



Australian
Human Rights
Commission

Mr Abela v Commonwealth of Australia

Department of Home Affairs

[2024] AusHRC 171

July 2024

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

[2024] AusHRC 171

Report into the use of force

Australian Human Rights Commission 2024

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

Dear Attorney

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

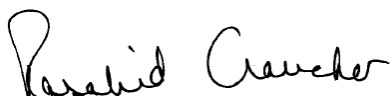
Mr Abela complains that the force used against him by staff of Serco Australia Pty Ltd (Serco) while detained at Melbourne Immigration Transit Accommodation contravened article 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I find that, in utilising force to extract Mr Abela from his room on 12 March 2021, without attempting other negotiation tactics and following the procedure set out in the relevant procedural instruction in order to search his accommodation, the Department did not treat him with humanity or respect for his inherent dignity, contrary to article 10(1) of the ICCPR.

On 4 April 2024, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 28 June 2024. That response can be found in Part 10 of this report.

I enclose a copy of my report.

Yours sincerely,



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

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1 Introduction

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr Ivan Abela against the Commonwealth of Australia, Department of Home Affairs (the Department) alleging a breach of his human rights. The inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr Abela complains about force used against him by Serco Australia Pty Ltd (Serco) officers while he was detained at the Melbourne Immigration Transit Accommodation (MITA) (now Melbourne Immigration Detention Centre). Serco operates as a contractor for the Department to manage detention centres.
3. Mr Abela's complaint raised possible breaches of articles 7 and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR) as scheduled to the AHRC Act.
4. The particular environment of immigration detention means that the use of force may occasionally be necessary. However, the use of force on detainees directly engages their rights. In particular, people who are deprived of their liberty have the right to be treated with humanity and with respect for their inherent dignity. For this reason, any use of force must be appropriately justified and necessary in the circumstances. Force should only be used as a measure of last resort. This means that available alternatives to using force, such as negotiation and de-escalation techniques should be employed and exhausted before there is a resort to force. Force should be used only for the shortest amount of time necessary. The degree of force used must not be excessive.
5. This document comprises a report of my findings in relation to this inquiry and my recommendations to the Commonwealth.

2 Summary of findings and recommendations

6. As a result of this inquiry, I find that the decision to use force against Mr Abela on 12 March 2021 was used not as a last resort and cannot be justified as reasonable and necessary, in breach of Mr Abela's rights under article 10(1) of the ICCPR.

7. I make the following recommendations:

Recommendation 1

The Commission recommends that the Commonwealth provide Mr Abela with an apology for the use of force against him on 12 March 2021.

Recommendation 2

The Commission recommends that, following the Department's investigation into the incident, the individual officers involved be reminded of their obligations to conduct searches in accordance with the DSM and in a way that respects the humanity and inherent dignity of all detainees.

Recommendation 3

The Commission recommends that Mr Abela's records on 12 March 2021 be revised to reflect the fact that it was not his own abusive or aggressive behaviour that led to an unplanned use of force against him.

Recommendation 4

The Commission recommends that the Department direct Serco to conduct a training session for all officers on conducting room searches.

Recommendation 5

The Commission recommends that the Department remind Serco to ensure that incident reports are filled out to completion and that post-incident report requirements are followed. Serco procedures should be updated to reflect the need for procedural fairness to be provided.

3 Background

8. Mr Abela's migration history has been previously set out in the Commission's report *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141.
9. Mr Abela has been in Australia since 1981. His permanent residence visa was cancelled on 20 May 2010 under section 501 of the *Migration Act 1958 (Cth)* (Migration Act). He was briefly released when he successfully sought review of the cancellation decision in the Administrative Appeals Tribunal, but the visa was cancelled again personally by the Minister on 14 February 2012. Mr Abela remains in immigration detention where he has been since 14 February 2012.

3.1 Use of force incident on 12 March 2021

10. In his complaint, Mr Abela states that 4 Serco Emergency Response Team (ERT) officers entered his 'premises' and seriously assaulted him when forcing him to the ground and handcuffing him, breaking three of his ribs.
11. The Department's response to Mr Abela's complaint contains the following description of the events of 12 March 2021:

On 12 March 2021, at the instruction of the Australian Border Force (ABF), the Serco Emergency Response Team (ERT) executed a compound-wide room search operation at MITA in accordance with this authority to ensure the good order and safety of the immigration detention facility.

During the search operation, all detainees were requested to remain in their rooms pending further instruction from the ERT officers. Mr Abela was asked by ERT officers to remain in his accommodation (Room 37) and wait for further instruction while the ERT were clearing the room adjacent to his.

After clearing the adjacent room and securing the door, Mr Abela and his roommate were asked to exit their room at approximately 0733 hrs. Mr Abela's roommate complied and exited the room, however, Mr Abela refused to leave the room. An ERT officer verbally engaged with Mr Abela in an attempt to seek his compliance, including explaining the requirement to leave the room. However, Mr Abela immediately became confrontational, was aggressive and abusive to officers, and repeatedly refused to comply. The ERT Team Leader attended the room and on multiple occasions directed Mr. Abela to exit the room. Mr. Abela continued his noncompliant and abusive behaviour claiming that the ERT officers had no right to enter his "premises".

During this time Mr Abela also took photos and videos of the ERT Officers without their consent, including appearing to send images to a third party, despite officers expressly stating they did not consent.

After numerous attempts to gain Mr Abela's compliance to exit the room, two ERT Officers entered the room and applied the Enhanced Escort Position (EEP) to escort Mr Abela from the room. Almost immediately, Mr Abela began resisting by swinging his arms aggressively with closed fists, utilising his bodyweight to break free from the EEP by pushing and pulling against the officers. Other ERT officers, aware of Mr Abela's refusal to comply and on location for the search operation responded to assist. At approximately 0736 hrs, Mr Abela was ground stabilised and mechanical restraints were applied to Mr Abela's wrists to the rear of his body. While Mr Abela was ground stabilised, he attempted to bite and head-butt an ERT officer.

12. Once stabilised, Mr Abela was escorted using the EEP to a van, where he was then transported to High Care Accommodation in the Shaw compound.
13. Mr Abela was seen at his request by an International Health and Medical Services (IHMS) nurse at approximately 10.20 am, complaining of pain in his ribs. The nurse noted no apparent injury except for a red mark of around 2 cm diameter on his lower left back. The following day an IHMS GP referred Mr Abela for an x-ray.
14. In support of his complaint, Mr Abela provided an image of a radiology report which makes a finding of 'equivocal non-displaced fractures of the posterolateral eighth, ninth and tenth left ribs'.
15. He also provided a discharge summary from the Austin Hospital which disputes this finding, stating:

Impression

 - CT findings do not correlate with clinical exam
 - 11th rib fracture on right is unlikely given no pain on palpitation of this side
16. The discharge notes indicate that an old fracture was a more likely explanation for the findings, and discharged Mr Abela back to the detention centre with pain medication if needed.
17. IHMS referred Mr Abela for a subsequent CT scan on 22 March 2021 which concluded that there was no evidence of any fractures to his ribs.
18. Mr Abela also claims that he suffered ongoing wrist pain resulting from the use of force against him. Notes provided by the Department from a physiotherapist indicate that he suffered from carpal tunnel syndrome, and testing and treatment were provided to Mr Abela for over a year after first complaining of wrist pain.

4 Legal framework

4.1 Functions of the Commission

19. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with or contrary to any human right.
20. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.

21. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.
22. The rights and freedoms recognised by the ICCPR are 'human rights' within the meaning of the AHRC Act.¹

4.2 Scope of 'act' and 'practice'

23. The terms 'act' and 'practice' are defined in section 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.
24. 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.
25. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or those acting on its behalf.²

5 Human rights of detainees

26. Persons subject to immigration detention are entitled to the human rights protected by the ICCPR, including special protections as persons deprived of their liberty by the State.
27. Article 7 of the ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
28. Article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
29. States have a responsibility to ensure that the rights guaranteed in articles 7 and 10 of the ICCPR are accorded to detainees in privately run detention facilities.
30. Article 10(1) imposes a positive obligation on States to ensure that detainees are treated with humanity and respect for their inherent dignity.³ This is in recognition of the fact that detained persons are particularly vulnerable

because they are wholly reliant on a relevant authority to provide for their basic needs.⁴ In this case, the relevant authority is the Commonwealth of Australia through the Department and the service providers who act on its behalf.

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

In contrast to article 7, article 10 relates only to the treatment of persons who have been deprived of their liberty. Whereas article 7 primarily is directed at specific, usually violent attacks on personal integrity, article 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention. As a result, article 10 primarily imposes on States parties a positive obligation to ensure human dignity. Regardless of economic difficulties, the State must establish a minimum standard for humane conditions of detention (requirement of humane treatment). In other words, it must provide detainees and prisoners with a minimum of services to satisfy their basic needs and human rights (food, clothing, medical care, sanitary facilities, education, work, recreation, communication, light, opportunity to move about, privacy, etc). ... Finally it is again stressed that the requirement of humane treatment pursuant to article 10 goes beyond the mere prohibition of inhuman treatment under article 7 with regard to the extent of the necessary 'respect for the inherent dignity of the human person'.⁵

32. These conclusions are also evident in the jurisprudence of the United Nations Human Rights Committee, which discusses the positive obligation on relevant authorities to treat detainees with humanity and respect for their dignity.⁶
33. The content of article 10(1) has been developed through a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty,⁷ including:
- the *Nelson Mandela Rules*,⁸ and
 - the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).⁹
34. In 2015, the Mandela Rules were adopted by the United Nations. They provide a restatement of a number of United Nations instruments that set out the standards and norms for the treatment of prisoners.¹⁰ At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed regardless of a State Party's level of development.

35. Several of the Mandela Rules are relevant to the use of force on detainees by detaining officers. Rule 82(1) of the Mandela Rules provides:
- Prison staff shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Prison staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the prison director.
36. This rule provides limits on the circumstances in which force may be used and limits the use of force in those circumstances to what is necessary.
37. Rule 121 requires that civil prisoners ‘shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order’.
38. From the above, the following conclusions may be drawn:
- article 10(1) of the ICCPR imposes a positive obligation on State parties to take action to ensure that detained persons are treated with humanity and dignity
 - the threshold for establishing a breach of article 10(1) of the ICCPR is lower than the threshold for establishing ‘cruel, inhuman or degrading treatment’ within the meaning of article 7 of the ICCPR, which is a negative obligation to refrain from such treatment
 - article 10(1) of the ICCPR may be breached if a detainee’s rights, protected by one of the other articles of the ICCPR, are breached – unless that breach is necessitated by the deprivation of liberty
 - minimum standards of humane treatment must be observed in detention conditions, including immigration detention.

6 Legal and policy framework for use of force in immigration detention

39. Serco’s contract with the Department to run immigration detention facilities, and the Department’s Detention Services Manual (DSM), are the primary documents that set out the obligations of Serco and departmental staff with respect to use of force.
40. The Serco contract provides that Serco must ensure that force is not used unless as a measure of last resort, and then only with the reasonable level of

force necessary. It further states that all reasonable precautionary measures must be taken to ensure the safety of the detainee. It requires personnel who use force to be properly trained and accredited.¹¹

41. When Serco has used force or instruments of restraint such as handcuffs on a detainee, it must prepare an incident report for the Department and refer the detainees to the Detention Health Services Provider for a medical examination immediately after the use of force or restraints.¹²
42. Both the Department and its service providers owe a duty of care to all persons held in immigration detention. This means that they are legally obliged to exercise reasonable care to prevent detainees from suffering reasonably foreseeable harm. The Department's duty of care is non-delegable.
43. When the Department contracts out the provision of services to people in held detention to third parties, it has a responsibility to ensure the contracted service providers are qualified and can meet the standards outlined in the contract.
44. While these third parties must also discharge their own duty of care obligations to a detainee in held detention, this duty is additional to, and is not a substitute for, the Department's duty of care.
45. The Department's DSM provides that:
 - conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force and/or restraint is used
 - reasonable force and/or restraint should only be used as a measure of last resort
 - reasonable force and/or restraint may be used to prevent the detainee inflicting self-injury, injury to others, escaping or destruction of property
 - reasonable force and/or restraint may only be used for the shortest amount of time possible to the extent that is both lawfully and reasonably necessary
 - if the management of a detainee can be achieved by other means, force must not be used
 - the use of force and/or restraint must not include cruel, inhumane or degrading treatment

- the use of force and/or restraint must not be used for the purposes of punishment
- the excessive use of force and/or restraint is unlawful and must not occur in any circumstances
- the use of excessive force on a detainee may constitute an assault
- all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant FDSP operational procedures.¹³

46. The Department's DSM provides that 'all use of force and/or restraint should be proportionate to the situation, objectively justifiable and only used as a measure of last resort' and that the 'level of force must be proportionate to the threat being faced and always at the minimum level required to achieve legislative outcomes'.¹⁴

7 Conducting searches in immigration detention

47. The power to conduct searches of persons in immigration detention facilities is granted pursuant to section 252 of the Migration Act. The section reads:

Searches of persons

(1) For the purposes set out in subsection (2), a person, and the person's clothing and any property under the immediate control of the person, may, without warrant, be searched if:

(a) the person is detained in Australia...

(2) The purposes for which a person, and the person's clothing and any property under the immediate control of the person, may be searched under this section are as follows:

(a) to find out whether there is hidden on the person, in the clothing or in the property, a weapon or other thing capable of being used to inflict bodily injury or to help the person to escape from immigration detention;

...

(8) An authorised officer or other person who conducts a search under this section shall not use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.

48. The Migration Act does not specifically grant a power to conduct room searches or searches of property not within the immediate control of a detainee. Instead, the Department requires Serco to conduct random searches of accommodation within immigration detention facilities in order to fulfil their duty of care to detainees.¹⁵
49. The DSM contains guidance to Serco officers searching detainees and their property within an immigration detention facility within *DSM – Procedural Instruction – Safety and security management – Screening and search of detainees and their property* (Procedural Instruction) and *DSM – Standard Operating Procedure – Safety and security management – Screening and search of detainees and their property*.
50. Serco is referred to in the Procedural Instruction as the Facilities and Detainee Service Provider (FDSP).

The FDSP is to conduct regular searches throughout the IDF to detect and control the presence of illegal, excluded and controlled items and conduct random security checks of accommodation, **with the detainee who occupies the room present, if possible**.¹⁶

[emphasis added]

51. In saying this, however, the Procedural Instruction contains the following warning:

Although there is a capacity to conduct searches of detention premises on the basis that an occupier (the Department or its contracted FDSP) of premises has the right to search those premises, **there is no immediate common law right to search a detainee's personal effects**. Doing so without the detainee's consent or other lawful justification may constitute an unlawful act of trespass and give cause for legal action by the owner of the property.¹⁷

[emphasis in original]

52. Rules for conducting non-statutory searches of detainee accommodation are set out in detail in the Procedural Instruction:

The officer conducting the search must:

- if the search is targeted or a random search of accommodation:
 - identify themselves, and those who will conduct the search, to any detainees in the area

- explain the reason/s and the legal basis for the search
- explain to whom any information collected will be provided and how it will be stored
- allow detainees a reasonable timeframe within which to comply with each search request
- search property in a way that will not be offensive or damage goods
- be mindful of potential sensitivities of detainees, particular [sic] with regard to sex. For example, where possible, male officers should avoid searching females' sleeping quarters
- video record a search of any property, and
- if a detainee cannot be present to witness the search (they have been hospitalised or have escaped from immigration detention), notify them, if possible, that their property has been searched and the search has been video recorded.¹⁸

53. The Procedural Instruction states the following with respect to instances of detainees refusing to submit to a statutory screen or search procedure under s 252 or s 252AA of the Migration Act, involving screening devices such as wands or x-ray machines and searches of their person:

In the first instance, officers should seek to achieve the desired objective, whenever possible, by de-escalation techniques such as discussion, negotiation, or verbal persuasion. All use of force (UoF) should be proportionate to the situation, objectively justifiable (that is, evidence to show it was reasonably necessary to conduct the search) and only used as a measure of last resort.

If a detainee refuses to undergo a screen and/or search procedure and it appears that reasonable force may be required, the authorised officer conducting the procedure **must**:

- use an interpreter to ensure that there are no language-based misunderstandings
- advise the detainee involved that s252AA/s252 of the Act allows reasonable force to be used in order to conduct a screen and/or search procedure and unless cooperation is forthcoming, the authorised officer intends to use reasonable force in order to conduct the screening and/or search procedure

- allow the detainee involved a reasonable period in which to voluntarily submit to the procedure
- only proceed to use reasonable force to conduct the procedure with the approval of and under the supervision of their line manager
- apply reasonable force only as a last resort and ensure that it is justifiable (that is, such action was reasonably necessary to conduct the screening/search) and proportionate to the amount of resistance offered
- if appropriate, seek the assistance of another authorised officer prior to conducting the procedure, and
- if reasonable force is used, officers should follow the policy on the UoF and maintain accurate records when force is used.¹⁹

[emphasis in original]

8 Consideration

8.1 Act or practice of the Commonwealth

54. Serco was acting under a contract with the Department, and therefore the act or practice of Serco is an act or practice by or on behalf of the Commonwealth.
55. The relevant act or practice of the Commonwealth for the purposes of this inquiry is the decision to use force against Mr Abela on 12 March 2021.

8.2 Use of force incident on 12 March 2021

56. The Department provided both CCTV and body camera footage of the use of force incident to the Commission. The CCTV footage is of limited benefit as the camera from which it is derived shows only the doorway of Mr Abela's accommodation unit, and has no sound.
57. The body camera footage depicts that Mr Abela refused to leave his room in order for the Serco officers to conduct a search of his accommodation. For the entire period of the footage, Mr Abela is sitting on his bed.
58. Approximately 7 minutes and 15 seconds pass between the time that Serco officers first open the door to Mr Abela's unit to ask him to leave, until they decide to enter and physically remove him.

59. During that period, the following exchange can be heard on the body camera footage. In the below transcript, I have named the person wearing the body camera 'ERT 1'. While other officers are present throughout the exchange, ERT 1 is the only person who speaks to Mr Abela for the first 6 minutes. The other voice audible from around 6 minutes into the footage is a person with ERT T/L (team leader) visible on his vest.

ERT 1: Ivan?

MR ABELA: Yeah?

ERT 1: Can you come with us please?

MR ABELA: What for?

ERT 1: Hey?

MR ABELA: What for?

ERT 1: We just have to empty the room.

MR ABELA: What do you mean, empty the room?

ERT 1: Yeah.

MR ABELA: What do you mean empty the room?

ERT 1: We need to clear the room for a search so we don't want anyone to be inside the room.

MR ABELA: Oh, okay. And you think you're just going to walk into my home and do whatever the fuck you want without me being here. I'm sorry, I've got an agreement with the Commonwealth.

ERT 1: Look, there's something you can raise it with the centre management.

MR ABELA: No, no, no, no, it's not going to happen.

ERT 1: So you're not going to comply with our directions?

MR ABELA: I have my personal property in here, you want me to trust you to come in here and search my room and put me in visits.

ERT 1: Well I told you, it's the procedure that everyone else is following, if you have a problem you can raise it with centre management but right now you need to come with us because that's what everyone else is doing.

MR ABELA: So because everyone else is doing, I have to follow it as well. I don't care, I take shit to court. You take me out of here that'll be a court issue.

ERT 1: Are you going to comply?

MR ABELA: No, I'm not.

ERT 1: You're not going to comply, okay, all good.

MR ABELA: Simple as that. You bring in management.

[discussion between officers]

MR ABELA: [Speaking on phone] This is the Afghani that was [inaudible], I'll show you pictures later.

ERT 1: Alright.

MR ABELA: Everything on the camera.

ERT 1: Yeah, yeah, no worries.

MR ABELA: Where's your manager? I'll talk to your manager.

ERT 1: He'll come.

[Mr Abela sitting on bed with cigarette in mouth. Directs phone towards ERT 1]

ERT 1: You don't have my consent to take my photos Ivan, alright?

MR ABELA: Sue me.

ERT 1: Alright.

MR ABELA: [speaking on phone] Send it straight through to the lawyer. When you look at the photo it's the one on the right that's talking.

I don't give my consent for you to trespass into my room.

ERT 1: Alright.

MR ABELA: What, you think because you're wearing a Serco uniform you can [inaudible]. Especially you. You're hanging to use force, aren't you, because that's the type of person you are. By all means. I'll even lie on the floor for you.

[No talking. Mr Abela reaches to get something that appears to be a tobacco pouch]

MR ABELA: [speaking to himself] Jump, how high? Fucking Jesus, they don't learn, these mother fuckers man, they don't learn.

ERT 1: [speaking to another office] [Name redacted], he's refusing, speak to [ERT T/L], he says he's refusing to leave the room.

MR ABELA: Threatening me to leave my [inaudible]. They can come in, not knowing, you know, they plant, because everyone is a fucking drug dealer in here. Wasn't it one of your own kind that was just sacked recently, the female, for bringing in meth and having a relationship with a detainee? She was Afghani. Like you. Probably on the same boat.

[talking to himself] Then you say to me, I don't give you permission to take my photo. I know, don't worry.

ERT T/L: This is a lawful ERT operation. If you have any issues you know the complaint process. From here, I'm giving you a lawful directive to come outside, if you don't...

MR ABELA: [inaudible]

ERT T/L: I'm giving you the option.

MR ABELA: It's not an option, this is my house.

ERT T/L: It is. It's an option for you to come compliantly.

MR ABELA: There is a community member telling me now to leave my house.

ERT T/L: That's the first one, the second one, are you going to come out, if you're not, you're going to be assisted.

MR ABELA: Assisted? So you're threatening me?

ERT T/L: No, I'm giving you the option, that's the second time you refused.

You are, you're refusing, we've been authorised.

MR ABELA: What are you looking for?

ERT T/L: You tell me, because you probably know what I'm looking for.

I don't have to tell you what I'm looking for.

MR ABELA: Are you accusing me?

ERT T/L: I'm not accusing you, it's the whole compound.

MR ABELA: Yeah, that's fine but this is my fucking home.

ERT T/L: If you have any issues...

I'm giving you the option, I'm giving you the option, okay this is the last time, a lawful direction. I'm giving you the option to come out, that's three times I've told you.

MR ABELA: Three times I've told you, you walk in you're trespassing.

ERT T/L: This is a federal government facility.

MR ABELA: The last time I proved you wrong.

ERT T/L: I've given you three times already, okay [officers enter room].



Figure 1: Mr Abela on his bed immediately prior to ERT officers entering the room.



Figure 2: Four officers enter the room and take Mr Abela. Only his head is visible as he is bent forward.

60. The greatest variation in the accounts of the incident provided to the Commission by Mr Abela and the Department arises at the point when Mr Abela was in the EEP, and then was ground stabilised while being moved out of his room.
61. According to Mr Abela, he had a tobacco pouch on his bed at the time the Serco officers grabbed him, which fell to the floor. He claims to have said 'let

me pick up my pouch/smokes' and tried to pick it up, but was pulled hard by officers who then threw him to the ground with severe force. The Serco officers yelled 'stop resisting' at him, to which he responded, 'I am not resisting'. He says that he felt his right shoulder almost being dislocated, and that he twisted with the movement so as to avoid any break.

62. In contrast, the Department's response set out above states that Mr Abela resisted by swinging his arms and attempting to break free from them, which was the reason they chose to ground stabilise him.
63. The footage does not assist in any way in determining which account is correct. There are too many bodies in the way to have a clear view of Mr Abela at the crucial parts of the footage. Mr Abela cannot be heard saying that he was bending over to pick up his tobacco pouch, but it also cannot be ruled out that he did, and I note that he was holding a cigarette and what appeared to be a pouch of tobacco during the 6 minutes of footage prior to the use of force.



Figures 3 (above) and 4 (below): Mr Abela once ground stabilised.



64. Once Mr Abela is on the floor, the voices talk over one another to the extent that it is not possible to accurately transcribe the conversation, but the main points to be gleaned from between 8 minutes and 9 minutes into the footage are the ERT team leader telling Mr Abela to stop resisting, and him denying that he was resisting. Mr Abela can be heard yelling 'fucking hell, my shoulder' and 'I can't breathe'.
65. When the team leader informs Mr Abela at around 9 minutes into the footage that the officers are going to lift him to his feet, he says 'my shoulder, you can't, my shoulder, fuck'.

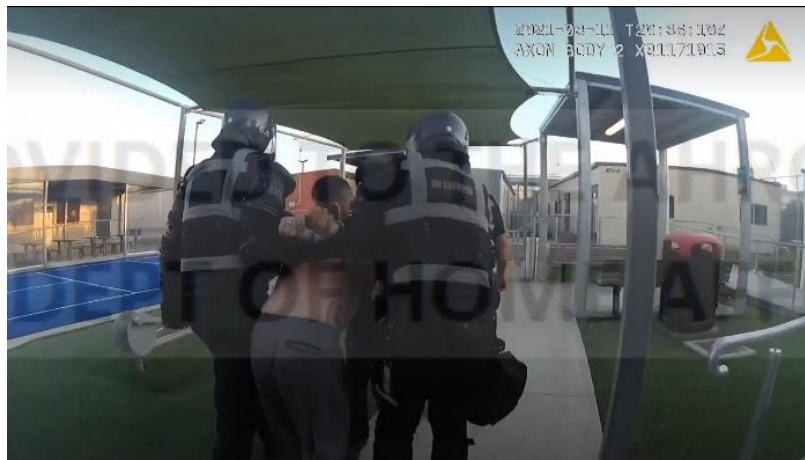


Figure 5: Mr Abela being escorted in the EEP away from his accommodation block and towards transportation.

66. The remainder of the footage shows Mr Abela being taken to a van, loaded into a seat, and then driven to the Shaw compound. No other incident of note was observed on the footage.
67. Mr Abela provided the Commission with photographs he says were taken on 12 March 2021 at approximately 1.05 pm.



Figures 6 and 7: Mr Abela with bruising on right shoulder, and left arm in a makeshift sling.

68. The Department acknowledged in their response that Mr Abela was not offered medical assistance immediately after the use of force on 12 March 2021. In the response, the Department wrote 'Serco have advised that a reminder was issued to staff in multiple forums and in writing reminding them of the requirement to offer medical assistance post use of force'.

69. The photographs provided by Mr Abela show significant bruising to his right shoulder, although this was not noted by IHMS nurses reviewing him on 12 or 13 March 2021. While there was initially cause to believe that Mr Abela's ribs had been fractured, it became apparent that this was not the case, and I have not seen any evidence from the records supplied by either the Department or Mr Abela to indicate that any sustained injury occurred as a result of the force utilised on 12 March 2021. It appears that there is no causative link between the incident and the carpal tunnel syndrome he suffered to satisfy me that this injury occurred as a result of the use of force incident.

8.3 Findings

70. The transcript of the bodycam footage set out above demonstrates a number of features which are influential in my forming the view that force was utilised not as a last resort against Mr Abela, and that further de-escalation strategies could have been attempted.
71. These strategies and the procedures to be followed when conducting accommodation searches are outlined in the Procedural Instruction as set out above at paragraph 52. The requirements to be observed when using force in immigration detention is set out above at paragraphs 45 and 46.
72. I acknowledge that Serco ERT officers spoke to Mr Abela for about 7 minutes before using force. However, in response to Mr Abela informing ERT 1 that he did not intend to comply with the direction, the response provided to him was 'all good'. At other times, ERT 1 said 'okay' or 'alright' to Mr Abela's refusal to comply. These words in their common English usage suggest that it may be acceptable for Mr Abela to refuse the direction.
73. These exchanges were closely followed by Mr Abela's request to speak to the ERT officer's manager. He was informed by ERT 1 that 'he' would come.
74. It is not clear whether the 'manager' who was expected to arrive was the ERT team leader who did arrive at approximately 6 minutes into the footage.
75. The ERT team leader, upon arriving, immediately issued three directives to Mr Abela to leave the room. These were issued in close succession to one another, and with no preamble, discussion, or negotiation employed.
76. The very first sentence spoken by the ERT team leader was: 'This is a lawful ERT operation. If you have any issues you know the complaint process. From here, I'm giving you a lawful directive to come outside, if you don't ...'. It is somewhat clear from the exchange that the alternative to Mr Abela complying with the direction was that force would be used against him. For statutory searches of persons, the Procedural Instruction mandates that the legal basis for the use of force should be outlined. The Department notes that this was a

search of premises rather than a search of persons, however, in my view informing detainees of the legal basis for a use of force is good practice regardless of the circumstances when force is used. I note that the DSM on use of force reminds officers that effective communication is a key element in resolving matters, before moving to force.

77. Only one minute passes between the ERT team leader first issuing his direction to Mr Abela to leave his room, and then giving the authorisation for the ERT officers to enter the room and use force to extract him.
78. During that time, Mr Abela asks the question about what they're looking for. I do not consider the ERT team leader's response in saying 'You tell me, because you probably know what I'm looking for. I don't have to tell you what I'm looking for' was likely to de-escalate the situation in any way. It was also in direct contradiction with the Procedural Instruction to 'explain the reason/s and the legal basis for the search'.
79. No evidence before me suggests that the possibility of allowing Mr Abela to remain present while the search was conducted was contemplated as another way of de-escalating the situation. In fact, the Procedural Instruction requires that detainees be present while their accommodation is searched, if possible. This may well have addressed Mr Abela's stated concerns that he was not able to be present during the search:

And you think you're just going to walk into my home and do whatever the fuck you want without me being here ...

I have my personal property in here, you want me to trust you to come in here and search my room and put me in visits.

80. The ERT officers involved could have brought in a manager to speak to Mr Abela, and could have done more in their attempts to negotiate with Mr Abela, including by explaining the reason for the search or by allowing him to be present during the search prior to issuing the direction to use force. By failing to do so, I find that force was used not as a method of last resort on 12 March 2021.
81. I do not form any view about the level of force utilised, or whether it was justified to ground stabilise Mr Abela, in light of my finding that force was not necessary at all in the circumstances.
82. I am also unable in the absence of evidence to find that Mr Abela received any significant or sustained injuries as a result of the use of force.

83. On 20 November 2023, I issued to the parties a notice under section 27 of the AHRC Act containing my preliminary view with respect to Mr Abela's complaint. The Department responded to the notice on 4 March 2024, indicating that they were not in a position to comment on whether the acts raised by Mr Abela in his complaint were inconsistent with or contrary to his human rights. The Department indicated that they would investigate further the allegations, and provide the Commission with information of the outcome of the review as soon as completed.
84. I find that, in utilising force to extract Mr Abela from his room on 12 March 2021, without attempting other negotiation tactics and following the procedure set out in the Procedural Instruction in order to search his accommodation, the Department did not treat him with humanity or respect for his inherent dignity, contrary to article 10(1) of the ICCPR.

9 Recommendations

85. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.²⁰ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.²¹ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.²²

9.1 Apology

86. I have found that force was used against Mr Abela without first attempting other negotiation tactics, or following the procedure set out in the DSM. While there were aspects of Mr Abela's complaint which could not be sufficiently substantiated, it is clear from his complaint that he was humiliated and hurt as a result of the decision to use force. Mr Abela alleges that he has suffered PTSD as a result of the incident, however I am unable to make findings to that effect without medical evidence in support. I consider it appropriate that the Commonwealth provide him with an apology.

Recommendation 1

The Commission recommends that the Commonwealth provide Mr Abela with an apology for the use of force against him on 12 March 2021.

9.2 Accountability for wrongdoing

87. It is important to Mr Abela that the individual officers be held to account for not following the proper procedures when attempting to search his room on 12 March 2021. He is also aggrieved by the fact that he has been reported for abusive and aggressive behaviour when he may only have become so after force was used against him inappropriately.

Recommendation 2

The Commission recommends that, following the Department's investigation into the incident, the individual officers involved be reminded of their obligations to conduct searches in accordance with the DSM and in a way that respects the humanity and inherent dignity of all detainees.

Recommendation 3

The Commission recommends that Mr Abela's records on 12 March 2021 be revised to reflect the fact that it was not his own abusive or aggressive behaviour that led to an unplanned use of force against him.

9.3 Training on legal requirements for room searches

88. The Procedural Instruction cited contained within the DSM in section 7 above in the Commission's view correctly sets out the parameters of the law when it comes to conducting room searches.
89. However, it appears from the Commission's inquiry into Mr Abela's complaint that officers were not following the Procedural Instruction and DSM in a number of respects:
- if possible, a detainee must be allowed to remain present while room searches are being conducted – this allows for transparency and may increase the detainee's trust in the process of room search
 - officers must explain the basis of the search, including whether it is random, or whether any particular items are being looked for
 - if a detainee requests, a manager should be made available to discuss the search
 - a genuine discussion should be entered into if a detainee does not wish to submit to a search of their personal effects – this discussion should involve negotiation and de-escalation strategies

- any force involved in removing a detainee from their room should only occur as a last resort only, and only when the reason for the search justifies it.

Recommendation 4

The Commission recommends that the Department direct Serco to conduct a training session for all officers on conducting room searches.

9.4 Accurate completion of incident reports

90. Mr Abela has also asked that the Commission consider making recommendations to improve the quality of incident reports, and to ensure that they are signed by managers as required.
91. I note Mr Abela's comments to the extent that the incident reports provided to the Commission are not signed, and contain some minor discrepancies. While these have not impacted the Commission's inquiry on this occasion, they have been a source of grievance to Mr Abela.
92. The Commonwealth Ombudsman has previously recommended that incident reports be provided to detainees as part of the recording process to allow for procedural fairness.²³ Such a step may have the benefit of reducing a detainee's frustration at later receiving incident reports that they feel have not been properly completed, or contain inaccuracies.

Recommendation 5

The Commission recommends that the Department remind Serco to ensure that incident reports are filled out to completion and that post-incident report requirements are followed. Serco procedures should be updated to reflect the need for procedural fairness to be provided.

10 The Department's response to my findings and recommendations

93. On 4 April 2024, I provided the Department with a notice of my findings and recommendations.
94. On 28 June 2024, the Department provided the following response to my findings and recommendations:

The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings identified in this

report and the recommendations made by the President of the Commission.

The Department does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, article 10(1) of the *International Covenant on Civil and Political Rights*.

Recommendation 1 - Disagree

The Commission recommends that the Commonwealth provide Mr Abela with an apology for the use of force against him on 12 March 2021.

While the Department acknowledges the circumstances raised in the complaint, the Department does not consider it appropriate to issue an apology.

Recommendation 2 - Disagree

The Commission recommends that, following the Department's investigation into the incident, the individual officers involved be reminded of their obligations to conduct searches in accordance with the DSM and in a way that respects the humanity and inherent dignity of all detainees.

The Department disagrees with recommendation two.

The Department reiterates its response of 2 September 2021 that officers, including Facilities and Detainee Services Provider (FDSP) officers, have legislative authority under section 252 of the Migration Act 1958 to search detainees and their personal property under their immediate control, and to search immigration detention facility premises, including detainee accommodation, under common law.

The Department wishes to clarify that the search conducted on 12 March 2021 was a search of immigration detention facility premises, not of Mr Abela's person or property, and was conducted under common law authority. It was undertaken, at the ABF's direction, to ensure the safety and security of detainees, departmental officers, contracted services providers and other persons and to safeguard good order at the (then) Melbourne Immigration Transit Accommodation.

The Department further seeks to correct the Commission's statements at Paragraphs 80 and 90 where detention operational policy procedural instructions are incorrectly interpreted in relation to searching, with particular note toward the Commission's statement that 'the procedural instruction requires that detainees be present while their accommodation is searched' and 'officers are not following the procedural instruction in a number of respects'.

Detention operational policy and procedures do not require that a detainee must be present while their accommodation is searched. Per detention operational policy, the FDSP is to conduct regular searches throughout immigration detention facilities to detect and control the presence of illegal, excluded and controlled items and conduct random security checks of accommodation, with the detainee who occupies the room present, if possible. In this regard, the Department seeks to clarify that officers did not deviate from the endorsed detention operational policy and procedures.

Recommendation 3 - Disagree

The Commission recommends that Mr Abela's records on 12 March 2021 be revised to reflect the fact that it was not his own abusive or aggressive behaviour that led to an unplanned use of force against him.

The Department disagrees with recommendation three and maintains that Mr Abela immediately became confrontational, was aggressive and abusive to officers and repeatedly refused to comply with the officers' direction to leave the detainee accommodation area to enable the search to be conducted in a safe and secure manner. In this regard, the Department maintains the appropriateness of the incident reporting.

Recommendation 4 - Partially agree

The Commission recommends that the Department direct Serco to conduct a training session for all officers on conducting room searches.

The Department partially agrees with recommendation four to the extent that existing training requirements are in place for officers in respect to conducting (detainee) room searches. All FDSP officers are appropriately trained and qualified for their assigned role and responsibilities, including undergoing refresher training, as it relates to security functions. This also includes training that encompasses working and positively engaging with detainees, including communication, building rapport, mental health training and first aid training.

In addition, after a critical or major incident has been resolved, the FDSP must conduct a post-incident review, including to identify any gaps in processes, procedures and training requirements, and make appropriate recommendations and implement any necessary changes to processes, procedures and training.

Notwithstanding, the Department believes the Commission has misunderstood or misrepresented the detention operational policy and procedural requirements as they relate to conducting lawful searches of immigration detention premises and conflated the requirements in place for searching and screening a detainee and/or their personal property. Further, the Department affirms that the consent of a detainee/s is not required nor sought in respect to searches of immigration detention facilities premises.

Recommendation 5 - Partially agree

The Commission recommends that the Department remind Serco to ensure that incident reports are filled out to completion and that post-incident report requirements are followed. Serco procedures should be updated to reflect the need for procedural fairness to be provided.

The Department partially agrees with recommendation five to the extent that the quality of FDSP incident reporting is an area of continuous improvement focus, however, does not agree that FDSP procedures should be updated to reflect the recommended need for procedural fairness.

The Department's Incident Reporting Guidelines, which are used by the FDSP, were developed to provide the FDSP with context, awareness and support in order to ensure that incident reporting is completed fully and appropriately. The Guidelines specifically outline that FDSP should not make criticisms or come to conclusions when reporting an incident and that all incident reports must be factual, accurate, objective and neutral. Incident reporting is specifically monitored under the performance framework and the Department engages regularly with the FDSP and will provide a formal reminder to ensure accurate and complete reporting.

95. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

July 2024

Endnotes

- ¹ The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- ² See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- ³ Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
- ⁴ Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
- ⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel, 2nd ed, 2005) 250.
- ⁶ UN Human Rights Committee, *Communication No 629/1993*, UN Doc CCPR/C/60/D/639/1995 (28 July 1997) (*Walker and Richards v Jamaica*); UN Human Rights Committee, *Communication No 845/1998*, 74th sess, UN Doc CCPR/C/74/D/845/1998 (26 March 2002) (*Kennedy v Trinidad and Tobago*); UN Human Rights Committee, *Communication No 684/1996*, 74th sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) (*R.S. v Trinidad and Tobago*).
- ⁷ Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/ Rev.1 at 33 (10 April 1992) [5].
- ⁸ UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by 'the Nelson Mandela Rules', UN Doc A/RES/70/175 (17 December 2015).
- ⁹ The Body of Principles were adopted by the UN General Assembly in *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 6th Comm, 43rd sess, 76th plen mtg, Agenda Item 138, UN Doc A/43/49 (9 December 1988) Annex.
- ¹⁰ UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by 'the Nelson Mandela Rules', UN Doc A/RES/70/175 (17 December 2015), preliminary observation 2(1), 7.
- ¹¹ Immigration Detention Facilities and Detainee Services Contract between the Commonwealth and Serco, 10 December 2014, Sch 2 (Statement of Work), Section 4 (Security Services) clause 3.8.
- ¹² Immigration Detention Facilities and Detainee Services Contract between the Commonwealth and Serco, 10 December 2014, Sch 2 (Statement of Work), Section 4 (Security Services) clause 3.10.
- ¹³ Department of Home Affairs, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [4]-[5].
- ¹⁴ Department of Home Affairs, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [5].
- ¹⁵ Department of Home Affairs, *Detention Services Manual – Safety and security management – Screening and searching of detainees and their property* (27 November 2018) p 17 [4.12.3]
- ¹⁶ Department of Home Affairs, *Detention Services Manual – Safety and security management – Screening and searching of detainees and their property* (27 November 2018) p 17 [4.12.4]
- ¹⁷ Department of Home Affairs, *Detention Services Manual – Safety and security management – Screening and searching of detainees and their property* (27 November 2018) p 18 [4.12.10]
- ¹⁸ Department of Home Affairs, *Detention Services Manual – Safety and security management – Screening and searching of detainees and their property* (27 November 2018) p 18 [4.12.8]-[4.12.9].

- ¹⁹ Department of Home Affairs, *Detention Services Manual – Safety and security management – Screening and searching of detainees and their property* (27 November 2018) p 13 [4.10.1]-[4.10.2].
- ²⁰ Australian Human Rights Commission Act ('AHRC Act'), s 29(2)(a).
- ²¹ AHRC Act, s 29(2)(b).
- ²² AHRC Act, s 29(2)(c).
- ²³ Commonwealth Ombudsman, *Monitoring Commonwealth Places of Detention: Annual Report of the Commonwealth National Preventive Mechanism under the Optional Protocol to the Convention Against Torture (OPCAT)* (Report, 2023) 27
<https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/290137/Commonwealth-NPM-Report.pdf>; Commonwealth Ombudsman, *Monitoring Immigration Detention: The Ombudsman's Activities in Overseeing Immigration Detention* (Report, 2021) 31
<https://www.ombudsman.gov.au/__data/assets/pdf_file/0015/112560/Report-No.-04_2021-Monitoring-Immigration-Detention-The-Ombudsmans-activities-in-overseeing-immigraiton-detention-January-June-2020-A2184717.pdf>.