwater Correctional Centre and was told Adam had been killed by another inmate that morning ... but as far as [name redacted] could find out Adam was OK.

60. In that same letter she stated that she thought the statement that Adam was 'OK' may have been made 'to [allay] my fears'. She tried to contact the MRRC by telephone, but because it was outside business hours, her calls were not answered. She further stated that she spent that night 'thinking my son might have been killed.'

61. On 2 October 2009, Mr Watt's mother again repeatedly tried to telephone the MRRC. In her 11 August 2011 letter, she stated:

... when I finally got through I was given absolutely no information on how my son was, they said they could not give out any information.

I kept ringing, finally, there was one compassionate person, she would try and find out where Adam was. She was able to give me the information that Adam was taken to a hospital ... could not find out which one.

I called **every** hospital in Sydney[.]

Back to ringing the Jail, finally I was put through to the person in charge of the Pod. He told me Adam was Ok, nothing the matter ... 'You know, boys will be boys ha ha he is sitting in his cell'.

62. She further stated in that same letter that she did not believe the truth of this last statement, because she thought that if it were true, Mr Watt would have contacted her by telephone himself.

63. On 3 October 2009, Mr Watt's mother had an appointment to see Mr Watt, but was informed by the MRRC that the visit had been cancelled. The same day, she saw a report published that day in the Sydney Morning Herald that reported of the assault on Mr Watt. As reproduced in the complaint, the article included the following text:

Mr [Watt] was taken to Westmead Hospital in a serious condition and treated for several wounds to his head.

He was released later in the day and returned to Silverwater, where he is recuperating.

64. In that letter Mr Watt's mother also stated that on 4 October 2009, she was given a 'very watered down version' of the assault via her son's lawyer. She also says she received a phone call from Mr Watt 'from the hospital inside the jail'. On 10 October 2009, she visited Mr Watt at the MRRC.
65. CSNSW has acknowledged that at all relevant times, Mr Watt's mother was nominated as his next of kin in its records. It has also acknowledged that it did not contact Mr Watt's mother to inform her of the assault, of the injuries sustained by Mr Watt as a consequence of it, or of Mr Watt's transfer to hospital on any of 1, 2 and 3 October 2009. CSNSW submits that this was in accordance with its policies and procedures in place at the time. It submits that Mr Watt's medical condition following the assault was not sufficiently serious to require notification of his next of kin under its policies.
66. The operation of prisons at the time of the incident was governed by CSNSW's Operations Procedures Manual (OPM). That document has undergone a number of revisions since October 2009. At the date of the incident, the OPM relevantly provided:

#### **7.3.2.10 Hospitalisation of Inmates**

...

#### **2. Notifying the Next of Kin**

Where an inmate is hospitalised, General Managers are to ensure that the inmate's next-of-kin is notified as soon as possible.

**This procedure accords with Recommendation 147 of the Royal Commission into Aboriginal Deaths in Custody.<sup>15</sup>**

67. CSNSW has stated that at the time of the incident its policy was applied by notifying the next-of-kin only when an inmate was admitted to hospital for an overnight stay with little or no warning that that admission would occur. Later versions of the OPM that have been provided to the Commission reflect this interpretation of the policy, despite it not being recorded in any contemporary documentation that has been provided to the Commission.

68. CSNSW submits that on 1 and 2 October 2009, Mr Watt was not admitted overnight at hospital. When he was admitted on 3 October, that was for a planned procedure and did not occur with little or no warning. They submit that their OPM was followed in Mr Watt's case.
69. The question of whether the OPM as in effect on the relevant date was complied with turns on the meaning that the word 'hospitalised' is taken to have when used in that context. The word is not a term of art. The *Shorter Oxford English Dictionary* (6<sup>th</sup> ed) gives a definition of 'hospitalize' as 'admit to or treat in a hospital', suggesting that transfer to a hospital is not included in the concept, but that treatment without overnight admission could be. The OPM itself states that the procedure is intended to be consistent with 'Recommendation 147 of the Royal Commission into Aboriginal Deaths in Custody.' That recommendation was as follows:

**Recommendation 147:**

That police instructions should be amended to make it mandatory for police to immediately notify the relatives of a detainee who is regarded as being 'at risk', or who has been transferred to hospital.<sup>16</sup>

70. This recommendation was made following a discussion in the Royal Commission's report of police failures to contact relatives of persons in custody 'when he/she fell ill or was transferred to hospital'.<sup>17</sup> It is broader in scope than the OPM as the CSNSW asserts it interpreted it as at the relevant date. However, the OPM itself did not pick up the precise wording of Royal Commission Recommendation 147, and it may be that the difference in wording was deliberate and intended to exclude certain categories of transfer to hospital and limit the coverage of the policy to cases where there were serious injuries.
71. While there may be room for debate about what the 'best' interpretation of the OPM at the time of the incident might be, it is ultimately unnecessary for me to decide that question for the purposes of this complaint. What is most relevant for present purposes is that CSNSW had a policy (albeit an unwritten one) which interpreted the OPM in a particular manner, and it applied that policy in the case of Mr Watt. I am prepared to accept that this is the case, on the basis of CSNSW's submission, the fact that the word 'hospitalisation' is capable of bearing a meaning consistent with the policy, and the fact the OPM was subsequently revised in way that made this policy express.

72. That, however, does not dispose of the complaint. The question before me is whether CSNSW's compliance with this policy was consistent with Mr Watt's human rights in this case. I turn to that question below.

## 5.1 Relevant human rights

### (a) **Article 10 of the ICCPR and the *Standard Minimum Rules for the Treatment of Prisoners***

73. The treatment of prisoners receives express protection in article 10 of the ICCPR. Article 10(1) provides:

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

74. The UN Human Rights Committee has considered the application of article 10 in numerous communications by prisoners, alleging violations by prison authorities. These consider allegations of a wide range of mistreatment. Some examples of cases in which the Committee has found that article 10 has been violated include where a person has been held in incommunicado detention<sup>18</sup>; seriously injured by authorities and not provided with medical treatment<sup>19</sup>; being kept in crowded conditions with no light and poor sanitation, denied food and water for 20 hours and denied recommended medical treatment<sup>20</sup>.

75. While the threshold for treatment that will be inconsistent with article 10 is considered to be at the lower end of the treatment that article 7 prohibits (which proscribes torture, inhuman and degrading treatment), there is nevertheless a threshold: not every case of mistreatment in prison will amount to a violation of article 10:

Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.<sup>21</sup>

76. The Committee has not expressly considered whether the authorities' failure to notify a prisoner's next of kin in case of serious injury will in and of itself amount to a violation of that article.

77. A number of other international materials are relevant to the interpretation and application of article 10. Principal among these are the *Nelson Mandela Rules* (Mandela Rules),<sup>22</sup> and their precursor, the *Standard Minimum Rules for the Treatment of Prisoners* (SMRs).<sup>23</sup>
78. The first iteration of the SMRs were adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders and were endorsed by the UN Economic and Social Council in 1957.<sup>24</sup> A revised edition was passed by resolution of the UN General Assembly in December 2015.<sup>25</sup> This revised version is now known as the ‘Mandela Rules’. The discussion in this report will primarily deal with the earlier version of the SMRs, as it was current at the time of the acts and practices the subject of Mr Watt’s complaints.
79. The SMRs are not a legal instrument, or themselves binding in international law. However, they are a persuasive source drawn on by authoritative bodies in interpreting and applying article 10 of the ICCPR.
80. The jurisprudence of the principal human rights body responsible for interpreting the ICCPR, the UN Human Rights Committee (the UNHRC), frequently invokes specific rules in the SMRs when considering claimed violations of article 10 of the ICCPR. So, too, does the other principal UN body that interprets the ICCPR, the Working Group on Arbitrary Detention.
81. The Committee has observed that the SMRs are ‘minimum conditions which are accepted as suitable by the United Nations’<sup>26</sup> and that ‘[t]hese standards properly inform the Committee’s construction of article 10 (1) of the [ICCPR]’.<sup>27</sup> The UN Human Rights Committee has also stated, in General Comment No. 21, that states ‘are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoner’, including the SMRs.<sup>28</sup>
82. The drafting history of article 10 of the ICCPR makes clear that the article was not intended to give legal status to the SMRs, but supports the view that the SMRs should be taken to be a persuasive source when interpreting and applying article 10.<sup>29</sup>
83. In their book, *The Treatment of Prisoners under International Law*, Nigel Rodley and Matt Pollard have observed that while some rules in the SMRs appear to restate article 10 legal obligations, the nature of other rules

indicates that not every instance of non-compliance will result in a breach of article 10 of the ICCPR.<sup>30</sup>

84. The assessment of whether the treatment of a person is inconsistent with article 10 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects, as well as the sex, age and state of health of the victim.<sup>31</sup>
1. Rule 44 of the SMRs was entitled 'Notification of death, illness, transfer, etc.' It set out three general principles. Rule 44(1) provided, in full:

Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner.
85. The Mandela Rules restate, and perhaps broaden, this rule. Rule 69 of the Mandela Rules provides:

Individuals designated by a prisoner to receive his or her health information shall be notified by the director of the prisoner's serious illness, injury or transfer to a health institution.
86. The UN Human Rights Committee has not considered whether, and if so in what circumstances, a failure of prison authorities to notify an inmate's next of kin will be contrary to article 10, and so has not considered in what circumstances SMR 44 may be relevant to that question.
87. It is relevant to observe here that article 10 is concerned with the 'treatment' of persons deprived of their liberty. It does not protect the human rights of third parties, such as their next of kin. So in determining whether in the present case SMR 44 may usefully inform the interpretation of article 10, it is first necessary to consider whether the failure to notify an inmate's next of kin can involve 'treatment' of the inmate.
88. In my view, rule 44 of the SMRs can be seen to protect human rights in a number of ways:
  - a. It recognises the human dignity of prisoners that their next of kin be notified in the relevant circumstances

- b. it furthers a practical objective by providing vital information to allow prisoners' family members to advocate or intervene on their behalf to protect their rights. People in custody who have suffered serious injury may well not be able to do this for themselves, and
  - c. it reflects and protects the right to family life, both of those in custody, and of other members of their family.<sup>32</sup>
89. These factors demonstrate that rule 44 applies to regulate acts of prison authorities which directly concern the human rights of an injured prisoner (and not only the rights of their family members). For that reason, I am satisfied that failure to notify a prisoner's next of kin following a serious injury can involve 'treatment' of the relevant prisoner for the purposes of article 10.
90. However, I consider that rule 44 is an example of a rule the breach of which may, but will not necessarily, amount to a breach of article 10. That is because the circumstances of injured prisoners are likely to vary significantly. The severity of the injury, the timing of any notification, the closeness of the relationship with the next-of-kin, and the possibility in some circumstances of the next-of-kin receiving early notification through other means may all be factors relevant to assessing whether any failure to notify will amount to sufficiently serious mistreatment to violate article 10.

**(b) Finding regarding article 10 and the first complaint**

91. As set out above, it is not disputed that Mr Watt's mother was recorded as his next-of-kin in CSNSW's systems. It is also not disputed that CSNSW did not take any active steps to inform her of the assault, of Mr Watt's injuries, or of his hospitalisation on any of 1, 2, or 3 October 2009. The account of Mr Watt's mother contained in her letter of 11 August 2011 is also not disputed by CSNSW, and I accept it, to the extent it is set out above, as an accurate account of how she learned of these matters.
92. It is understandable that these events caused Mr Watt's mother considerable distress. She heard a rumour that her son may have been killed, which she was not able to verify. The next day, prison staff initially told her it could not disclose any information to her. Later in the day they told her Mr Watt had been taken to hospital before she was finally told that he was 'OK', but in a context which apparently did not include full details about what had happened. She did not believe this last piece of

information, though this appears to have been in part the result of her own assumptions. The following day, she read in a newspaper that her son had been subject to a serious assault and was recuperating in prison. She received an account of the incident through Mr Watt's lawyer the day after that, and from Mr Watt himself, either that day or soon afterwards. While I accept this distress was real and significant, it is not of direct relevance to the question of whether *Mr Watt's* right to humane treatment was violated.

93. The attack on Mr Watt was vicious. It has proved to have had significant long-term consequences for Mr Watt. While he was badly hurt, it is remarkable, having viewed the CCTV footage, that he did not suffer more dramatic immediate consequences. However, it remains the fact that Mr Watt had recovered consciousness (albeit with a degree of confusion) on his arrival at hospital on 1 October 2009. Tests then did not reveal life-threatening or other really serious injuries. Mr Watt was deemed fit to return to the MRRC from hospital that day. He was able to walk. On his return to the MRRC, Mr Watt reports that he was placed in a cell much like any other cell, without monitoring equipment, and without close medical supervision. Though Mr Watt's mother had to make her own inquiries, she was informed the following day by prison staff both that Mr Watt had been taken to hospital, and that he was 'OK' (albeit in what appeared to her to have been an insensitive manner).
94. At the relevant time, CSNSW had a written policy in place to notify next-of-kin in the case of inmate injuries, and a non-written policy which informed the interpretation of its written policy and later became its written policy. CSNSW appears to have complied with those policies. As is apparent from the discussion above, that policy does not comply with the requirements of rule 44 of the SMRs, or the current rule 69 of the Mandela Rules. While I accept that in some cases, admission to hospital overnight may be an acceptable proxy for the question of whether a person has a 'serious injury', it is not clear that it always will be.
95. In Mr Watt's case, I consider that it would have been desirable for CSNSW to have notified his nominated next-of-kin, his mother, immediately following the assault on 1 October 2009, however, considering the nature of Mr Watt's injuries as known at the time and all the circumstances of this case, I am not currently satisfied that the failure to notify his mother of his injuries or of his hospitalisation amounts to treatment that rises to the level of inhumane treatment such as to be inconsistent with or

contrary to article 10. I do not have material before me that can lead to a conclusion that alternative medical care would have identified the extent of Mr Watt's injuries sooner, to the extent that the threshold required by CSNSW's then policy for immediately notifying Mr Watt's next-of-kin would have been met.

96. I have not reviewed the current policies of CSNSW that guide the notification of next-of-kin in the event of injuries to or medical emergencies experienced by prisoners. They may have changed since the time of Mr Watt's complaint. However, in light of this matter I would urge CSNSW to review this aspect of its current policies to ensure that they fully comply with rule 69 of the Mandela Rules.

**(c) Articles 17 and 23 – the right to family and family life**

97. The right to family is protected in articles 17 and 23 of the ICCPR.

98. 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.

99. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

100. Providing commentary on the ICCPR, Professor Manfred Nowak has made the following observations about the relationship between articles 17 and 23:

the significance of Art. 23(1) lies in the protected existence of the institution 'family', whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.<sup>33</sup>

101. Also providing commentary on the ICCPR, Professor Sarah Joseph and Associate Professor Melissa Castan have stated:

despite an apparent qualitative difference between the article 17 and 23 guarantees, most cases regarding family rights have concerned violations, or exonerations, of States under both articles.<sup>34</sup>

102. For this reason, the Commission has taken the view that in complaints alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person's family, it will usually follow that that breach is in addition to (or in conjunction with) a breach of article 23(1).<sup>35</sup>
103. The concept of 'family' is not limited to the nuclear family comprising spouses and infant children. It extends to relationships between parents and adult children.<sup>36</sup>
104. Not every limitation of prisoners' privacy, or family life, will be inconsistent with the rights protected in these provisions. Article 17 is expressly limited to prohibit those limitations which are arbitrary or unlawful. Lawful imprisonment will necessarily entail some restriction on contact between family members, and will not, of itself, be arbitrary in the relevant sense. However, where such interference goes beyond the 'usual incidents' of detention,<sup>37</sup> or is not necessary for that detention, it may well be arbitrary even though it is lawful.<sup>38</sup>
105. Much of the jurisprudence considering interference with the family and with family life concerns separation of family members, particularly in the context of immigration matters or the separation of children from their parents because of divorce or child custody proceedings. In *Estrella v Uruguay*,<sup>39</sup> the UN Human Rights Committee found a violation of article 17 in circumstances where the author of the complaint was a prisoner, who was not allowed to contact his family for a period of one month. During that time, he was kept blindfolded, and was not allowed to bathe. Subsequently, his correspondence with his family was heavily censored for an extended period. Throughout that time, he was subject to various other forms of inhuman treatment. This communication supports the view that in some circumstances restricting the receipt of information between family members may interfere with family life. The circumstances in *Estrella v Uruguay*, however, were clearly very different from the ones in the present complaint.
106. In 2012, an expert group was convened to review the SMRs. In a working paper on the right to family life, the expert group considered rule 44 of the SMRs and commented that the rule:

recognizes the right to family life ... it involves the right of families and other partners to be aware of matters affecting family members who are in prison.<sup>40</sup>

107. I am of the view that the failure of prison authorities to notify an inmate's next-of-kin of a serious injury may interfere with the rights to family and family life protected by articles 17 and 23. Whether it does so in a particular case will depend on all the relevant circumstances. Those circumstances will likely include factors such as the apparent nature of the injuries, the nature of the familial relationship, and the timeliness of any notification.

**(d) Findings regarding articles 17 and 23 and the first complaint**

108. This complaint was initially made in a letter from Mr Watt's mother. It was later pursued by Mr Watt himself. It has been pursued on the basis that it is a complaint made on behalf of Mr Watt. However, for the sake of completeness I have also considered whether the act complained of may have been inconsistent with the human rights of his mother not to be subject to arbitrary interference with family.

109. I consider that there are circumstances in which the failure of prison authorities to inform a prisoner's next-of-kin of their serious injury and/or their hospitalisation could be inconsistent with the right to family life. Families have a right to receive important health information concerning their family members who are detained.

110. As I observed above, from reviewing the CCTV footage it appears that the assault was very significant indeed. However, it emerged that the injuries as diagnosed shortly afterwards at Westmead Hospital were not nearly so serious. While the longer-term consequences for Mr Watt have proved to be significant, for the purposes of considering if and when his next-of-kin should have been notified of the assault and his hospitalisation, I consider the relevant question is how serious his injuries appeared to be at that time.

111. As I have also commented above, Mr Watt's mother was evidently distressed by the manner in which she heard of these matters. A rumour was reported to her of Mr Watt's injury. She called the MRRC as soon as its telephones were open the next day. While she appears to have received at times unhelpful and incomplete information, she was ultimately told both that Mr Watt had been hospitalised, and that he

was 'OK'. A number of the factors that I consider would have significantly increased her apprehension were not attributable to CSNSW — though fuller timely notification from CSNSW would likely have addressed that apprehension to some extent.

112. The factors in this case are finely balanced. However, having considered all of the materials before me, I am not satisfied that, given the nature of Mr Watt's injuries as diagnosed at the time and the timeframe in which his mother became aware of those injuries, CSNSW's failure to contact her directly to inform her of the assault, injuries and hospitalisation was of sufficient seriousness to constitute an 'interference' with family for the purposes of article 17. It follows that I am not satisfied that the acts of CSNSW have been established to be inconsistent with or contrary to article 17 or 23 of the ICCPR.

**(e) Concluding remarks regarding the first complaint**

113. In my view, the facts of this matter suggest that the policy CSNSW had in place in relation to notification of next-of-kin following injury, as interpreted by its unwritten policy which later became its written policy, was overly restrictive. Some discretion should have been exercised in making an exception in the circumstances of this case given the seriousness of the assault, as evident from the CCTV footage. Similarly, it appears that some of the exchanges between Mr Watt's mother and prison staff were not entirely satisfactory. However, for the reasons above, I am not presently satisfied that these, and the failure to notify Mr Watt's mother of the assault, have led to a breach of articles 10, 17 or 23 of the ICCPR in the present case.
114. I do consider it possible that strict adherence by CSNSW to its policy of notifying next-of-kin (or 'emergency contacts') might, in other cases, involve breaches of these rights. I would therefore urge CSNSW to revise its policies and consider
- a. whether it is appropriate to retain overnight admission to hospital as a threshold that must be met before next-of-kin are notified of injuries to inmates
  - b. if that threshold is retained, whether a discretionary element could be introduced in the relevant policies to allow that policy to be departed from in appropriate circumstances.

115. However, in all the circumstances of this case, I am unable to conclude that the failure to notify Mr Watt's mother of the assault amounted to a breach of arts 10(1), 17(1) or 23(1) of the ICCPR.

## **6 Second complaint – failure to provide 'adequate facilities' for the preparation of defence**

116. Mr Watt has complained that while he was detained on remand, he was not able to access adequate facilities to review the evidence against him, and to prepare his defence in the criminal proceedings against him.
117. Mr Watt has stated that the prosecution's brief of evidence in those criminal proceedings comprised 22 volumes of documentary evidence, and 78 compact discs. At various times, Mr Watt has given slightly varying accounts of the volume of materials in the prosecution's brief. However, the description of it as comprising 22 volumes of written materials and 78 compact discs is confirmed in a copy of correspondence from the Commonwealth Director of Public Prosecutions (CDPP) to the Governor of Parklea Correctional Centre.<sup>41</sup> That figure has not been disputed by CSNSW.
118. Mr Watt has complained that while he was detained on remand, he was not provided with a laptop computer or CD player to access these materials while confined to his cell. Instead, he was required to access these materials only on computers available to inmates in various common areas within each of the prisons in which he was held. He stated that the times at which he was able to access these facilities were restricted and insufficient to prepare his defence.
119. In his statement made on 5 July 2019, Mr Watt stated that he received the first part of the prosecution's brief of evidence in the first year of his detention, while he was held at either the MRRC or the MSPC. He has not stated how much of the final brief was provided to him at this time, or exactly when he received it. Mr Watt has stated that he received significant additional materials, constituting the remainder of the brief, in his 'second year of imprisonment', while he was held at Parklea. He has said that the additional materials he received were 'the 32 CDs which contained the case against me'. The presently relevant fact is that a

significant proportion of the prosecution brief was first delivered to him at that time.

120. Mr Watt has not provided any detail about the content of the prosecution brief. He has, however, indicated that it contained a significant number of audio recordings which he wanted to listen to. Mr Watt has asserted in a written submission that the prosecution's brief included '500,000+' recordings of telephone conversations. That number has not been verified. Again, the presently relevant claim is that the prosecution brief against Mr Watt contained a very significant number of audio recordings that he wished to listen to so as to understand and interrogate the prosecution's case against him.
121. In a written statement, Mr Watt stated that when he was detained at the MRRRC and the MSPC, his lack of access to computers meant that he was not able to have meaningful access to the prosecution's brief. At the MRRRC, he says the computers that were available to him did not have the necessary software to review the material on the compact discs included in the brief. He said that while he was held at the MSPC, due to a lack of available staff to facilitate computer access, he was able to access computers on which to review the compact discs for 'approximately 30 minutes per month'.
122. Mr Watt has claimed that he requested increased access to computer facilities on many occasions. The files provided by CSNSW contain records of three such written requests, dated 27 July 2009, 3 March 2010 and 13 March 2010. He has stated that during the period that he was held in Parklea, a judge ordered that he be given greater access to computer facilities. The gist of this statement is borne out by a copy of correspondence from the CDPP to the governor of Parklea, dated 4 May 2010, recording that at a recent court hearing, the presiding Magistrate had 'stressed the need for [Mr Watt] to be provided with a proper opportunity to listen to' the audio recordings contained in the prosecution's brief. The CDPP requested that CSNSW give these remarks from the Magistrate 'appropriate attention' and noted that Mr Watt's committal hearing was due to recommence on 13 September 2010.
123. Mr Watt has stated that, after these remarks from the court, he was able to access shared computers within Parklea for about five and a half hours a day to listen to the CDs in the prosecution's brief, though on occasion this might have been reduced due to staffing changes at the prison, including being unable to access the computers at all for extended

periods of time when there were staffing issues. Mr Watt asserts that the resources remained inadequate and consequently he could not properly review the brief of evidence against him so as to properly defend himself, notwithstanding the periodic increased access following the court's remarks.

124. CSNSW has not provided detailed submissions about precisely what level of access to computers Mr Watt had at various times during his detention. It has provided copies of extracts from its OPM, detailing how prisoners could request and obtain access to computer facilities to review legal materials and prepare for legal proceedings. Submissions by CSNSW indicate that at the relevant time, computer facilities were limited, and prison staff had to allocate access in a 'fair way' between those detainees requesting access to it. CSNSW has confirmed that, at the relevant time, prisoners in NSW were not allowed to have access to computers in their cells, although in a limited number of cases exceptions to that rule had been made following requests by courts.
125. Mr Watt has not claimed that he was not allowed sufficient access to the 22 volumes of documentary evidence in the prosecution's brief.<sup>42</sup>

## 6.1 Relevant human rights

126. Article 14(3)(b) of the ICCPR relevantly provides that:

In the determination of any criminal charge against him, everyone shall be entitled ... to have adequate time and facilities for the preparation of his defence.

127. The right in article 14(3)(b) of the ICCPR is protected in equivalent terms in article 6(3)(b) of the European Convention on Human Rights, and the jurisprudence of the European Court of Human Rights can usefully illuminate the interpretation of article 14(3)(b) ICCPR.
128. The guarantee of 'adequate facilities' includes a right of access:
- to all evidentiary materials, which the prosecution plans to offer in court against the accused, or which are exculpatory. The scope of this provision must be understood to be such as to ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access.<sup>43</sup>

129. The guarantee in article 14(3)(b) is for 'adequate time and facilities'. These two requirements are related. For an accused to prepare their defence, they require access to the evidence against them for sufficient time to consider that evidence. As the European Court of Human Rights has held, the right requires that:

The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.<sup>44</sup>

130. International human rights bodies appear not to have expressly considered the question of whether access to computers may be required in some cases to afford an accused 'adequate facilities'. However, they have considered cases in which access to documentary materials could only be gained in a particular location, during limited times, or subject to various other restraints. It is clear from these cases that interference with, or limitations on, enabling access to review documentary materials may constitute a breach of article 14.<sup>45</sup> In my view, it is clear that a right of access to evidentiary materials must include a right to review them. If those materials cannot be accessed without the use of a computer, then failure to provide adequate access to a suitable computer will amount to a failure to provide adequate facilities. If the use of a computer were not provided in those circumstances, the accused would have no true access to the relevant evidentiary materials.

131. The right to review evidentiary materials is not dependent on whether or not a defendant is legally represented. If the defendant is self-represented, they will clearly require adequate access to the evidence led against them. If they are legally represented, they will require access to that evidence so that they can instruct their lawyer.<sup>46</sup>

132. What is required to afford 'adequate time and facilities' will depend on all the circumstances of the particular case.

## 6.2 Analysis of Mr Watt's circumstances regarding his second complaint

133. I turn now to the circumstances of Mr Watt's case. It is evident that there was a significant delay in providing to Mr Watt a copy of the prosecution's full brief of evidence. Mr Watt reports that some of that material was provided during 'the first year' that he was in custody. However, a

substantial amount of the brief was not forwarded to him until he had been transferred to Parklea in March 2010. In particular, Mr Watt's statement indicates that a significant amount of the evidentiary material was on CDs, and therefore he required the use of a computer to access the evidence he had been provided on the CDs at that time.

134. It is clear that Mr Watt had requested increased access to computers from at least mid-2009. Given that he was unable to access a large amount of prosecution material without the use of a computer, it is unfortunate that increased access was not provided at an earlier stage. However, I am unable to conclude on the materials before me that the level of computer access provided to Mr Watt amounted to a deprivation of adequate time and facilities to prepare his defence.
135. Mr Watt initially framed his complaint in terms of the failure of CSNSW to provide him with a laptop or CD player to review legal materials in his cell. The guarantee of 'adequate facilities' does not encompass an absolute right to review evidence at a time and place of an accused's choosing. What is guaranteed is the right to be given access to all evidence and sufficient opportunity to review and consider it before trial.<sup>47</sup> In my view, the failure to provide Mr Watt with access to a laptop in his cell did not, in and of itself, amount to a denial of his right to a fair trial under article 14. The relevant question here is whether Mr Watt had adequate time and access to facilities for the preparation of his defence.
136. Mr Watt was provided with a full copy of the prosecution's brief at some time after March 2010. Before that time, on the basis of Mr Watt's uncontradicted statements, I am prepared to accept that his access to computer facilities was extremely limited. Until March 2010, on the basis of the material before me, Mr Watt would have been able to review and consider the 22 volumes of documentary evidence in the prosecution brief, but would not have been able to review meaningfully any audio or video recordings on any CDs that may have been provided to him at an earlier stage. He was not in a position to review the entirety of the prosecution brief before March 2010, regardless of the amount of computer access he might have been granted, as it had not been served in its entirety prior to that time.

137. Within two months of receiving the prosecution brief, Mr Watt notified the court of his difficulties in accessing the evidence. The court and the prosecution authorities recognised Mr Watt's concerns and took steps to address them. Consequently, Mr Watt's access to computer facilities was increased to five and a half hours a day, although according to Mr Watt, this was not always realised and he frequently was afforded less computer access due to staffing issues and other reasons.
138. The charges against Mr Watt ultimately did not proceed to trial, but rather, in August 2010 they were variously withdrawn and dismissed. Mr Watt was therefore not required to defend himself at trial in circumstances where he had not had an opportunity to review the prosecution brief. This may be contrasted with the cases in which the UN Human Rights Committee and the European Court of Human Rights have found breaches of articles 14(3)(b) and 6(3)(b).
139. In these circumstances, I consider that Mr Watt was not denied 'adequate facilities' for the purposes of article 14(3)(b) of the ICCPR. It is not necessary for me to conclude as to whether being provided with access to computer facilities of five and a half hours on some days, with other days less computer access due to staffing issues, from May until August 2010 was a sufficient amount of time for Mr Watt to review the prosecution brief.
140. In some circumstances, a lack of adequate facilities to prepare a defence can lead to breaches of other rights in the ICCPR, such as the right to be tried without undue delay and the right against arbitrary detention (which includes a right to be detained for the minimum time necessary to achieve a legitimate objective). Those circumstances might arise where a defendant is remanded in custody pending trial, and the trial is postponed because the defendant has not been given sufficient access to relevant evidence to allow the trial to proceed in a fair manner. Those, however, are not the circumstances of this case. The submissions and documentary materials supplied to me indicate that a trial against Mr Watt did not proceed because he was assessed by the court to lack capacity following the serious assault on or about 1 October 2009, described in paragraph 11 above and discussed as part of the first complaint.

141. For completeness, at the time and continuing to the present, Mr Watt disagreed with the court's assessment of his capacity to stand trial. It has not been asserted, and there are no materials before me to support the view, that the lack of greater computer access to review the prosecution brief led to delays in Mr Watt's trial or the prolongation of his detention.
142. In my view, in all the circumstances, I am not satisfied that the failure to provide Mr Watt with a laptop in his cell, or greater access to computers, was inconsistent with or contrary to his right to adequate facilities under article 14(3)(b), in circumstances where Mr Watt was not required to defend himself at trial.
143. I would, however, urge CSNSW to undertake a review of the systems currently used throughout their network of detention facilities to ensure that inmates have adequate time and access to adequate facilities to prepare a defence against any charge.

## 7 Third complaint – Excessive confinement to cell – failure to provide separate treatment

144. Mr Watt also complained that, throughout his detention, he was not treated in a manner appropriate to his status as an unconvicted prisoner, because he was detained in a 'maximum security facility', routinely confined to his cell for 18 hours per day, and continuously for a period of 36 hours once every week.<sup>48</sup> Mr Watt has claimed that this was inconsistent with his human right protected by article 10(2)(a) of the ICCPR to be afforded 'separate treatment consistent with his status as an unconvicted person'.

### 7.1 An 'act or practice?'

145. In several submissions addressing this complaint, CSNSW referred to regulation 30 of the *Crimes (Administration of Sentences) Regulation 2008* (NSW). That regulation provides that each inmate in NSW is to be included in one of several classes, including 'convicted' and 'unconvicted' inmates; and that 'as far as practicable inmates of any class are to be kept separate from inmates of any other class'. CSNSW has not submitted that the effect of this regulation was to positively require that Mr Watt be held in a facility with convicted inmates. More relevantly, it has not submitted that

this regulation required that Mr Watt be confined to his cell for particular periods of time.

146. Regulation 34(1) of the *Crimes (Administration of Sentences) Regulation 2008* (NSW) provides that the Commissioner of Corrective Services 'is to determine the... general routine for each correctional centre'. CSNSW has not claimed that in fulfilling this duty the Commissioner is performing a legislative function. Regulation 34(2) further provides that 'the Commissioner may determine different hours of work and different general routines for different parts of a correctional centre'.
147. In my view, these materials indicate that the setting of a general routine with the practical effect of requiring that remand prisoners be confined to their cells during specified periods was an 'act' for the purposes of the AHRC Act.

## 7.2 Submissions and evidence relating to the third complaint

### (a) Confinement to cell

148. In his written statement, Mr Watt stated that all inmates in the prisons where he was detained, whether convicted or unconvicted, were subject to the same routine of lockdowns in their cells.
149. His statement of 9 July 2019 added some further details which go beyond the scope of his complaint, including that he 'shared a cell with convicted prisoners' and 'was given the same treatment and the same routines as them'. If accepted as a fresh complaint or an amendment to his complaint, the first of these details would reagitate Mr Watt's earlier complaint of the failure to segregate him from convicted criminals. That complaint was terminated by a delegate of a former President of the Commission in 2016 on the basis that Mr Watt was pursuing another remedy in relation to the subject matter of the complaint through court proceedings. The more general claim that Mr Watt had the 'same treatment' and the 'same routines' as convicted prisoners could arguably be read as broadening Mr Watt's complaint to all aspects of his treatment while held on remand. In the absence of any specific allegations about particular aspects of his treatment claimed to be inappropriate to his status as an unconvicted person, this is a vague and general claim. As indicated at the outset of this document, Mr Watt has indicated that he

does not wish to complain of additional acts and practices at this late stage, and it is therefore unnecessary for me to consider these allegations further.

150. It is not in dispute that, at all relevant times, Mr Watt was detained in facilities together with convicted inmates, and that he was not segregated from those inmates.
151. CSNSW broadly accepts that Mr Watt was, throughout his period of imprisonment, confined to his cell for about 18 hours a day. In a submission dated 13 November 2015, CSNSW stated that inmates were allowed outside their cells for approximately 5 to 6 hours per day; in a later submission dated 15 March 2019, it said this period was approximately 6 to 7 hours per day. When asked to comment on whether inmates were locked in for a continuous 36-hour period once per week, CSNSW stated only:
- A lock-in extending for a longer period [i.e. longer than between 4 pm and 8 am, being a 16 hour period] may occur in the event of inmate unrest/security issues/industrial disputes. A lock in- for 36 hours would be unlikely to occur but could occur.
152. I take this to be a denial that there was, at any relevant time, a routine practice of weekly 36-hour confinements. In his response to my preliminary view, Mr Watt submitted that notwithstanding CSNSW policy and denial, there was a full lockin from every Monday night through to Wednesday morning, for all inmates.
153. CSNSW acknowledges that:
- All inmates are subject to the same structured day routine if they are the same designation and classification. Any variation within this would occur only if an inmate was subject to a segregation order.
154. In context, I take this statement to be a confirmation that Mr Watt was subject to the same 'day routine' as convicted prisoners in the same facilities.
155. On the material before me, in my view it is established that Mr Watt was, during his detention, confined to his cell for between 17 and 19 hours per day, and that in this respect, he was treated like the other inmates – including convicted inmates. It is likely that he was, from time to time, confined for longer periods than that. However, I am not able

to conclude, on the material before me, that he was subject to weekly lockins of 36 hours.

**(b) Security classification**

156. It is common ground between the parties that Mr Watt was detained for the whole of his detention in high security prisons. CSNSW has submitted that this was the result of his security classification, and that Mr Watt was assessed to be a 'high risk'. It states that all inmates, including those on remand, are subject to a security classification process when admitted to prison. It has provided a publicly available factsheet which contains the same statements. I do not understand these statements to be controversial, and they are consistent with documents that are before me.
157. Mr Watt has not complained that CSNSW's policy of security classification was not appropriately calibrated to assess the risks posed by inmates in detention, or that it was misapplied in his case. Therefore, those are matters that fall outside the scope of my inquiry. There is no material before me that suggests that these policies and their application was not appropriate.

### **7.3 The right to separate treatment in article 10 of the ICCPR**

158. Article 10(2)(a) of the ICCPR provides:
- Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.
159. There are two limbs to this clause of article 10. The first is the right of unconvicted inmates to be *segregated from convicted persons*; the second is their right to be afforded *separate treatment that is appropriate to their status as unconvicted persons*. These limbs are distinct.<sup>49</sup> The complaint I am now considering, and my inquiry, are limited to the second limb.

**(a) Australia’s reservation to article 10**

160. Australia has entered a reservation to article 10(2)(a) in the following terms:

In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively.

161. The UN Human Rights Committee has upheld this as a valid reservation.<sup>50</sup> In *Cabal and Bertran v Australia*, the UN Human Rights Committee stated that

The Committee observes that the State party’s reservation in question is specific and transparent, and that its scope is clear. It refers to the segregation of convicted and unconvicted persons and does not extend, as argued by the authors and not contested by the State party, to cover the separate treatment element of article 10, paragraph 2 (a) as it refers to these two categories of persons.<sup>51</sup>

162. The reservation, then, does not apply to the present complaint.

163. It appears to be an open question whether CSNSW would be entitled to rely on Australia’s reservation to the first limb of article 10(2)(a). The reservation is in the form that the obligation is to be achieved progressively. It is arguable that if no steps are being taken to increase compliance with the obligation to segregate, the reservation would have no application.<sup>52</sup> The materials provided to me during my inquiry have not established whether or not measures are being taken which will increase the degree of segregation of prisoners within NSW. However, this is not a matter which falls for me to determine in relation to the present complaint, which concerns only the second limb of article 10(2)(a) and is not impacted by the reservation.

**(b) The second limb of article 10(2)(a) – ‘separate treatment’**

164. There is very little jurisprudence concerning the obligation to afford separate treatment. It is clear from the text of article 10 that ‘separate treatment’ means something different from segregation. The majority of the communications considered by the UN Human Rights Committee have concerned the obligation to segregate.

165. The text of the article indicates that the requirement imposed by the second limb of article 10(2)(a) is not separate treatment *per se*. Rather, the obligation on states parties to the ICCPR is to ensure that untried prisoners receive 'separate' treatment that is appropriate given that they have not been convicted of any crime.
166. In considering the first limb of article 10(2)(a), the UN Human Rights Committee has made clear that the purpose of the segregation of convicted and unconvicted prisoners is to emphasize their status as unconvicted persons 'who enjoy the right to be presumed innocent'.<sup>53</sup> In my view, a similar rationale underlies the second limb. This reading is consistent with the approach of the UN Human Rights Committee in rejecting a communication where the allegation was limited to the conditions of detention of an unconvicted inmate being 'identical' to those of convicted inmates.<sup>54</sup>
167. In *Cabal and Pasini Bertran v Australia*,<sup>55</sup> the UN Human Rights Committee considered a communication by two unconvicted men detained with convicted prisoners pending extradition proceedings. They alleged, among other things, that they were not afforded separate treatment, contrary to article 10(2)(a). The Committee considered their 'treatment' holistically, noted that in some respects they were treated separately from convicted inmates, and found that:
- the authors have not substantiated, for purposes of admissibility, that the matters in which they were treated similarly to convicted prisoners would either not be compatible with their status as persons detained pending extradition procedures, or raise any issues separate from the lack of segregation.<sup>56</sup>
168. The SMRs in effect at the time of Mr Watt's detention, and the Mandela Rules which are now in effect, contain a number of rules about the ways in which unconvicted prisoners should be treated differently from convicted ones, including:
- a. 'untried prisoners shall sleep singly in separate rooms' (Rule 86 SMRs, Rule 113 Mandela Rules)
  - b. 'within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside' (Rule 87 SMRs, Rule 114 Mandela Rules)

- c. 'An untried prisoner shall be allowed to wear his or her own clothing if it is clean and suitable' (Rule 88(1) SMRs, Rule 115 Mandela Rules), and
  - d. 'untried prisoners are entitled to request writing materials to assist in the preparation of their defence' (Rule 93 SMRs, Rule 120(2) Mandela Rules).
169. As noted earlier in this document, neither the SMRs or the Mandela Rules are binding, but they can illuminate the content of article 10 of the ICCPR. A number of these rules include qualifications that they are to apply so far as is consistent with the good order of the institution.
170. None of these rules relate to hours of confinement or prison routine.

## 7.4 Analysis of Mr Watt's circumstances regarding the third complaint

171. It is not in dispute that Mr Watt was, while detained on remand, confined to his cell for approximately 18 hours per day, and in this respect was treated in the same way as the convicted prisoners who were accommodated in the same facility.
172. Mr Watt was not treated in precisely the same way as other prisoners. For example, it is agreed that after May 2010, on the Court's request, he was granted additional time to review the prosecution's brief of evidence to allow him to prepare for trial. Part 5.4 of CSNSW's OPM contained special procedures relating to access to computers by people with ongoing court matters.
173. The *Crimes (Administration of Sentences) Regulation 2008* (NSW), in force at all relevant times, also guarantees some additional rights for unconvicted prisoners remanded in custody in NSW. Unconvicted inmates in NSW cannot be required to work.<sup>57</sup> They have greater access to visits guaranteed.<sup>58</sup> They are entitled to a higher number of free telephone calls.<sup>59</sup> This is not intended to be a comprehensive list of all the ways in which unconvicted prisoners may receive separate treatment in NSW correctional facilities, but they do establish that, as in the matter of *Cabal and Pasini Bertran*,<sup>60</sup> the treatment afforded to unconvicted prisoners in NSW was not in all respects identical with that afforded to convicted prisoners.

174. The question that falls to me to consider is whether, in circumstances where Mr Watt was confined in facilities with convicted prisoners, confining him to his cell for approximately 18 hours per day, amounted to a failure to provide separate treatment that went beyond the failure to segregate him from convicted prisoners and was, on its own, not appropriate given his status as an unconvicted person.
175. It is implicit in the materials provided by CSNSW that he was so confined because he was subject to the same general prison routine as other prisoners held in the same facility.
176. In my view, it is not difficult to imagine difficulties for prison authorities in applying different routines of confinement to different categories of prisoner in the same facility where there is no segregation between those categories of prisoner. In my view, there is at least a very significant overlap between this similar treatment and the failure to segregate unconvicted prisoners (which failure is expressly not part of the current complaint). This would not so obviously be the case with certain other kinds of restrictions that might be imposed on prisoners, such as on their clothing, and on their contact with people outside the prison through visits and telephone calls.
177. I also consider that, at least in the facts of this case, applying the same routine of cell confinement to unconvicted prisoners assessed to pose a high risk, and held in a maximum-security facility, that is applied to convicted prisoners with those same characteristics, is not on its own liable to mark the unconvicted inmate as guilty, or to undermine the presumption of innocence. It has a different character from the kinds of differential treatment stipulated in the SMRs and the Mandela Rules as appropriate for untried persons.
178. In all the circumstances of this case, I am unable to conclude on the material before me that the application of a uniform prison routine confining Mr Watt to his cell for approximately 18 hours per day, and thereby treating him in the same way as convicted prisoners, amounted to an act or practice that was inconsistent with or incompatible to his right to 'separate treatment' under article 10(2)(a).

## 8 Fourth complaint – search of cell and treatment during prison transfer

179. Mr Watt has complained that at about 11pm on or about 10 March 2010, his cell at the MSPC was searched by CSNSW 'Riot Squad Officers'. Mr Watt has stated that the search involved eight officers and a dog, that he was strip-searched, and that the search was filmed by video camera. He has said that the search lasted for approximately three hours, and he was then transferred to Parklea where he was held in a segregation cell for a period. Mr Watt has stated that during this transfer to Parklea he was required to wear a 'full restraint kit', including 'leg irons', a waist belt and handcuffs, with his hands locked to the waist belt. He has stated that these events took place overnight, in circumstances where he had a court appearance the next day.
180. There are four elements to this complaint, relating to:
- a. the conduct of a strip search
  - b. the conduct of the search of Mr Watt's cell
  - c. the use of restraints during Mr Watt's transfer between prisons, and
  - d. the timing of these events.
181. These complaints engage the right to humane treatment in article 10 of the ICCPR, and the right to be free from arbitrary interference with private life in article 17 of the ICCPR.

### 8.1 CSNSW Response

182. In response to this complaint, CSNSW acknowledged that on the night of 9 March 2010, Mr Watt's cell at MSPC was searched by the State Emergency Unit (SEU), now known as the Security Operations Group (SOG), he was strip searched, and transferred to Parklea. CSNSW has stated:

Mr Watt was transferred from the MSPC at Long Bay to Parklea Correctional Centre on 9 March 2010 ... Mr Watt was searched on 9 March 2010 at the MSPC by the State Emergency Unit following the receipt of credible intelligence information. Two inmates were subject to strip searching and searching of their cells. Mr Watt was then removed and transferred to Parklea Correctional Centre.

183. In a document it provided to the Commission on 18 April 2019, CSNSW supplied further details of what it says occurred on the night of 9 March 2010. CSNSW stated in that document that the reasons for the search and transfer included that:

On 9 March 2010 WATT and his co-accused were identified for there [sic] involvement in allegations of corruption against a Senior Correctional Officer in the MSPC. For this reason, neither could remain at the same centre as the officer and were moved at short notice.

The SEU [State Emergency Unit] were utilised as independent officers [to the centre staff] because the operation to move WATT and his co-accused included property searches looking for evidence linked to the corruption allegation.

184. Documents supplied by CSNSW indicate that the search in question took place on the night of 9 March 2010, that Mr Watt left the MSPC at 11.47 pm that night and arrived at Parklea at 3.04 am on the morning of 10 March 2010.

185. CSNSW has indicated that it does not possess video footage of the incident. It has neither confirmed nor denied Mr Watt's claim that the search was recorded on video. It has not provided any documents recording usual procedures for the use, retention, and documenting of use of video recording during strip searches or cell searches.

186. CSNSW has submitted that it had lawful authority to 'search any inmate's cell and person without notice at any time of the day in accordance with regulation 43 of the *Crimes (Administration of Sentences) Regulation 2008*.'<sup>61</sup> That, however, does not address the question of whether or not particular decisions to search cells are inconsistent with or contrary to the human rights of an inmate.

187. In relation to the allegation that Mr Watt was restrained during the transfer between prisons by use of a 'full restraint kit', CSNSW has stated that '[t]here is no documentation that indicates that a "full restraint kit" was utilised'. They do accept that because it was a 'Statewide Emergency Unit'—facilitated escort, '[a]n inmate would be handcuffed for such an escort'.

188. CSNSW has acknowledged that the searches and transfer took place the night before Mr Watt had a scheduled court appearance. In relation to the timing of the searches and transfer, CSNSW has indicated that 'while

not ideal', the pressing nature of the intelligence leading to these events were 'overriding factors'.

**(a) CSNSW's Operations Procedures Manual (OPM)**

189. CSNSW has provided copies of extracts of its OPM as in place at the relevant time dealing with cell searches and searches of inmates, including strip searches. Relevantly, that document provides that strip searches may be required when it is suspected an inmate is carrying unauthorised property.

190. The OPM outlines the policy underlying these provisions as follows.

The maintenance of security in correctional centres and other places of detention is an essential part of the Department's mission: to manage offenders in a safe, secure and humane manner and reduce risks of re-offending.

Maintenance of correctional centre security involves preventing the passage of any unauthorised person, thing or information into, or out of, the centre. One strategy to achieve this is the effective and regular searching [of] inmates and correctional centres.

Searching inmates is critically important to security, good order and discipline. The security of inmates in a correctional centre also involves the regular searching of inmates as they return from visits, workshops and pre-release leave and at other times as a correctional officer thinks it is necessary. However, inmates must not be searched merely to harass or agitate them. The legislation allows for inmates to be 'pat' and 'strip-searched' but 'strip-searches' must only be carried out by correctional officers of the same gender as the inmate (except in the case of emergency).

While frequent but irregular searches of inmates' cells, possessions and work locations are indispensable to the safety and security of a correctional centre, officers should remember that inmates highly value their possessions. Searching should always be conducted with a minimum of fuss and mess ....

Searches of correctional centres are conducted for the purpose of discovering and removing or eliminating anything detrimental to the safety and welfare of staff, inmates and visitors.

191. With respect to strip searches, the OPM provides:
- A strip search is much more intrusive than a 'pat' search and must be conducted in a place away from the public view and the view of other staff and inmates not directly involved with the search. The search must be conducted with due regard to dignity and self respect and in as seemly a manner as is conducive to an effective search. Furthermore, unless there are exceptional circumstances, strip-searching will be carried out under the supervision of an officer not below the rank of Senior Correctional Officer.
192. It goes on to describe the manner in which strip searches should be carried out. Mr Watt has made no allegations which suggest that these provisions were not complied with during the search on 9 March 2010.
193. The OPM provides that correctional officers are required to search all inmates prior to, and on return from, escort. The procedure differentiates between different security classifications of inmates and facilities. Where a person is transferred between minimum security facilities, only a 'pat' search is required. Where an inmate is going from or to a maximum-security facility they are required to be strip-searched.
194. With respect to searches of cells and inmate property, the OPM provides that correctional centres must be searched regularly, and that 'additional searches may be carried out when warranted by intelligence'.
195. In general, inmates should be present during targeted searches, 'unless there are exceptional circumstances'.
196. The OPM provides that, at least in some searches, dogs and dog-handlers may be employed, but only for the 'core function of searching for drugs and unauthorised property in correctional centres'.

## 8.2 Discussion

### (a) Strip search

*Articles 7, 10 and 17 of the ICCPR*

197. Article 10(1) of the ICCPR provides that all persons deprived of liberty shall be treated with humanity and respect for the inherent dignity of the person. Article 7 provides that no one shall be subject to torture or to

cruel, inhuman or degrading treatment or punishment. Article 17 protects against arbitrary interferences with privacy.

198. As observed above, the threshold of conduct required to constitute cruel, inhuman or degrading treatment for the purposes of article 7 is higher than the threshold of inhuman treatment prohibited by article 10. However, in practice, in complaints made to international bodies, these two articles are frequently considered together. In this document I have proceeded to consider first the question of whether the acts and practices complained of are inconsistent with or contrary to article 10.
199. There is also overlap between the right to privacy protected in article 17 and the rights in each of articles 7 and 10. In some cases, intrusions on privacy may rise to a level which amounts to inhumane, inhuman or degrading treatment. Article 17 also protects less serious intrusions on privacy that do not meet the threshold of articles 7 and 10. Unlike articles 7 and 10, article 17 prohibits only those intrusions on privacy that are arbitrary or unlawful. As the UN Human Rights Committee observed in the context of arbitrary detention:
- The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.<sup>62</sup>
200. The commentary and jurisprudence of the UN Human Rights Committee makes clear that searches of premises and strip searches can, in some circumstances (in some cases together with other factors) be inconsistent with articles 7 and 10. They can also engage the right to privacy in article 17.<sup>63</sup>
201. In its General Comment on article 17, the UN Human Rights Committee stated:
- So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.<sup>64</sup>
202. Strip searches are not mentioned in the Committee's General Comments on article 7 and 10.<sup>65</sup>

203. The UN Human Rights Committee has considered several communications involving strip searches of prisoners. These contain little by way of general guidance. However, statements by the Committee in *Cabal and Bertran v Australia* indicate that strip searches of prisoners will not, of itself, violate articles 7 and 10 if justified by a real need such as to ensure the safety and security of a prison, if an individual is not singled out or 'targeted' for search, if searches are performed only for legitimate reasons and not for impermissible purposes such as to cause embarrassment, and if searches are not conducted in a manner causing unnecessary embarrassment.<sup>66</sup>

*Mandela Rules*

204. As observed above, the interpretation of article 10 of the ICCPR is assisted by reference to the SMRs and the Mandela Rules, though those rules are not themselves binding.
205. Rule 50 of the Mandela Rules provides general principles for the conduct of searches of prisoners:

The laws and regulations governing searches of prisoners... shall be in accordance with obligations under international law and shall take into account international standards and norms, keeping in mind the need to ensure security in the prison. Searches shall be conducted in a manner that is respectful of the inherent human dignity and privacy of the individual being searched, as well as the principles of proportionality, legality and necessity.

206. Strip searches must not be used 'to harass, intimidate or unnecessarily intrude upon a prisoner's privacy'.<sup>67</sup>
207. The Mandela Rules also qualify the circumstances in which 'intrusive' searches will be permitted. For example, 'strip and body cavity searches should be undertaken only if absolutely necessary'.<sup>68</sup> They must also 'be conducted in privacy and by trained staff of the same sex as the prisoner'.<sup>69</sup> Alternatives to such searches are 'encouraged'.<sup>70</sup> The Mandela Rules contain additional provisions relating to the conduct of cavity searches.<sup>71</sup> Mr Watt does not allege that he was subjected to a cavity search so these provisions are not presently relevant.

### *The European Court of Human Rights*

208. The European Court of Human Rights has considered a number of cases in which prisoners have claimed that being subject to strip searches while in detention was incompatible with their rights under articles 3 and 8 of the *European Convention on Human Rights* (the European Convention),<sup>72</sup> which are relevantly equivalent to articles 7 and 17 of the ICCPR.
209. The European Court has not found strip searches *per se* to be incompatible with these rights. It has found violations of the right in circumstances where:
- a. A prisoner has been subjected to repeated strip searches, which were not based on pressing need. The court held that these repeated searches were conducted in a short period of time, in circumstances liable to arouse in the applicant feelings of arbitrariness, inferiority and anxiety characteristic of a degree of humiliation going beyond the level which the strip-searching of prisoners inevitably entailed.<sup>73</sup>
  - b. A prisoner designated as a 'dangerous detainee' was strip searched every time he left and entered his cell – at least once and sometimes several times a day – for a period of two years and nine months, and was also routinely shackled, frequently held in solitary confinement, excessively isolated from family, the outside world and other detainees, and constantly monitored in his cell (including the sanitary facilities) on closed-circuit television. The Court held that these systematic searches were not shown to be necessary in the context of other strict surveillance measures, and  

must have diminished his human dignity and caused him feelings of inferiority, anguish and accumulated distress which went beyond the unavoidable suffering and humiliation involved in the imposition of detention on remand.<sup>74</sup>
  - c. A male prisoner forced to strip naked, and subjected to a cavity search in the presence of a female prison guard.<sup>75</sup>
  - d. A prisoner who was ridiculed by guards when asked to strip, with the guards exchanging humiliating remarks about his body and verbally abusing him.<sup>76</sup>

210. In summary, the jurisprudence indicates that human rights bodies acknowledge that strip searches will involve a degree of humiliation. However, they may be justified where they are shown to be necessary, are not motivated by a desire to humiliate, are performed in an appropriate way to avoid unnecessary distress, and do not involve aggravating features such as those outlined in the cases discussed above.

#### *Discussion*

211. Mr Watt has not alleged that exacerbating features were present in relation to the strip search on 9 March, beyond the invasion of privacy necessarily entailed by the conduct of such a search.<sup>77</sup>
212. It is unclear if Mr Watt claims that the video recording of the strip search aggravated the level of distress and embarrassment it occasioned. CSNSW has no records of any video footage of this search, but has not denied that the search was recorded. While it is understandable that the video recording of a strip search might occasion additional distress for the subject, such recordings can, if made appropriately, serve to protect human rights by documenting and therefore allowing for redress for any abuses occurring during a search.<sup>78</sup>
213. CSNSW has indicated that it conducted the search in response to a serious allegation it had received relating to the operation of the corrective facility. I have been unable to investigate the cogency of this allegation, or the reliability of the intelligence received by CSNSW. I am unable, however, to conclude that CSNSW was not justified in relying on the intelligence it received. I am also unable to conclude that the conduct of the strip search on 9 March 2010 was disproportionate to the identified security requirements or was conducted in a manner that was incompatible with Mr Watt's rights under articles 7 and 10 of the ICCPR.
214. The search appears to have been conducted in accordance with CSNSW's written policies and procedures in place at the time. Those policies and procedures acknowledge that such searches are necessarily embarrassing, and describe measures to minimise that to the extent possible.
215. In my view, in all the circumstances, I am not satisfied that the strip search conducted on 9 March 2010 was inconsistent with or contrary to Mr Watt's rights protected by articles 7, 10 or 17 of the ICCPR.

**(b) Search of cell**

216. Mr Watt complains about a search of his cell conducted on 9 March 2010.

217. Mr Watt has also complained that legal papers relevant to the preparation of his defence were searched during the search of his cell. That complaint is considered in part 9 of this document, together with other allegations made by Mr Watt to the effect that the confidentiality of his legal materials was not respected by CSNSW during the period of his incarceration.

218. CSNSW acknowledges that this search took place. The circumstances and manner in which prisoners' cells may be searched are dealt with in the sections of the OPM extracted in the preceding section of this document.

219. Rule 50 of the Mandela Rules provides general principles for the conduct of searches of prisoners and their cells:

The laws and regulations governing searches of prisoners and cells shall be in accordance with obligations under international law and shall take into account international standards and norms, keeping in mind the need to ensure security in the prison. Searches shall be conducted in a manner that is respectful of the inherent human dignity and privacy of the individual being searched, as well as the principles of proportionality, legality and necessity.

220. Rule 51 provides that searches should not be used 'to harass, intimidate or unnecessarily intrude upon a prisoner's privacy'.<sup>79</sup>

221. In its guidance on implementing the Mandela Rules, the Organisation for Security and Cooperation in Europe (the OSCE) suggests that 'intelligence-led searches' is, *prima facie*, a proper basis for the conduct of a search of a cell. However, it must also be necessary and proportionate.<sup>80</sup> Although referring to 'intrusive searches' – which are defined in the Mandela Rules to be strip and body cavity searches – the OSCE says a decision to conduct such a search 'should be based on an individual assessment and/or process as a result of specific, reliable intelligence'.<sup>81</sup>

222. As discussed above, CSNSW has indicated that the search of Mr Watt's cell was undertaken in response to intelligence it had received. On the information before me, it appears that the search was conducted in accordance with CSNSW's policies and procedures, which recognise that prisoners value their possessions, and that searches should be conducted with a minimum of 'fuss and mess'. Regardless of its ultimate accuracy,

there is nothing before me to suggest that that intelligence was not at the time considered credible, or was not received and acted on in good faith by CSNSW. Based on the submissions before me, it does not appear that there are other, aggravating features of the search of Mr Watt's cell above the intrusion on privacy necessarily entailed by such a search.

223. In my view, I do not consider that the conduct of the search reached the threshold required to constitute treatment lacking respect for Mr Watt's dignity or humanity. Further, in all the circumstances, in my view, I am not satisfied that the search of Mr Watt's cell on 9 March 2010 was not conducted in pursuit of a legitimate purpose, or was not necessary or proportionate. I am therefore not satisfied that it was inconsistent with or contrary to his right to privacy protected by article 17 of the ICCPR or his right to humane treatment as protected by article 10(1).

**(c) Use of restraints during transfer**

224. Mr Watt alleges that during his transfer from the MSPC to Parklea he was required to wear a full restraint kit, including 'leg irons', a waist belt and handcuffs, with his hands locked to the waist belt.

225. Mr Watt has not described precisely the form of the 'leg irons' that he says were applied to him.

226. In correspondence dated 15 March 2018, I asked CSNSW to respond to this allegation, and to provide 'copies of any relevant documents, including policies and procedures, risk assessments and incident reports'.

227. In reply, on 18 April 2019, CSNSW provided a one page form titled 'Schedule of Orders for Removal & Transfer of Inmates' dated 9 March 2010, indicating that Mr Watt was to be transferred from the MSPC to Parklea on that date by the Statewide Emergency Unit. In addition, CSNSW stated:

An inmate would be handcuffed for such an escort. There is no documentation that indicates that a "full restraint kit" was utilised.

228. CSNSW did not, however, expressly deny that the form of restraints described by Mr Watt were used. Nor did it provide any information or submissions about what the lack of documentation recording use of such equipment might mean.

*CSNSW's Operations Procedures Manual concerning use of restraints during transfer*

229. On 23 July 2021, in response to my preliminary view, CSNSW provided further submissions and information including an excerpt of its OPM relating to the use of restraints as in effect in March 2010. The OPM permitted the routine use of handcuffs and ankle cuffs for the transport of certain categories of inmates.
230. CSNSW confirmed in those submissions that the relevant OPM did not identify the relevant categories of inmates for which the use of restraints was permitted but stated that it understood that serious offenders in maximum security would have been subject to this part of the policy.
231. CSNSW further stated that at the relevant time in most, but not all circumstances the use of restraints could only be employed as a 'tactic of last resort', and only to the extent considered reasonable and appropriate, and to cease when no longer required to control the inmate.
232. CSNSW further stated that correctional officers were not, under the relevant OPM in effect at the time, required to take records of the use of restraints in these situations involving the transfer of a serious offender, and that likely explains the absence of records concerning this incident.
233. CSNSW also states that leg irons were not used by CSNSW in 2010, although they were not expressly excluded from use by the OPM.
234. CSNSW has not provided copies of any documents recording any risk assessment in relation to the use of restraints during Mr Watt's transfer, or any pro forma risk assessment documents. Based on CSNSW's 23 July 2021 submissions, I am of the view that it is unlikely that any such documents exist.
235. CSNSW has also submitted that its OPM may not be relevant because the transfer was undertaken by the SEU, which may have been subject to its own operating procedures. CSNSW has explained that different vehicles are used by different units that may affect transfer, with different levels of restraint used on inmates depending on a vehicle's built-in security measures.

236. CSNSW's submissions also stated that in March 2010, CSNSW's policy was that an executive officer was required to be present for any inmate transfer so that they could assess each transport and identify potential risk factors. The submissions then speculate that for Mr Watt's transfer, the executive officer may have determined that the additional restraints were required, particularly if a lower security vehicle was used.
237. More significantly, notwithstanding the additional information provided by CSNSW in response to my preliminary view, a number of the conclusions are largely based on speculation on what may have occurred. There remains an absence of any documented risk assessment for Mr Watt and the March 2010 transfer, or any other documents that record the level of restraint used during the transfer. I do note that CSNSW stated that correctional officers were not, under the relevant OPM, required to take records of the use of restraints in situations involving the transfer of a serious offender, and that likely explains the absence of records concerning this incident.
238. CSNSW have also stated that leg irons were not used by CSNSW in 2010. Mr Watt has not described the 'leg irons' that were applied to him. I note that at the relevant times the *Crimes (Administration of Sentences) Regulation 2008* (NSW),<sup>82</sup> permitted the use of ankle cuffs, and prohibits the use of leg irons.
239. On balance, I am satisfied that Mr Watt was restrained by application of shackles – such as ankle cuffs – to his feet, a waist belt, and handcuffs which were locked to the waist belt.
240. I am not satisfied that prohibited leg irons were applied to him. International human rights law establishes that, where demonstrated to be necessary and proportionate, use of the restraints applied to Mr Watt, may be permissible. In other circumstances, the unjustified use of restraints can be inconsistent with the right to be treated with humanity and with respect for the inherent dignity of the human person, protected by article 10(1) of the ICCPR.

*Position in the SMRs and Mandela Rules*

241. The Mandela Rules prohibit the use of certain forms of restraints on prisoners.

242. Rule 47(1) of the Mandela Rules provides:
- The use of chains, irons or other instruments of restraint which are inherently degrading or painful shall be prohibited.
243. The earlier SMRs<sup>83</sup> provided more detail. Rule 33 provided:
- Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints.
244. The prohibition on 'irons' is on weighted instruments of restraint, and does not include a strict prohibition on all forms of leg or ankle cuffs.<sup>84</sup>
245. The Mandela Rules provide that instruments of restraint may be used as a precaution against escape during transfer,<sup>85</sup> but only where authorised by law,<sup>86</sup> where no less restrictive alternative exists,<sup>87</sup> where the method of restraint chosen is 'the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed',<sup>88</sup> and the restraints are imposed for the minimum period necessary.<sup>89</sup>

*The UN Human Rights Committee*

246. There is not an extensive amount of jurisprudence from the UN Human Rights Committee considering when the use of restraints may involve a breach of articles 7 or 10 of the ICCPR.
247. In *Cabal and Pasini Bertran v Australia*,<sup>90</sup> the UN Human Rights Committee considered complaints by two men who alleged that they were repeatedly restrained in an equivalent way to Mr Watt, including use of leg shackles, manacles, and a belt.<sup>91</sup> The Committee held there had been no violation of articles 7 or 10, because, in the circumstances, the use of those restraints had been justified by the authorities. The circumstances were that the two men were considered a flight risk because:
248. they had in the past evaded arrest through the use of false travel and identity documents, that they had access to considerable financial resources; had made payments to other prisoners, and that prison intelligence had reported incidents of other prisoners offering to assist any escape in return for financial payment.<sup>92</sup>

249. That is, the Australian authorities in that case had demonstrated that the use of the restraints was necessary in the particular circumstances of the authors.

*Discussion*

250. In my view, the authorities above indicate that the use of particularly restrictive forms of restraints on a person in detention will amount to treatment that is inconsistent with the right protected by article 10(1) of the ICCPR to be treated with dignity and humanity unless it is demonstrated to be necessary, reasonable and proportionate in the circumstances.
251. Where restraints are used during transfers, the authorities require that it must be demonstrated that the risk of escape could not reasonably be addressed by the use of a less restrictive form of restraint.
252. In the present matter, CSNSW has made no submissions, and provided no evidentiary materials, indicating that the form of restraint applied to Mr Watt was reasonable or necessary in the circumstances, and if so, on what grounds. There is no evidence of any risk assessment undertaken at the time of Mr Watt's transfer to assess whether the method of restraint chosen was the least intrusive method that was necessary and reasonable, based on the level and nature of the risks posed, and to ensure that the restraints were imposed for the minimum period necessary. In my view, the use of the restraint kit on Mr Watt during the prison transfer on the night of 9 to 10 March 2010 was therefore inconsistent with his right to be treated with dignity under article 10(1) of the ICCPR

**Recommendation 1**

That restraints only be applied to an inmate where an individual assessment of their risk shows that this is warranted. That risk assessment ought to be documented, including the factors that indicate that the use of restraints is warranted.

**Recommendation 2**

That CSNSW's operating procedures make clear that:

- a. the use of restraints, including handcuffs, should be a measure of last resort in all circumstances

- b. prior to each occasion when the use of restraints is proposed, there should be an individualised risk assessment for that detainee in the context of the particular operation that takes into account:
  - (i) any general risk assessment based on the relevant incidents that an inmate has been involved in whilst imprisoned
  - (ii) the particular requirements of the transportation and its need or purpose
  - (iii) whether the inmate can be transported safely without the need for restraints to be applied
- c. 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
- d. restraints should be used only for the shortest period of time necessary in the circumstances, and their use regularly re-evaluated for necessity during their use
- e. restraints should not be routinely applied to a particular class of inmates, including serious offenders or others in maximum security, without an individualised risk assessment of the kind described above being carried out.

### 8.3 Timing of search

- 253. The searches and transfer described in Mr Watt's complaint occurred the night before he was scheduled to appear at a court hearing. The timing of the transfer does not appear to have been arbitrary, as CSNSW has indicated that the intelligence leading to the transfer required it to occur 'at short notice.'
- 254. Mr Watt did appear at that hearing, although it appears he had not slept the night before. I understand that this would likely have been a stressful, and distressing, situation.
- 255. In *Moiseyev v Russia*, the European Court held that placing defendants in a situation where they appeared at
  - a vitally important trial in a state of lowered physical and mental resistance following an exhausting overnight transfer by prison van ...

undoubtedly weakened [the defendants'] position at a vital moment when they needed all their resources to defend themselves.<sup>93</sup>

256. The European Court has held that reducing a defendant's ability to defend themselves in this way at an important hearing can interfere with their right to a fair trial, and in particular, their right to be afforded 'adequate facilities'.<sup>94</sup>
257. In the present case, it appears that the hearing at which Mr Watt appeared on 10 March 2010 was a procedural hearing. While Mr Watt was unhappy with the way that hearing proceeded, he has not submitted that its outcome was affected because of exhaustion following the transfer. Moreover, he has not demonstrated that the overall outcome of the criminal proceedings against him was affected by reason of exhaustion at the hearing on 10 March 2010.
258. While the timing of the searches and Mr Watt's transfer were unfortunate, in my view it was not inconsistent with his right to a fair trial under article 14 of the ICCPR.

## 9 Fifth complaint – Confidentiality of legal materials

259. Mr Watt complains that he was not afforded confidentiality with respect to his legal materials. There are two elements of this complaint.
- a. The first of these relates to the confidentiality of Mr Watt's legal materials generated on prison computers.
  - b. The second relates to a search of legal materials in his cell during the search on the night of 9-10 March 2010, described in the discussion of Mr Watt's fourth complaint in the preceding section.
260. He also complains that legal materials in his cell were confiscated at the time of the search and were subsequently lost by CSNSW. I deal with each of these matters in turn.

### 9.1 Confidentiality of legal materials while using prison computers

261. Mr Watt used computer facilities at the prisons where he was held to prepare for his trial. He complains that he was not able to ensure the

confidentiality of his legal materials by password-protecting his files, and that he was not permitted to retain in his own possession floppy disks on which they were saved. Instead, those disks were stored in the libraries of the various prisons.

262. Mr Watt provided some more detail about these allegations in his statement of 9 July 2019, as follows:

At Silverwater and Long Bay, I was not allowed to keep all of my legal materials within my cell. I had to keep electronic information I wanted to save on floppy disks, which were not allowed to remain in my possession. I would have to speak to an area manager in the library in order to obtain a floppy disk. I would use the computers in the library and save information on floppy disks which had to be given back to the area manager before I left the library. There was no password protection on the floppy disks.

Initially, the process at Parklea was the same, and I used floppy disks to save my materials which had to be given back to library staff. Then the judge made an application to the Governor of the prison advising him that I needed to be given greater access to my brief.

The process at Parklea then changed so that the library staff set up a folder onto a public computer where I could save my files. These could be accessed by anyone. This was the only way to save the documents. Every inmate was subject to this practice. I was also not allowed to print any materials. It was a wholly inadequate measure to ensure legal confidentiality.

On multiple occasions at Parklea I was required to save my legal notes on public computers which could be accessed by anyone.

I cannot exactly recall whether I was also allowed to use floppy disks to save documents on the computers at Parklea but I may have been able to.

263. It is clear from the above that Mr Watt's complaint concerns files he created containing his own notes, and possibly other materials, rather than files on the CDs in the prosecution brief of evidence discussed earlier in this document.
264. Mr Watt has not alleged that his confidential legal materials were in fact read or inspected.

265. CSNSW has not denied that Mr Watt was required to save his legal notes on floppy disks, that he was not permitted to password protect these disks, and that it was a requirement that the disks be stored by library staff—that is, Mr Watt was not permitted to keep the disks in his own possession.
266. In response to a request to explain the justification for these policies, CSNSW stated in submissions dated 15 March 2019 simply that ‘it is understood floppy disks are no longer used in inmate computers’.
267. In correspondence dated 8 October 2015, CSNSW provided the following information about then-current practices concerning inmate use of computers in NSW:

Legal documents produced by inmates are sometimes produced using computers which are part of the Offender Access to Computers network — each inmate has their own login and password, with such documents saved into their own folder on the network. Otherwise, an inmate may generate legal documents on an inmate legal computer. Staff are required to delete such information once it has been transferred on the inmate’s behalf by a staff member to an electronic storage device, as the next user of the inmate legal computer will have access to that document if not deleted.

268. It was not stated when the practices described in this summary provided in 2015 came into effect, or whether they were in effect at the time that Mr Watt was detained. A review of the documents discussed below suggests that these practices were put in place after Mr Watt was released from detention.
269. At all relevant times CSNSW’s OPM has addressed inmate access to computers, although not always specifically with respect to access to computers for the purpose of reviewing legal documents and preparing a defence. The relevant OPM has been revised on a number of occasions since Mr Watt was released from custody.
270. The version in effect at the time of his detention is numbered ‘1.2’ and was issued on 12 December 2006. In section 5.4, it provided that
- Offenders with on-going court matters may also have access to desktop computers to review their legal transcripts on CD and to prepare for trial or appeal matters in accordance with Section 9.3 of the OPM.

271. The version of section 9.3 of the OPM provided to the Commission<sup>95</sup> deals with access to prison property, including ‘documents for legal proceedings’, but is silent on matters relating to access to computers or the confidentiality of legal materials. The reference to ‘offenders’ in this passage is unfortunate in the context of this complaint, as it presumes that all people held in NSW correctional centres have been found guilty of criminal offences.
272. The OPM further provided:

#### **5.4.1.6 Issue of Disks**

- a) It is recognised that during the course of computer assisted education and vocational training it will be necessary to issue offenders with work disks. Work disks include course disks supplied with distance learning courses as well as disks supplied by correctional education officers for education and training purposes.

The supply of and use of these disks by offenders will be subject to the following procedures.

- When not in use all disks are to be locked in a security facility.
- Each disk used by offenders will be labelled with the offender’s name and MIN.
- Any inventory of work disks will be maintained by the senior correctional education officer including disk allocation.
- Daily work disk issues and returns will be noted in an individual offender work disk use register.
- ...
- Disks are not permitted to be stored in offenders’ cells.
- ...
- To ensure that disks are being used for authorised education and training purposes only, senior correctional education officers are responsible for the periodic check of the data contained on education work disks (a record of each check is to be noted by the senior correctional education officers).
- ...

#### **5.4.2 Disk Data Transfer**

The transfer of disks by offenders between the correctional centre and the community is prohibited. ...

...

#### 5.4.4 Evaluation and Monitoring

Standards have been developed to enable the general manager (delegate) and senior correctional officers to control and monitor offenders [sic] access to, and use of computers and associated software. These are outlined below and are to be used as a checklist.

##### 5.4.4.1 Checking

a) Check that the issuing of computer disks is carefully monitored.

...

##### Monitoring

General managers (delegate) and senior correctional education officers **must** ensure that periodic checks are conducted on the contents of all offender desktop computers in the computer training rooms, work areas and work disks used by offenders.

...

##### Responsibility/Reporting

General managers (delegate) are responsible for:

- ensuring that offender's access to desktop computers is always supervised.

...

Senior correctional education officers and managers in CSI are responsible for:

...

- forwarding work disks used by offenders to the senior correctional education officer of another correctional centre where offenders are transferred.

273. This is the only relevant discussion of the use of computers by inmates I have identified in the extracts CSNSW has provided from the OPM as in effect throughout Mr Watt's detention.

274. On 23 July 2021, in response to my preliminary view, CSNSW submitted that the sections of the OPM extracted above allowed inmates to save work prepared on CSNSW computers to floppy disks, with such floppy

disks being issued for work or educational purposes. CSNSW submitted that it was not intended for these floppy disks to be used by inmates to save notes concerning their legal matters. to apply to the issue of floppy disks for legal matters.

275. CSNSW's submissions go on to submit that the failure of CSNSW to expressly issue floppy disks for the purpose of preparing legal materials, or having suitable policies surrounding how floppy disks were secured, must be considered in a historical context at a time where the use of computers in prisons and correctional centres was not as commonplace as today.
276. Notwithstanding CSNSW's submission that the relevant sections of the OPM relate to the issuance of floppy disks for work or educational purposes, with there being no other relevant policy, I infer that Mr Watt's use of computer facilities was subject to and in accordance with the policy extracted above, including the protocols for the use of floppy disks to save materials. This is because CSNSW has not provided any other context within which Mr Watt could have been issued a floppy disk, and I observe that Mr Watt's account is entirely consistent with the regime described in the extracts above.
277. In my view, I am satisfied that Mr Watt was required to save files he prepared in relation to his defence to floppy disks which he was not entitled to keep in his possession or password protect.
278. The situation is less clear in relation to Mr Watt's claim that while at Parklea he was, on occasion, told to save his work files to a public computer that could be accessed by other prisoners. In its submission of 15 March 2019, CSNSW stated that 'it is understood that each inmate has their own login and password to enable preparation of legal documentation'. CSNSW does not submit that this was the case at the time of the events the subject of Mr Watt's complaint. The possibility of inmates saving files other than to floppy disks is not addressed in the parts of the OPM that have been provided to me.
279. In an earlier submission, dated 8 October 2015, CSNSW stated that at that time there were two types of computers that might be made available to inmates. 'Offenders' Access to Computers Network' (OAC Network) computers were networked, and inmates each had their own account to which they could save files. Each inmate had their own password to access their files on these computers. 'Inmate legal computers' could

also be used by inmates to prepare for legal proceedings. Documents generated on these computers would have to be saved on that computer by the inmate, and then saved to an external storage device and deleted from the computer by prison staff.

280. CSNSW does not indicate when this system commenced. A version of an extract of the OPM dated 'February 2012' indicates that the OAC Network 'was rolled out in 2011'.<sup>96</sup>
281. On 23 July 2021, CSNSW provided further information concerning its policies regarding inmate legal materials since 2012. CSNSW stated that since 2012, inmates have had access to removable storage devices when provided these by their legal representatives or an exempt body such as the State Crime Commission, Legal Aid Commission, or a prosecutorial body.
282. CSNSW further stated that, from August 2012, its OPM expressly stated that CSNSW were not permitted to view the contents of these devices and that inmates could retain these devices in their possession. CSNSW clarified that the OPM amendments applied to the review of legal materials prepared by inmates on CSNSW computers, and from 2012 CSNSW staff were directed to not scrutinise legal materials closely when they were printed or removed from CSNSW computers.
283. CSNSW also clarified in its submissions that it remained the case that in 2012 inmates were not allowed to retain floppy discs in their possession due to security concerns that they could be modified and used as weapons. Similarly, at this time, inmates continued to be prohibited from password protecting their floppy disks as they were intended to be used for work and education purposes. However, in 2012, it became expressly prohibited for CSNSW to scrutinise the contents of floppy disks (see paragraph 295 below).
284. I am satisfied that these policies and procedures described as commencing in 2011 and 2012 were not in place at the time of the events subject of Mr Watt's complaint. The submissions and materials provided by CSNSW therefore do not cast any light on this element of Mr Watt's complaint.
285. Mr Watt's complaint is therefore essentially uncontested.

286. However, in his statement, Mr Watt states:

I cannot exactly recall whether I was also allowed to use floppy disks to save documents on the computers at Parklea but I may have been able to.

287. In light of this statement, in my view I am unable to conclude that Mr Watt was required to save his legal files on a computer that was accessible to other inmates.

288. CSNSW submitted on 15 March 2019 that

inmate legal materials are not inspected if subject to privilege. If not subject to privilege, such materials would only be subject to inspection through visual scanning in the event there was a suspicion the inmate was involved in a breach of discipline and the materials may provide an evidentiary basis for such a suspicion.

289. It further stated that 'it is considered to be staff misconduct for a staff member to misuse any information gained in the course of duty'. CSNSW did not clarify whether this policy was in place at the times relevant to Mr Watt's complaint; if it was, it was not reproduced in the portions of the written OPM provided to me.

290. In an earlier submission, dated 8 October 2015, CSNSW stated:

Staff are instructed as a matter of policy to respect professional boundaries and not to read inmate generated legal material as such material may be privileged. The only staff who may access inmate folders on the [OAC] network are those who are responsible for the administration of the network at the centre. Staff may need to perform a cursory check of the downloaded documents or files from an external storage device to ensure they have been copied into the data folder of the inmate legal computer's desktop. If the inmate generated material is prepared on an inmate legal computer, the inmate will need to ask a staff member to transfer the document to an electronic storage device (e.g. – an approved rewritable CD or USB key) which may then be printed by that staff member, on behalf of the inmate on a corporate printer;

As per the above point, staff are instructed not to read inmate generated legal material. It is not possible to give an assurance that any inmate generated material will not be read or viewed by staff. Except where there is a lawful excuse to do so, it would be misconduct for a staff member to provide inmate generated legal material to the DPP/Police.

291. This submission was expressly stated to be a summary of practices in place in 2015; CSNSW did not submit that they were in place at times relevant to Mr Watt's complaint.
292. CSNSW has also referred to regulation 103 of the *Crimes (Administration of Sentences) Regulation 2014* which creates a special protocol for the inspection of materials taken into prisons by legal practitioners for use in advising their clients. That regulation was not in effect while Mr Watt was in custody, but an equivalent regulation did exist in regulation 97 of the *Crimes (Administration of Sentences) Regulation 2008*. The 2008 regulation also contained special provisions relating to the inspection of correspondence between inmates and their lawyers.<sup>97</sup> None of these regulations applied to inmate-generated materials such as the defence notes the subject of Mr Watt's complaint.
293. I have been provided with several revised versions of relevant parts of the OPM and an equivalent document which came into effect after Mr Watt's release from prison. Those documents contained express provisions relating to legal materials accessed or created by inmates on prison computers. For instance, a version of the document released on 23 February 2012, provided that:
- Staff are not to view the contents of external storage device [sic] containing legal material that has been supplied, with a supporting letter, by an inmate's legal representative, an exempt body or a prosecutorial body, as the contents would be considered privileged.<sup>98</sup>
294. And further:
- Staff should avoid reading any documentation that relates to an inmate's legal proceedings as this information may be claimed by the inmate to be privileged.<sup>99</sup>
295. Equivalents of both of these clauses are also contained in relevant sections of the CSNSW's Custodial Operations Policy and Procedures (which I understand replaced the OPM) dated 16 December 2017 and 16 December 2018.<sup>100</sup> These later written policies and procedures are consistent with CSNSW's submissions of practices at two points in time following Mr Watt's release from custody.
296. In my view, it follows from the above that, even if CSNSW did, at the time of Mr Watt's detention, instruct staff not to read inmate-generated legal material, that instruction was not recorded in its OPM.

**(a) Human rights implications**

297. The right to confidentiality of legal materials is protected under the right to a fair trial, and the right to privacy.
298. Article 14(1) of the ICCPR protects the right for all persons to be equal before the courts and tribunals, while article 14(3)(b) of the ICCPR protects the right of an accused ‘to communicate with counsel of his own choosing’. In addition to the assessment of article 14(3)(b) requirements as set out at clause 6.1 above, I note that the UN Human Rights Committee has made clear that article 14(3)(b) requires that
- Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.<sup>101</sup>
299. The right to correspond privately with counsel requires that an accused be able to prepare confidential documents for the consideration of counsel.<sup>102</sup>
300. The guarantee in human rights law of a defendant’s confidential communication with counsel mirrors the common law rule of legal professional privilege. This rule exists to ensure parties to actual or contemplated litigation are freely able to access legal advice to protect their legal rights and interests. The uniform Evidence Acts in effect in various Australian jurisdictions have recognised that this rationale also requires that the same privilege be extended to materials created by unrepresented litigants in relation to the conduct of their own proceedings.<sup>103</sup>
301. The right to confidentiality of legal materials is also protected by the right to privacy in article 17 of the ICCPR. That right is not limited to communications passing between a lawyer and their client.
302. The right to confidentiality of legal materials is not absolute. As noted earlier in this document, it may be subject to permissible limitations where prescribed by law, done in pursuit of a legitimate objective, necessary, and proportionate. So, for instance, police recording conversations between a lawyer and client in relation to the investigation of serious offences, where that was done pursuant to a warrant, and the recordings were not admitted into evidence against the client, was in the circumstances held by the UN Human Rights Committee not to amount to a violation of article 17 of the ICCPR.<sup>104</sup>

303. The UN Human Rights Committee has principally considered the application of articles 14(3)(b) and 17 in relation to direct surveillance of communications passing between lawyers and their clients. The European Court of Human Rights has given more detailed consideration to the right to confidentiality of legal materials in the context of prisons, and in particular, the interception of correspondence and searches of inmate's documents by prison authorities. That jurisprudence is therefore helpful in assessing the present complaints.
304. The European Court has held that correspondence between a defendant and his lawyer can be opened and read by prison authorities, but only in exceptional circumstances when the authorities have reasonable grounds for believing that the lawyer-client privilege is being abused.<sup>105</sup>
305. In *Campbell v United Kingdom*,<sup>106</sup> the applicant was a prisoner who complained that his correspondence with his solicitor was being scrutinised by prison authorities. The European Court of Human Rights found that, in principle, all items of correspondence between a prisoner and his lawyer which, whatever their purpose (that is, whether for the purpose of conducting litigation or otherwise) 'concern matters of a private and confidential character', are protected by the right to privacy.<sup>107</sup> Inspection of that correspondence will only be permissible for limited reasons and in limited circumstances. The Court set the following principles in assessing whether either inspection (that is, opening to inspect for contraband but not reading), or reading, of this kind of correspondence may be permissible:

This means that the prison authorities may **open** a letter from a lawyer to a prisoner when they have **reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose**. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner. The **reading** of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in **exceptional circumstances** when the authorities **have reasonable cause to believe that the privilege is being abused** in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as "reasonable cause" will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused.<sup>108</sup>

306. The mere fact, then, that a defendant is detained is not sufficient to subject all written communications with his lawyer to perusal.<sup>109</sup>
307. *Campbell v United Kingdom* concerned the interception and opening of communications passing between a prisoner and their lawyer. In *R v Secretary of State for the Home Department, Ex Parte Daly*,<sup>110</sup> the House of Lords applied the principles outlined in that case to the inspection of legal correspondence found during searches of prisoners' cells. The court accepted that 'random searches of prison cells was necessary for the purpose of security, preventing crime, and maintaining order and discipline'.<sup>111</sup> The court observed that it may be necessary for those conducting the search to perform a cursory inspection of documents found to establish their nature and whether closer scrutiny is warranted or permissible.<sup>112</sup> This initial inspection could be needed to determine whether the documents in question are in fact related to legal proceedings, or whether illicit items were being hidden amongst them, or whether the documents themselves might contain illicit material such as 'escape plans or any records of illegal activity'.<sup>113</sup> None of that undermines any of the principles enunciated in *Campbell v United Kingdom*, as outlined above.
308. The cases above concern the confidentiality of legal correspondence. I consider that the same principles apply to legal materials prepared by a prisoner in relation to their defence of criminal charges, regardless of whether they are contained in, or prepared for the purpose of inclusion in, correspondence to their lawyer.
309. I also consider that the principles described in *Campbell* and *Daly* are equally applicable to searches and perusal of electronic materials.

**(b) Discussion**

310. As outlined above, I accept Mr Watt's claim that he used prison computers to generate legal materials in relation to his defence of the criminal charges against him. I accept that he was required to save those materials to floppy disks, which he was not permitted to password protect and which he was not permitted to keep in his own possession. Rather, it was a requirement that they be stored by prison staff.
311. The OPM, as in effect at all relevant times, contained provisions requiring that these disks be labelled, and kept in a secure location, and their contents could only be accessed by certain prison staff.

312. In my view, the fact that Mr Watt was required to save his work to floppy disks, the fact that he was not entitled to password protect those disks, and the fact that he was not permitted to retain those disks in his own possession were not on their own inconsistent with or contrary to his right to privacy afforded by Article 17 of the ICCPR. Having reviewed the relevant parts of the OPM, I am prepared to accept that it was necessary to control access to external storage devices to maintain order in prisons. I also consider that, because prison staff might, per *Campbell and Daly*, be required to conduct searches of inmate materials, a ban on prisoners applying password protection to those materials was not, in and of itself, inconsistent with Mr Watt's right to privacy.
313. However, that right did require that appropriate measures be in place to ensure that those materials were only scrutinised in such circumstances, and in such a manner, as to ensure that Mr Watt's right to privacy was subject only to such level of interference as shown to be necessary and proportionate to the objective of maintaining order in prisons.
314. The OPM in place during Mr Watt's custody required that prison staff periodically check the contents of inmate disks stored in their possession. I therefore infer that prison staff in fact did so. The OPM did not contain any provisions governing the review of legal materials contained on those disks. It did not instruct staff not to read legal materials, or, alternatively, only to read them in exceptional circumstances.
315. I note CSNSW's submission that the OPM dealt with disks issued for educational or vocational purposes, rather than for legal purposes, and this perhaps explains the lack of any provisions governing the review of legal materials. I also note CSNSW's submission that the lack of policies in place in 2008-2010 surrounding how floppy disks were secured, must be considered in a historical context at a time where the use of computers in prisons was not as commonplace as today.
316. CSNSW has made submissions stating that, as at 2015 (and continuing) staff were 'instructed' not to scrutinise legal correspondence. Even if staff were so instructed as such in the period 2008-10 (which is not clear on the materials before me), it could only have been delivered orally as it did not appear in the materials that have been provided to me. I do not consider that that form of instruction to prison staff would constitute a satisfactory protection of Mr Watt's right to privacy, in such an important context as the confidentiality of his legal materials.

317. The OPM makes clear that prison staff have many rules to apply and to follow in carrying out their duties. An oral instruction is, in that context, liable to be temporarily overlooked or forgotten. Further, the instruction may, through inadvertence, not be given to some staff.
318. For these reasons, I am not satisfied that adequate safeguards were in place to ensure that the limitations on Mr Watt's right to privacy occasioned by regular scrutiny of his legal files were restricted to the minimum level strictly necessary to achieve a legitimate objective.
319. In my view, requiring Mr Watt to save his legal files to floppy disks, in circumstances where the OPM required regular review of the contents, and contained no protection for legal materials, was inconsistent with Mr Watt's right to privacy under article 17 of the ICCPR.
320. I am also of the view that these actions were inconsistent with Mr Watt's right to communicate in confidence with counsel of his choosing contrary to his right under article 14(3)(b) of the ICCPR. This right requires that an accused be able to prepare confidential documents for counsel's consideration. Mr Watt required facilities that ensured the documents he prepared were kept confidential so that he may be able to access legal advice to protect his legal rights and interests during the period of his imprisonment. The systems in place were not adequate for the purpose of article 14(3)(b).

## **9.2 Concluding remarks regarding first limb of fifth complaint**

321. Shortly after Mr Watt was released from prison, the CSNSW OPM was updated to include some protection for legal documentation. Had those changes been in effect during Mr Watt's detention, I may have arrived at a different view about this aspect of Mr Watt's complaint. That however is not a matter which falls to me for consideration.
322. CSNSW's submissions indicated that the OPM has been replaced with the Custodial Operations Policy and Procedures (COPP). According to CSNSW, the updated policy reflects the modern reality that more inmates now use computers to prepare legal documents and defences.

323. CSNSW submitted that since September 2020 its policy has required inmates to have access to 'blue' non-networked computers, laptops and tablets to review and prepare for legal matters. These devices are not connected to the CSNSW network. According to CSNSW's submissions, the COPP permits inmates with approval to access laptops and tables to use these devices in their cell, although it does not provide any information about the type of approval required or what the requirements for such approval may be.
324. It is not clear from its 2021 submissions whether, despite the computers being 'blue' non-networked computers whether CSNSW or other inmates would have access to information contained on those devices, or how inmates may use these computers in a confidential manner. It is also not clear where or how inmates may store information digitally. Current practices are not relevant to Mr Watts complaint.
325. In other words, CSNSW's current policy enables at least some inmates to have access to computers for the purposes of reviewing and preparing legal documents, but does not extend so far as to ensure that this right is protected for all inmates, notwithstanding modern realities. While I commend the advances that have been made in CSNSW's policies, in my view the COPP ought to provide this protection to all inmates.

### **Recommendation 3**

That CSNSW review their policies and procedures to ensure that adequate safeguards are in place to ensure the confidentiality of inmates' legal documents. These safeguards should ensure that searches of inmate's legal documents are only permitted in exceptional circumstances, where there are reasonable grounds to consider that the contents of the documents endanger prison security or the safety of others or are otherwise of a criminal nature.

## **9.3 Search of legal materials on 9 – 10 March 2010**

326. Mr Watt complains that, during the search of his cell at the MSPC on 9-10 March 2010, CSNSW staff read legal materials stored in his cell. Mr Watt has provided the following account of this aspect of the search:

[T]hey started on my legal paperwork, going over every piece or paper with what would have been a 5,000 word brief of defence notes and

instructions as well as the prosecutions allegations, piece by piece they reviewed the page and then dropped it in a tub....

It was clear they were looking for something and were expecting to find it.<sup>114</sup>

327. As described above, following the search, Mr Watt was transported from the MSPC to Parklea. On his arrival, he requested access to some of the legal materials that had been searched so that he could refer to them during his court hearing scheduled later that morning. He states that in response to that request:

The officer refused, he told me he was going to take my entire property with him to search it thoroughly.<sup>115</sup>

328. CSNSW has acknowledged that the search took place, 'following the receipt of credible intelligence information'.<sup>116</sup> Some further relevant information is contained in a document initially sent to the NSW Ombudsman, and forwarded to the Commission on 18 April 2019.<sup>117</sup>

[T]he operation to move WATT ... included property searches looking for evidence linked to [a serious] allegation.

...

... Mr Watt's personal property and legal documents did not travel with him to Parklea.

...

WATT's property was packed by ... Officers and stored until it could be searched for contraband.

The search was conducted after the escort because it had to be comprehensive as the potential contraband was believed to be ... in the form of paperwork.

#### **(a) Discussion**

329. Based on the materials discussed above, I am satisfied that Mr Watt's legal materials were searched in his cell, and in his presence, during the search in question. I am further satisfied that his documents were confiscated for the express purpose of being searched closely for particular documentation. That process must necessarily have necessitated reading the contents of at least some portion of Mr Watt's papers.

330. As discussed above in relation to Mr Watt's electronic files, searches of prisoners' legal materials is a significant limitation on their right to privacy. The searches in question, therefore, involved a departure from the ordinary rules that human rights law applies to confidentiality of prisoners' legal materials. However, CSNSW conducted searches on the basis of specific intelligence indicating that contraband might be contained within the written materials in Mr Watt's cell.
331. In my view, that brings it within the scope of the kind of exceptional circumstances described in *Campbell v United Kingdom*.<sup>118</sup> I am therefore not satisfied that the search of Mr Watt's papers on the night of 9-10 March 2010 has been demonstrated to be inconsistent with or contrary to any human right.
332. This is not of course to suggest that I have formed any view about whether the intelligence on which CSNSW relied proved on an actual inspection of the materials in question to be accurate. That is a matter about which I need not, and am not in a position to, express a view.

## 9.4 Confiscation and loss of legal materials

333. Mr Watt complains that following the search of his cell and legal materials on the night of 9–10 March 2010, a tub of his legal materials that were in his cell at the time of the search was confiscated and lost by CSNSW. CSNSW has acknowledged that this occurred.
334. CSNSW has not explained how it was possible for this tub of materials, which was confiscated to be searched in relation to serious allegations and was, I therefore assume, of some significant interest to them, to be misplaced. There is nothing before me, however, to suggest, that this loss was other than accidental.
335. CSNSW has submitted that following its loss of Mr Watt's legal materials, 'these documents were then obtained from the Department of Public Prosecutions (DPP) and hand delivered to Mr Watt on 23 April 2010'. In my view, if this submission is intended to suggest that the loss was fully remedied by this action, it is fundamentally misconceived. In the first place, the lost materials were not simply constituted by the prosecution brief of evidence. Mr Watt was understandably concerned about the loss of the materials he had compiled in relation to his defence, including instructions he had prepared in relation to that defence.

336. He wished to use information in those materials in the hearing scheduled on 10 March 2010, the morning after the search and transfer. His statements also make clear that these materials related to the conduct of his defence more generally.
337. The loss of materials such as these could amount to a significant impediment to a defendant in the preparation of their defence to legal proceedings. That might mean they were deprived of an opportunity to put their case most effectively at trial. In such circumstances, loss of legal documentation could amount to an interference with the right to equality of arms in legal proceedings, protected by article 14(1) of the ICCPR, or with the right of an accused to correspond with counsel, protected by article 14(3)(b) of the ICCPR.
338. In the present case, although Mr Watt's submissions indicate that he was unhappy with the way in which the procedural hearing on 10 March 2010 proceeded, he was ultimately not disadvantaged in his defence of the charges brought against him by the conduct of CSNSW. Those charges did not proceed to trial, a number being withdrawn and a number dismissed. Mr Watt's submissions indicate that he was not permitted at the hearing of 10 March 2010 to address all of the matters that he wished to. However, it appears from Mr Watt's account that that was because the court did not permit Mr Watt to address those issues. It was not because Mr Watt was unable to refer to his legal notes during the hearing.
339. For these reasons, in my view I am unable to conclude that the loss of Mr Watt's legal materials was inconsistent with or contrary to his right to a fair trial, as protected by articles 14(1) and 14(3)(b) of the ICCPR.

## 10 Conclusion

340. For the reasons given above, my view is that:
- a. The restraint of Mr Watt by CSNSW using leg shackles, handcuffs and a waist belt while transferred from the MSPC to Parklea on 9–10 March 2010, in the absence of the demonstrated necessity of that form of restraint, was inconsistent with his right to be treated with dignity and humanity under art 10(1) of the ICCPR.
  - b. The requirements by CSNSW that Mr Watt save his legal notes to floppy disks, not password protect these disks, and leave these disks for storage with prison staff rather than retain them in his possession,

in circumstances where the contents of those disks were subject to routine scrutiny by prison staff, and no adequate protections were in place to ensure that confidential legal materials were not read by staff, was inconsistent with Mr Watt's right to communicate in confidence with counsel of his choosing (protected by article 14(3)(b) of the ICCPR) and his right to privacy (protected by article 17 of the ICCPR).

341. In my view, I am not satisfied that the other acts and practices the subject or Mr Watt's complaints have been established to be inconsistent with or contrary to his human rights.

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

342. On 23 December 2022, I provided the Department with a notice of my findings and recommendations.
343. On 14 April 2023, the Department provided the following response to my findings and recommendations:

Thank you for your correspondence dated 23 December 2022, in which you provided Corrective Services NSW (**CSNSW**) with the final findings and recommendations of the *Inquiry into complaints made by Mr Adam Watt that certain acts and practices during his detention in NSW correctional centre were inconsistent with or contrary to his human rights (the Inquiry)*.

I understand that, under section 29 of the *Australian Human Rights Commission Act 1986*, in referring your final report to the Attorney General, you are to advise of any action, to your knowledge, that the relevant party has taken or is taking as a result of the findings and recommendations of the Inquiry.

On 23 December 2022, you provided CSNSW with the opportunity to respond to the preliminary findings of the Inquiry. CSNSW carefully reviewed the findings and recommendations outlined in the section 29 Notice and a detailed response has been prepared below.

### **Response to Recommendations outlined in section 29 Notice**

#### **Recommendation 1**

***That restraints only be applied to an inmate where an individual assessment of their risk shows that this is warranted. That risk***

***assessment ought to be documented, including the factors that indicate that the use of restraints is warranted.***

1. CSNSW acknowledges Recommendation 1 and notes that the current *Custodial Operations Policy & Procedures Manual* (COPP) allows for individualised risk assessments in certain circumstances.

2. Regulation 132 of the *Crimes (Administration of Sentences) Regulation 2014* (CAS Regulation), concerning the 'Use of equipment for restraining inmates', stipulates that:

*(1) With the concurrence of the general manager, a correctional officer may use handcuffs, security belts, batons, chemical aids and firearms for the purpose of restraining inmates.*

*(2) With the concurrence of the Commissioner, a correctional officer may also use the following equipment for the purpose of restraining inmates:*

*(a) anklecuffs;*

*(b) other articles, other than chains or irons, approved by the Commissioner for use for that purpose.*

3. To maintain the good order and security of a correctional centre, prevent or reduce the risk of an escape, and protect persons from attack or harm, restraints have been deemed by the Commissioner and General Manager as necessary in certain routines, escorts, or for inmates with higher risk classifications.

4. Section 19.1, part 12 of the COPP details when handcuffs are required for escorts. It provides that:

Male inmates who are classified AA, A, B, E1 & E2 (including unconvicted and appellant inmates) must be handcuffed while under escort. Female Category 4 and 5 inmates must also be handcuffed while under escort.

In most circumstances, inmates classified minimum security (that is, with a C classification or Category 1, 2 or 3 female) should not be handcuffed when on escort.

Exceptions to this rule are when the inmate is being:

- escorted in the same vehicle as male inmates with an AA, A, B or E classification or Category 4 or 5 females
- transferred, for any reason, from a less secure environment to a medium or maximum security environment

- the Governor/GM decides that handcuffs should be applied for security reasons.

Handcuffs are not mandatory:

- when the inmate has an injury and handcuffs cannot be secured (e.g. an injured arm or wrist). Specific instructions should be sought from the Governor.
- when the inmate is entering court (unless a court direction is in place requiring an inmate to be handcuffed during court proceedings. Escorting officers may seek approval from the court to handcuff an inmate for security reasons)
- if the Governor is satisfied, based on a risk assessment, that handcuffs are unnecessary despite the inmate being of a classification where handcuffs would usually be used
- during escorts of female inmates conducted by the Court Escort Security Unit (CESU) (only when the inmate is travelling in a secure vehicle), and
- for inmates who are pregnant. Governors may exercise their discretion when deciding whether to handcuff pregnant inmates.

5. The COPP allows for the Governor of a correctional centre to conduct a risk assessment on any inmate and order that handcuffs in some circumstances may not be required.

6. Risk assessments are continually reviewed in some circumstances. For example, in medical escorts, the COPP allows for ongoing risks assessments to be conducted, which may result in greater or lesser restraints being applied.

7. Although some uses of restraints are documented, CSNSW is not required to document the use of restraints in relation to escorts as per CAS Regulation 133(4)(b), which states that reporting a use of force is not required when:

*(i) the inmate is restrained for the purposes of being moved from one location to another, and*

*(ii) the move and use of the restraint is required to be noted administratively.*

## Recommendation 2

*That CSNSW's operating procedures make clear that:*

*(a) the use of restraints, including handcuffs, should be a measure of last resort in all circumstances*

*(b) prior to each occasion when the use of restraints is proposed, there should be an individualised risk assessment for that detainee in the context of the particular operation that takes into account:*

*(i) any general risk assessment based on the relevant incidents that an inmate has been involved in whilst imprisoned*

*(ii) the particular requirements of the transportation and its need or purpose*

*(iii) whether the inmate can be transported safely without the need for restraints to be applied*

*(c) 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*

*(d) restraints should be used only for the shortest period of time necessary in the circumstances, and their use regularly re-evaluated for necessity during their use*

*(e) restraints should not be routinely applied to a particular class of inmates, including serious offenders or others in maximum security, without an individualised risk assessment of the kind described above being carried out.*

8. CSNSW notes Recommendation 2(a) but does not support it.

9. CSNSW considers that the use of restraints is necessary in certain circumstances, such as escorts or for inmates with higher risk classifications. Whilst CSNSW policy allows for individualised assessments of inmates to review the need for restraints, restraints may be necessary to:

- a. maintain the good order and security of a correctional centre,

- b. reduce the risk of an escape; and

- c. protect persons from attack or harm, including other inmates, corrections staff and members of the community.

10. In response to Recommendation 2(b), where restraints are required for non-routine use, the COPP (section 13.7 *Use of force*) specifies, the Governor must make an assessment in writing and grant approval for the use of restraints such as handcuffs or security belts. The Commissioner may also conduct an assessment and grant approval for the use of anklecuffs. These assessments are on an individual basis and consider a range of factors, such as the classification of the inmate.

11. For some routine uses of restraints, such as escorts, CSNSW currently conducts an individualised escort assessment, which covers Recommendations 2b(i) and 2b(iii). The escort assessment allows for the assessing officer to input additional details in the summary free text field, including any additional requirements of the transportation, as recommended in 2(b)(ii).

12. In response to Recommendation 2(c), the risk assessment undertaken as part of escort procedures allows for CSNSW to consider restraints on an individualised basis. For example, if an inmate is pregnant or has a medical condition, the method of transport and use of restraint are both considered, and ongoing assessments may be conducted.

13. In response to Recommendation 2(d), CSNSW only uses restraints when deemed necessary. Further, as mentioned above, the use of restraints is re-evaluated throughout the period of their use and are removed as soon as practical and safe to do so.

14. In response to Recommendation 2(e), CSNSW takes the view that restraints may need to be used routinely with a particular classification of inmates for the reasons outlined at paragraph 7 above.

### **Recommendation 3**

***That CSNSW review their policies and procedures to ensure that adequate safeguards are in place to ensure the confidentiality of inmates' legal documents. These safeguards should ensure that searches of inmate's legal documents are only permitted in exceptional circumstances, where there are reasonable grounds to consider that the contents of the documents endanger prison security or the safety of others or are otherwise of a criminal nature.***

15. CSNSW supports recommendation 3 in principle.

16. Since the time of Mr Watt's incarceration, there have been a number of changes to the COPP to ensure greater confidentiality of inmate legal materials. The COPP currently implements policies similar to those

suggested in this recommendation, including but not limited to the following:

Section 20.8, subsection 2 of the COPP states:

*'Staff must not view the contents of any removable storage device containing legal material that has been supplied with a supporting letter by an inmate's legal representative or an exempt body. The contents are subject to legal privilege.'*

Section 8.1, subsection 1.8 Privileged correspondence states:

*'A letter or parcel to an inmate from an exempt body or exempt person must be delivered as soon as practicable to the inmate to whom the letter is addressed (at CSNSW expense) and must not be opened for inspection...'*

Section 8.1, subsection 5.2 of the COPP states:

*'Correspondence, including faxes and emails, from an exempt body or legal practitioner to an AA, Category 5, EHRR or NSI inmate must be delivered to the inmate without opening, inspecting or reading its contents.'*

17. Failing to adhere to COPP policy may result in disciplinary action.

### **Response to additional comments within s. 29 Notice**

#### **Response to paragraphs 97 and 115**

***I have not reviewed the current policies of CSNSW that guide the notification of next-of-kin in the event of injuries to or medical emergencies experienced by prisoners. They may have changed since the time of Mr Watt's complaint. However, in light of this matter I would urge CSNSW to review this aspect of its current policies to ensure that they fully comply with rule 69 of the Mandela Rules. I do consider it possible that strict adherence by CSNSW to its policy of notifying next-of-kin (or 'emergency contacts') might, in other cases, involve breaches of these rights. I would therefore urge CSNSW to revise its policies and consider***

- a. whether it is appropriate to retain overnight admission to hospital as a threshold that must be met before next-of-kin are notified of injuries to inmates***
- b. if that threshold is retained, whether a discretionary element could be introduced in the relevant policies to allow that policy to be departed from in appropriate circumstances.***

18. CSNSW policies in relation to notifying next of kin have been reviewed since Mr Watt's period of incarceration. CSNSW most recently conducted a review in 2022 regarding Emergency Contact Persons (ECP) and Next of Kin (NOK) contacts. As per COPP 6.2 *Hospitalisation of inmates*, the Governor or authorised officer must contact the ECP or NOK as soon as possible when an inmate is admitted to hospital or where a medical condition becomes life threatening.

#### **Response to paragraph 144**

***I would, however, urge CSNSW to undertake a review of the systems currently used throughout their network of detention facilities to ensure that inmates have adequate time and access to adequate facilities to prepare a defence against any charge.***

19. Section 20.8 of the COPP stipulates that Governors or the Manager of Security of a correctional centre must ensure that inmates have access to, and are not hindered in, their attempt to gain access to their legal resources.

20. Section 8.3 of the COPP was reviewed in 2020 and details how inmates can access approved laptops or tablets to view their pre-loaded legal materials.

344. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM  
**President**

Australian Human Rights Commission

16 May 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).
- 2 Division 6 of the *Crimes Act 1914* (Cth) deals with persons who are unfit to stand trial, and provides that, in the case of a person who is unfit to stand trial and likely to remain so for at least 12 months, a court may order that the person be released, and the charges against them may be dismissed or permanently stayed.
- 3 *Watt v State of New South Wales* [2018] NSWSC 1926.
- 4 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- 5 See *Human Rights Legislation Amendment Act 2017* (Cth).
- 6 See *Secretary, Department of Defence v [AHRC], Burgess & Ors* (1997) 78 FCR 208.
- 7 Submission by the Commonwealth in response to the Commission's preliminary view issued pursuant to section 27 of the AHRC Act at [29].
- 8 Submissions by CSNSW in response to the Commission's preliminary view issued pursuant to section 27 of the AHRC Act at [7].
- 9 *Report of an inquiry into a complaint made on behalf of federal prisoners detained in New South Wales correctional centres that their human rights have been breached by the decision to ban distribution of the magazine 'Framed'*, HREOC Report No. 32 (2006).
- 10 *Report of an inquiry into a complaint made on behalf of federal prisoners detained in New South Wales correctional centres that their human rights have been breached by the decision to ban distribution of the magazine 'Framed'*, HREOC Report No. 32 (2006), section 4.1.
- 11 Cf *Report of an inquiry into a complaint made on behalf of federal prisoners detained in New South Wales correctional centres that their human rights have been breached by the decision to ban distribution of the magazine 'Framed'*, HREOC Report No. 32 (2006).
- 12 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.9, (10 April 1992) [3]; see also Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005), 245.
- 13 See UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41<sup>st</sup> sess, UN Doc E/CN.4/1985/4, Annex (28 September 1985) 1.
- 14 *Watt v State of New South Wales* [2018] NSWSC 1926.
- 15 Corrective Services NSW, *Operational Procedures Manual*, Version 1.0 (20 March 2008).
- 16 Elliot Johnston QC, *Royal Commission into Aboriginal Deaths in Custody — National Report* (1991), Vol. 3, Rec 147.
- 17 Elliot Johnston QC, *Royal Commission into Aboriginal Deaths in Custody — National Report* (1991), Vol. 3, Section 24.3.122.

- 18 Human Rights Committee, *Views: Communication No 2086/2011*, 112<sup>th</sup> sess, UN Doc CCPR/C/112/D/2086/2011 (17 November 2014) (*Aicha Dehimi and Noura Ayache v Algeria*).
- 19 Human Rights Committee, *Views: Communication No 1885/2009*, 110<sup>th</sup> sess, UN Doc CCPR/C/110/D/1885/2009 (5 June 2014) (*Corinna Horvath v Australia*).
- 20 Human Rights Committee, *Views: Communication No 2077/2011*, 115<sup>th</sup> sess, UN Doc CCPR/C/115/D/20177/2011 (4 January 2016) (*A.S v Nepal*).
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- 22 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015).
- 23 *Standard Minimum Rules for the Treatment of Prisoners*, ESC Res 663 C (XXIV), UN ESCOR, (31 July 1957 and ESC Res 2076 (LXII), UN ESCOR, (13 May 1977).
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- 27 *Xavier Evans v Trinidad and Tobago*, UN Doc CCPR/C/77/D/908/2000 (n 25) [6.4].
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- 29 See UN General Assembly, *Draft International Covenants on Human Rights: Report of the Third Committee*, UN Doc. A/4045, (9 December 1958) [84].
- 30 Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3<sup>rd</sup> ed) (OUP 2009), 384.
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- 32 See UN Office of Drugs and Crime, Open-ended intergovernmental expert group on the Standard Minimum Rules for the Treatment of Prisoners, *Working Paper prepared by the Secretariat*, UN Doc UNODC/CCPCJ/EG.6/2012/2 (6 November 2012) 16.
- 33 Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 518.
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- 35 Human Rights and Equal Opportunity Commission, *Nguyen and Okoye v Commonwealth (Department of Immigration and Multicultural Affairs) and GSL (Australia) Pty Ltd* [2008] AusHRC 39 (1 January 2008), [80]-[88].

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- 37 Cf, in the context of article 10 ICCPR, UN Human Rights Committee, *Views: Communication No 762/1997*, 71<sup>st</sup> sess, UN Doc CCPR/C/71/D/762/1997 [6.2], (*Jensen v Australia*).
- 38 UN Human Rights Committee, *General Comment No 16: Article 17 (Right to privacy) The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 32<sup>nd</sup> sess, UN Doc HRI/GEN/1/Rev.9 (8 April 1988).
- 39 UN Human Rights Committee, *Views: Communication No 74/1980*, 18<sup>th</sup> sess, UN Doc CCPR/C/OP/2 at 93 (1990) [9.2] (*Estrella v Uruguay*).
- 40 UN Office of Drugs and Crime, Open-ended intergovernmental expert group on the Standard Minimum Rules for the Treatment of Prisoners, *Working Paper prepared by the Secretariat*, UN Doc UNODC/CCPCJ/EG.6/2012/2 (6 November 2012) 16.
- 41 Letter from Commonwealth Director of Public Prosecutions to Governor of Parklea Correctional Centre dated 4 May 2010.
- 42 The Corrective Services NSW *Operational Procedures Manual* provided that prison inmates could keep a quantity of documentary materials in their cells, including in relation to legal proceedings.
- 43 UN Human Rights Committee, *General Comment No 32: Article 14, Right to equality before the courts and tribunals and to a fair trial*, 90<sup>th</sup> sess, UN Doc CCPR/C/GC/32 (23 August 2007) [32]. See also UN Human Rights Committee, *Views: Communication No 1636/2007*, 100<sup>th</sup> sess, UN Doc CCPR/C/100/D/1636/2007 (1 November 2010), (*Andreas Onoufriou v Republic of Cyprus*), [6.11].
- 44 *Can v Austria*, (1984) 96 Eur Comm HR, [53]. Adopted by the European Court of Human Rights in, for example, *Mayzit v Russia* (2005) 32 Eur Court HR [78].
- 45 See UN Human Rights Committee, *Views: Communication No 1304/2004*, 101<sup>st</sup> sess, UN Doc CCPR/C/101/D/1304/2004 (20 March 2011) (*Khoroshenko v Russia*); UN Human Rights Committee, *Views: Communication No. 1405/2005*, 101<sup>st</sup> sess, UN Doc CCPR/C/101/D/1405/2005 (12 May 2014) (*Pustovoit v Ukraine*); *Moiseyev v Russia* (2008) Eur Court HR.
- 46 *Moiseyev v Russia* (2008) Eur Court HR, [214].
- 47 See e.g., UN Human Rights Committee, *Views: Communication No 2059/2011*, 116<sup>th</sup> sess, UN Doc CCPR/C/116/D/2059/2011 (13 May 2016), [4.5-4.6], [9.3] (*Y.M. v Russia*); *Can v Austria*, (1984) 96 Eur *McGee v Gilchrist-Humphrey* Comm HR, [53].
- 48 This is how the complaint was first framed by Mr Watt, and how it was generally prosecuted. In one submission (of 13 November 2015) he states that he was confined to his cell for '45 hours' once every week.

- 49 See 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.9, (10 April 1992) [9].
- 50 UN Human Rights Committee, *Views: Communication No 954/2000*, 82<sup>nd</sup> sess, UN Doc CCPR/C/82/D/954/2000 (2 November 2004) [6.5] (*Minogue v Australia*).
- 51 UN Human Rights Committee, *Views: Communication No 1020/2001*, 78<sup>th</sup> sess, UN Doc CCPR/C/78/1020/2001 (19 September 2003) [7.4] (*Carlos Cabal and Marco Pasini Bertran v Australia*).
- 52 The UN Human Rights Committee was invited to consider this argument in *Carlos Cabal and Marco Pasini Bertran v Australia* (above), but did not express a concluded view about it. In any event, in that communication, Australia provided evidence of then-current measures being implemented to increase compliance with art 10(2)(a).
- 53 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.9, (10 April 1992), [9].
- 54 UN Human Rights Committee, *Views: Communication No 1100/2002*, 86<sup>th</sup> sess, UN Doc CCPR/C/86/D/1100/2002, (18 April 2006) [3.4], [10.7], (*Yuri Bandajevsky v Balarus*).
- 55 *Carlos Cabal and Marco Pasini Bertran v Australia*, UN Doc CCPR/C/78/1020/2001 (19 September 2003).
- 56 *Carlos Cabal and Marco Pasini Bertran v Australia*, UN Doc CCPR/C/78/1020/2001 (19 September 2003) [7.5].
- 57 *Crimes (Administration of Sentences) Regulation 2008* (NSW), reg 35.
- 58 *Crimes (Administration of Sentences) Regulation 2008* (NSW), reg 72.
- 59 *Crimes (Administration of Sentences) Regulation 2008* (NSW), reg 111.
- 60 *Carlos Cabal and Marco Pasini Bertran v Australia*, UN Doc CCPR/C/78/1020/2001 (19 September 2003).
- 61 Submission of Corrective Services NSW to Commission dated 27 December 2010.
- 62 UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014).
- 63 UN Human Rights Committee, *Concluding Observations on the United Kingdom*, UN Doc CCPR/C/79/Add.57 (9 November 1995), [12].
- 64 UN Human Rights Committee, *General Comment No 16: Article 17 (Right to privacy) The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 32<sup>nd</sup> sess, UN Doc HRI/GEN/1/Rev.9 (8 April 1988), [8].
- 65 UN Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44<sup>th</sup> sess, UN Doc A/44/40 (10 March 1992) [30]; and 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.9, (10 April 1992) [33].

- 66 *Carlos Cabal and Marco Pasini Bertran v Australia*, UN Doc CCPR/C/78/1020/2001 (19 September 2003) [8.2].
- 67 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 51.
- 68 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 52(1).
- 69 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 52(1).
- 70 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 52(1).
- 71 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 52(1).
- 72 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
- 73 *El Shennawy v France* (2011) Eur Court HR, [46].
- 74 *Piechowicz v Poland* (2012) Eur Court HR, [176], [178].
- 75 *Valašinas v Lithuania* <sup>(2001)</sup> Eur Court HR.
- 76 *Iwańczuk V. Poland* (2001) Eur Court HR.
- 77 cf *El Shennawy v France* (2011) Eur Court HR, [46].
- 78 See e.g. Penal Reform International/Association for the Prevention of Torture, *Video-recording in police custody: Addressing factors to prevent torture and ill-treatment* (2<sup>nd</sup> ed, 2015), <[https://www.apt.ch/content/files\\_res/factsheet-2\\_using-cctv-en.pdf](https://www.apt.ch/content/files_res/factsheet-2_using-cctv-en.pdf)>.
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- 80 Organisation for Security and Cooperation in Europe, *Guidance Document on the Nelson Mandela Rules: Implementing the United Nations Revised Standard Minimum Rules for the Treatment of Prisoners* (Guidelines, 2018) 61 [21], <<https://www.osce.org/odihr/389912?download=true>>.
- 81 Organisation for Security and Cooperation in Europe, *Guidance Document on the Nelson Mandela Rules: Implementing the United Nations Revised Standard Minimum Rules for the Treatment of Prisoners* (Guidelines, 2018) 61 [21], <<https://www.osce.org/odihr/389912?download=true>>.
- 82 *Crimes (Administration of Sentences) Regulation 2008* (NSW), reg 132(2).

- 83 The Nelson Mandela Rules superseded the Standard Minimum Rules by their adoption by the UN General Assembly on 17 December 2015: GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015).
- 84 See e.g. Penal Reform International, *Instruments of Restraint — Addressing Risk Factors to Prevent Torture and Ill-Treatment* (Report, 2<sup>nd</sup> ed, 2015), 1 <<https://cdn.penalreform.org/wp-content/uploads/2016/01/factsheet-5-restraints-2nd-ed-v5.pdf>>.
- 85 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 47(2)(a).
- 86 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 47(2).
- 87 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 48(1)(a).
- 88 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 48(1)(b).
- 89 *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 48(1)(c).
- 90 *Carlos Cabal and Marco Pasini Bertran v Australia*, UN Doc CCPR/C/78/1020/2001 (n 51).
- 91 *Carlos Cabal and Marco Pasini Bertran v Australia*, UN Doc CCPR/C/78/1020/2001 (n 51). For details of the form of restraint applied to the authors see [2.9], [4.17], [5.5], [8.2].
- 92 *Carlos Cabal and Marco Pasini Bertran v Australia*, UN Doc CCPR/C/78/1020/2001 (n 51) [8.2].
- 93 *Moiseyev v Russia* (2008) Eur Court HR, [221].
- 94 *Moiseyev v Russia* (2008) Eur Court HR, [221], and authorities cited therein.
- 95 Corrective Services NSW, *Operations and Procedures Manual*, section 9 ‘Inmate Private Property’, Version 1.1 (11 February 2008).
- 96 Corrective Services NSW, *Operations and Procedures Manual*, section 5.4 ‘Offender Access to Computers’, Version 2.0 (23 February 2012) cl 5.4.1.1.
- 97 *Crimes (Administration of Sentences) Regulation 2008* regs 107, 109.
- 98 Corrective Services NSW, *Operations and Procedures Manual*, section 5.4 ‘Offender Access to Computers’, Version 2.0 (23 February 2012) cl 5.4.3.
- 99 Corrective Services NSW, *Operations and Procedures Manual*, section 5.4 ‘Offender Access to Computers’, Version 2.0 (23 February 2012) cl 5.4.5.

- 100 Corrective Services NSW, *Custodial Operations Policy and Procedures*, Pt 20.8 'Inmate Access to Legal Resources' (16 December 2017) and Pt 8.3 'Inmate Computers' (16 December 2018).
- 101 UN Human Rights Committee, *General Comment No 32, Article 14: Right to equality before the courts and tribunals and to a fair trial*, 90<sup>th</sup> sess, UN Doc CCPR/C/GC/32, (23 August 2007) [34].
- 102 See the *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70<sup>th</sup> sess, UN Doc A/RES/70/175, (17 December 2015), Rule 120(2).
- 103 *Evidence Act 1995* (Cth), ss 119-120; *Evidence Act 1995* (NSW), 119-120.
- 104 UN Human Rights Committee, *Views: Communication No 903/2000*, 82<sup>nd</sup> sess, UN Doc CCPR/C/82/D/903/2000 (1 November 2004) ('*Van Hulst v The Netherlands*').
- 105 *Khodorkovskiy and Lebedev v. Russia* (2013) Eur Court HR, [640].
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- 110 *R v Secretary of State for the Home Department, Ex Parte Daly* [2001] UKHL 26; [2001] 2 AC; [2001] 3 All ER 433; [2001] 2 WLR 1622.
- 111 *R v Secretary of State for the Home Department, Ex Parte Daly* [2001] UKHL 26; [2001] 2 AC; [2001] 3 All ER 433; [2001] 2 WLR 1622 [13].
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- 113 *R v Secretary of State for the Home Department, Ex Parte Daly* [2001] UKHL 26; [2001] 2 AC; [2001] 3 All ER 433; [2001] 2 WLR 1622 [13].
- 114 Submissions from Mr Watt, forwarded to Commission under cover of correspondence dated 20 July 2010.
- 115 Submissions from Mr Watt, forwarded to Commission under cover of correspondence dated 20 July 2010.
- 116 Correspondence from Corrective Services NSW to Commission, dated 4 November 2011.
- 117 Correspondence from Corrective Services NSW to NSW Ombudsman, dated 16 September 2010 (forwarded to Commission under correspondence dated 18 April 2019).
- 118 *Campbell v United Kingdom* (1991) Eur Court HR.









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