



Australian  
Human Rights  
Commission

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# Mr CJ v Commonwealth of Australia

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## (Department of Home Affairs)

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**[2024] AusHRC 169**

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July 2024

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Australian Human Rights Commission  
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# **Mr CJ v Commonwealth of Australia (Department of Home Affairs)**

[2024] AusHRC 169

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

Mr CJ complains of excessive force used against him by staff of Serco Australia Pty Ltd (Serco) while being detained at Melbourne Immigration Transit Accommodation (MITA). He alleges that on 24 May 2022, Serco officers assaulted him without cause, and as a result of the force used, he sustained multiple injuries to his body, including a serious shoulder injury. Consequently, Mr CJ complains that the force used against him contravened article 10(1) of the International Covenant on Civil and Political Rights (ICCPR).

As a result of this inquiry, I have found that the use of force on 24 May 2022 was excessive, and caused lacerations to Mr CJ's left knee, right hand, forehead and right foot, and injury to his left elbow. The manner in which Mr CJ was restrained was disproportionate to the need to protect him and detention centre staff, and maintain order. Further, the level of force was not used as a last resort, where it was open for Serco officers to attempt further communication, negotiation, and de-escalation strategies.

I find that these actions were inconsistent with, or contrary to Mr CJ's right under article 10(1) of the ICCPR to be treated with humanity and respect for his inherent dignity when deprived of liberty.

On 8 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 19 June 2024. That response can be found in Part 9 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

Emeritus Professor Rosalind Croucher AM FAAL

**President**

Australian Human Rights Commission

July 2024

## Contents

<b>1</b>	<b>Introduction .....</b>	<b>6</b>
<b>2</b>	<b>Summary of findings and recommendations .....</b>	<b>6</b>
<b>3</b>	<b>Background .....</b>	<b>7</b>
<b>3.1</b>	<b><i>Immigration detention</i> .....</b>	<b>7</b>
<b>3.2</b>	<b><i>Use of force</i> .....</b>	<b>8</b>
<b>4</b>	<b>Legal framework for human rights inquiry .....</b>	<b>10</b>
<b>4.1</b>	<b><i>Functions of the Commission</i> .....</b>	<b>10</b>
<b>4.2</b>	<b><i>Scope of ‘act’ and ‘practice’</i> .....</b>	<b>11</b>
<b>4.3</b>	<b><i>Rights of detainees</i> .....</b>	<b>11</b>
<b>5</b>	<b>Legal and policy framework for use of force and restraints in immigration detention .....</b>	<b>14</b>
<b>5.1</b>	<b><i>Use of force</i> .....</b>	<b>14</b>
<b>5.2</b>	<b><i>Restraints</i> .....</b>	<b>16</b>
<b>6</b>	<b>Consideration of records of incidents .....</b>	<b>16</b>
(a)	<i>Lead-up to use of force</i> .....	17
(b)	<i>Use of force</i> .....	20
(c)	<i>Placement in High Care Accommodation</i> .....	23
(d)	<i>Medical treatment</i> .....	24
<b>7</b>	<b>Findings .....</b>	<b>25</b>
<b>7.1</b>	<b><i>Acts or practices relevant to this inquiry</i> .....</b>	<b>25</b>
<b>7.2</b>	<b><i>Use of force incident</i> .....</b>	<b>26</b>
(a)	<i>Interaction at Mr CJ’s room</i> .....	26
(b)	<i>Use of force incident</i> .....	29
<b>7.3</b>	<b><i>Injuries and conclusion</i> .....</b>	<b>30</b>
<b>8</b>	<b>Recommendations .....</b>	<b>31</b>
<b>8.1</b>	<b><i>Training</i> .....</b>	<b>31</b>
<b>8.2</b>	<b><i>Incident reports</i> .....</b>	<b>32</b>
<b>9</b>	<b>The Department’s response to my findings and recommendations ..</b>	<b>34</b>

# 1 Introduction

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr CJ against the Commonwealth of Australia, Department of Home Affairs (Department) alleging a breach of his human rights. The inquiry was undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr CJ complains that excessive force was used against him by staff of Serco Australia Pty Ltd (Serco) – being a detention service provider of the Department – while detained at Melbourne Immigration Transit Accommodation (MITA).
3. Mr CJ alleges that on 24 May 2022, Serco Emergency Response Team (ERT) officers assaulted him for no reason. Mr CJ alleges that as a result of the force used, he suffered injuries to his body including a serious shoulder injury.
4. Mr CJ complains that the use of force against him contravened articles 7 and 10 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup>
5. This report is issued pursuant to s 29(2) of the AHRC Act setting out my findings in relation to this complaint and my recommendations to the Commonwealth.
6. Given that Mr CJ is a person seeking asylum and has raised protection claims against his home country, I have made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

## 2 Summary of findings and recommendations

7. As a result of this inquiry, I find that:
  - excessive force was used by ERT officers on Mr CJ – the manner in which he was restrained was disproportionate to the need to protect him, the safety of staff and to maintain good order at the detention centre
  - the lacerations to Mr CJ's left knee, right hand, left forehead and right foot were a result of the excessive use of force
  - the injury to Mr CJ's left elbow was a result of the excessive use of force
  - the level of force was not used as a last resort and escalated the physicality of the situation – further communication, negotiation

and conflict de-escalation strategies could and should have been attempted.

8. I find that these actions were contrary to Mr CJ's rights under article 10 of the ICCPR, to be treated with humanity and with respect for his inherent dignity when deprived of liberty.
9. I make the following recommendations:

#### **Recommendation 1**

The Department and Serco ensure that officers who may be required to use force in their roles be appropriately and periodically trained with an emphasis on communication, negotiation and conflict de-escalation strategies as alternatives to the use of force.

#### **Recommendation 2**

The Commission recommends that the Department request Serco to update its 'Post Incident Review' template form to include a requirement to identify whether:

- body worn cameras had been turned on for the incident (and if not, why not)
- any footage (CCTV and/or body worn camera) of the incident was available
- if footage was available, whether it was viewed in the course of the review process.

#### **Recommendation 3**

Where available evidence, such as video footage, suggests that a contemporaneous incident report was inaccurate, this should be raised with the officer creating the incident report as part of ordinary performance management.

## **3 Background**

### **3.1 Immigration detention**

10. On 21 August 2013, Mr CJ, who is from Afghanistan, arrived in Australia at Christmas Island and was detained under s 189(3) of the *Migration Act 1958*



(Cth) (Migration Act) as an unauthorised maritime arrival. He remained detained on Christmas Island for 18 months, before being transferred to the mainland. On 11 March 2015, he was released from immigration detention after being granted a Bridging Visa E (BVE).

11. On 17 March 2017, Mr CJ applied for a Safe Haven Enterprise Visa (SHEV). As at August 2022, this application was still being assessed having been referred to the Visa Applicant Character Consideration Unit.
12. According to the Department's response to Mr CJ's complaint to the Commission dated 21 October 2022, Mr CJ was convicted of assault in December 2016 and March 2018 while on a BVE. For both offences, he was issued an 18-month good behaviour bond. In January 2020, he was convicted of sexual assault and issued with a community corrections order for 18 months.
13. On 2 December 2020, Mr CJ's BVE was cancelled by the Department under s 116 of the Migration Act and he became an unlawful non-citizen. He sought merits review of this cancellation at the Administrative Appeals Tribunal but subsequently withdrew this application.
14. On 29 January 2021, Mr CJ was arrested in relation to a domestic violence incident. No charges resulted and he was released pending summons with a family violence safety notice. As he was an unlawful non-citizen, he was detained under s 189(1) of the Migration Act and transferred to MITA, where he remains to date.

### **3.2 Use of force**

15. The use of force incident that Mr CJ has complained about took place at approximately 3.55 pm on 24 May 2022.
16. In the lead-up to the use of force incident, at approximately 3.30 pm, all detainees in Bass 2 compound at MITA were instructed by Serco to return to their rooms and remain inside their rooms. The Australian Federal Police (AFP) were onsite to carry out an operation in collaboration with Serco and the Australia Border Force (ABF).
17. As part of the AFP operation, Serco officers were tasked as an Emergency Response Team (ERT) on the grounds of Bass 2 compound. There was an Emergency Command Centre established with representatives from Serco and ABF monitoring the operation via CCTV.
18. The circumstances leading up to the subsequent use of force by ERT officers are contested between the Department and Mr CJ.

19. The Department alleges in its response to the Commission dated 21 October 2022, that around 3.50 pm, 'Mr CJ became non-compliant by refusing to stay within his accommodation, becoming increasingly aggressive and verbally abusive towards the AFP and Serco staff. The Department allege that when Mr CJ remained non-compliant and aggressive, despite attempts to de-escalate, it was decided that he was 'jeopardising the safety, security and good order of the facility and potentially preventing the AFP's ability to carry out the operation safely'. The ERT team leader was directed to escort Mr CJ out of Bass 2 compound and take him to High Care Accommodation (HCA) at Shaw compound. Three ERT officers escorted Mr CJ using the enhanced escort position (EEP). EEP is an arm and elbow lock used to escort detainees.
20. The Department alleges that while being escorted out of Bass 2 compound, Mr CJ became physically non-compliant by resisting and breaking free. As Mr CJ continued to resist, ERT officers, with a use of force, ground-stabilised Mr CJ and applied mechanical restraints before escorting him to Shaw HCA.
21. These facts are disputed by Mr CJ who maintains that he had returned to his room when asked, despite being made to feel intimidated and humiliated by ERT officers in full riot gear holding shields, in particular by an ERT officer who removed his body camera and held it up to Mr CJ's room window. He alleges he was assaulted for no reason and subjected to unnecessary and excessive use of force.
22. What is apparent from bodycam footage provided by the Department is that around 3.53 pm, Mr CJ opened his accommodation room door to ask how long he would have to stay in his room. A short conversation followed and at 3.54 pm, Mr CJ was escorted from his room to be taken to Shaw HCA. While walking through Bass 2 compound, Mr CJ's right shoulder dropped, causing the ERT officer's hold of his right arm to break. Use of force was then used to ground-stabilise Mr CJ and mechanical restraints were applied at around 3.55 pm. Mr CJ was escorted to Shaw HCA via an escort van.
23. At Shaw HCA, Mr CJ was seen by IHMS. He had four lacerations, one to his left knee, one to his right hand, one to the left side of his forehead, and one to his right foot, which the IHMS primary health nurse dressed. He also complained of pain in his left hand and elbow and had minimal swelling around his elbow. He was provided Panadol and ibuprofen, as well as an ice pack. That evening, around 9.20 pm, he was taken by a transport and escort team to Northern Hospital Emergency Department. Once there, however, Mr CJ advised he did not want to wait to see a doctor as the wait time was to be eight or more hours, and he was returned to Shaw HCA.

24. On 26 May 2022, Mr CJ continued to complain of pain in his left shoulder and elbow, as well as his right wrist. There was no noticeable swelling, and he could move his arms and fingers. He requested an x-ray, which was arranged onsite at MITA. The x-ray showed no fracture.
25. Since this incident, Mr CJ has continued to complain of pain in his left elbow and has been treated by a physiotherapist. According to Physio Plus consultation notes dated 21 July 2022, Mr CJ has epicondylitis (tennis elbow) and an infraspinatus strain around his shoulder.
26. On 26 May 2022, Mr CJ lodged a complaint with Serco stating in his complaint form that he had been severely assaulted by ERT, has wounds all around his body and he can't move his shoulder due to the 'inhuman behaviour of the ERT officers'. After an investigation of the incident, Serco found in the 'Detainee or Staff Complaint Investigation Form' dated 7 June 2022, that Mr CJ was removed from the compound 'in order to maintain the good order of the BASS 2 compound and to ensure that there was no further escalation from Mr CJ, or other detainees becoming involved due to Mr CJ's behaviour', and that removing him was 'appropriate action at the time in order to ensure that the AFP operation was able to be completed uninterrupted'.
27. On 13 June 2022, Mr CJ lodged a complaint with the Commission.

## **4 Legal framework for human rights inquiry**

### **4.1 Functions of the Commission**

28. Section 11(1) of the AHRC Act identifies the functions of the Commission. Section 11(1)(f) gives the Commission the function 'to inquire into any act or practice that may be inconsistent with or contrary to any human right'.
29. Section 20(1)(b) of the AHRC Act requires the Commission to perform its function under s 11(1)(f) when a complaint is made in writing alleging that an act or practice is inconsistent with or contrary to any human right.
30. Section 8(6) of the AHRC Act provides that the functions of the Commission under s 11(1)(f) are to be performed by the President.
31. The rights and freedoms enumerated in the ICCPR are 'human rights' within the meaning of the AHRC Act.<sup>2</sup>

## 4.2 Scope of 'act' and 'practice'

32. 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.
33. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an 'act' includes a reference to a refusal or failure to do an act.
34. 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>3</sup> that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

## 4.3 Rights of detainees

35. Persons subject to immigration detention enjoy all of the human rights protected by the ICCPR, including special protections as persons deprived of their liberty by the state.
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.
37. Further, 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.
38. General Comment No 21 of the United Nations Human Right Committee (UN HR Committee) concerns article 10(1) of the ICCPR, and states:

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

39. This General Comment supports the conclusions that:
- article 10(1) imposes a positive obligation on State parties to take action to prevent the inhumane treatment of detained persons
  - the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR
  - article 10(1) may be breached if a detainees' rights under other articles of the ICCPR are breached, unless that breach is necessitated by the deprivation of liberty.
40. The above conclusions are also supported by the jurisprudence of the UN HR Committee, which emphasises the difference between the article 7(1) obligation not to engage in 'inhuman' treatment and the article 10(1) obligation to treat detainees with humanity and respect for their dignity.<sup>5</sup>
41. In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,<sup>6</sup> the Supreme Court of New Zealand further explained the difference between these two concepts as follows:
- A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment ... the words 'with humanity' are I think properly to be contrasted with the concept of 'inhuman treatment' ... The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts 'inhuman' with 'inhumane'.<sup>7</sup>
42. The content of article 10(1) has been developed through a number of UN instruments that articulate minimum international standards in relation to people deprived of their liberty, including:
- the Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)<sup>8</sup>
  - the Body of Principles for the Protection of all Persons under Any Form of Detention (Body of Principles).<sup>9</sup>
43. The UN HR Committee invites State Parties to indicate in their periodic reports the extent to which they are applying the Nelson Mandela Rules and the Body of Principles.<sup>10</sup> 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.<sup>11</sup>
44. Rule 82(1) of the Nelson Mandela Rules provides:

Prison staff shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Prison staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the prison director.

45. 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.
46. Rule 121 of the Nelson Mandela Rules requires that civil prisoners 'shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order'.
47. The prohibition in article 7 of the ICCPR is absolute and non-derogable. A person's treatment in detention must not involve torture or cruel, inhuman or degrading treatment or punishment.
48. In the case of *Wilson v Philippines*, the UN HR Committee found a breach of article 7 of the ICCPR where a prisoner was treated violently in detention:

The Committee considers that the conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7.<sup>12</sup>
49. 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.<sup>13</sup>
50. Previous inquiries of the Commission, including the Thematic Inquiry, have found that the use of force by detention service providers on detainees in immigration detention amounted to a breach of their human rights.<sup>14</sup>

## **5 Legal and policy framework for use of force and restraints in immigration detention**

### **5.1 Use of force**

51. Part 4 of the Thematic Inquiry report sets out the applicable legal and policy framework for the use of force in immigration detention.<sup>15</sup> I refer to and rely on the applicable aspects of that report, without repeating them here.
52. In summary, 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.
53. 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.<sup>16</sup>
54. 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.<sup>17</sup>
55. As described in the Department's DSM, both the Department and its service providers owe a duty of care to all persons held in immigration detention. This means that they are legally obliged to exercise reasonable care to prevent detainees from suffering reasonably foreseeable harm.<sup>18</sup> The Department's duty of care is non-delegable.<sup>19</sup>
56. 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.
57. 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.<sup>20</sup>
58. In addition to the Department's duty of care, the Department recognises that international human rights standards can inform the standard of care a detainee is to receive while detained in an immigration detention facility.<sup>21</sup>

59. 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<sup>22</sup>
- 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.<sup>23</sup>
- 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'.<sup>24</sup>

60. 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'.<sup>25</sup>

## **5.2 Restraints**

61. The policies applicable to the use of mechanical restraints are discussed in Part 5 of the Thematic Inquiry report.<sup>26</sup> I refer to and rely on the applicable aspects of that report, without repeating them here.
62. In summary, the Department's DSM provides that instruments of restraint must:
  - a. never be applied as a punishment or for discipline
  - b. never be applied as a substitute for medical treatment
  - c. never be used for convenience or as an alternative to reasonable staffing
  - d. be removed once the threat has diminished and the officer believes that the detainee is no longer a threat to themselves, others or property.<sup>27</sup>
63. Serco's contract with the Commonwealth provides that Serco must 'ensure that restraints are not used in a manner which is likely to cause injury, serious discomfort or potential danger to a Detainee'.<sup>28</sup>

## **6 Consideration of records of incidents**

64. There is bodycam footage with audio from two ERT officers as well as CCTV footage without audio that captures the use of force incident in part or whole and Mr CJ's subsequent placement into Shaw HCA.
65. Mr CJ has provided a detailed account, including photographs, of the period before the use of force incident when the detainees in Bass 2 compound were being instructed to return to and stay in their rooms.
66. The Department has also provided copies of incident reports, use of force records and medical records, that record the key events on 24 May 2022. There are four use of force reports from the key ERT officers involved:
  - a. UOF3268210 report prepared by the ERT officer who stood at Mr CJ's left when escorting him using EEP (ERT officer 1 report)
  - b. UOF3268211 report prepared by the ERT officer who stood at Mr CJ's right when escorting him using EEP (ERT officer 2 report)

- c. UOF3268770 report prepared by the ERT officer who stood behind Mr CJ when escorting him using EEP (ERT officer 3 report)
  - d. UOF3282492 report prepared by the ERT team leader.
67. I note that there are two versions of the reports prepared by ERT officer 1 and ERT officer 2. One version contains a more detailed account of the use of force incident than the other.
  - (a) *Lead-up to use of force*
68. According to Serco's Post Incident Review Use of Force report, the detainees in Bass 2 compound were directed to remain in their rooms until the AFP operation finished. It states that Mr CJ 'became non-compliant and started abusing AFP and Serco staff. The four use of force reports describe Mr CJ at this point as 'aggressive', 'abusive' and 'non-compliant'. They state that he was 'raising his voice' and 'becoming more agitated' (ERT officer 2 report), and that he 'tried to rush out of his room' (ERT officer 3 report). The Use of Force report prepared by the Team Leader also states:

As tensions in the corridor began to rise with other detainees in the other rooms also starting to raise their voices saying that they would come out of their rooms as well, I decided to remove detainee CJ from the area until the operation was completed for the safety and good order of the operation.
69. Mr CJ, however, states that while the ERT officers told everyone to go to their rooms, they did not tell anyone why they had to return to their rooms.
70. Mr CJ's account of what occurred was that he was outside his room when the AFP came to Bass 2. He believes the AFP arrived around 3.00 pm. It was only later, closer to 3.30 pm that the ERT came into the Bass 2 compound in full riot gear with some holding large shields. The ERT officers directed all detainees, including Mr CJ, to go to their rooms. According to Mr CJ, everyone including him was asking why, but the ERT officers would only repeat the demand to return to their rooms and they 'looked like they were going to start using force and threatening'. Mr CJ describes their presentation in full riot gear and shields, and treatment of detainees as 'brutal and traumatic'.
71. Mr CJ states that he returned to his room but continued to ask why he had to stay in his room. He alleges that an ERT officer was giving him a hard time, making fun of him and then took off his bodycam and held it to Mr CJ's room window. Mr CJ describes this as, 'making me more upset and angry, I felt intimidated, humiliated and provoked'. He took a photograph of the ERT officer's body camera, which shows the time of 3.30 pm (Figure 1).



**Figure 1:** Photograph of ERT officer holding his bodycam to Mr CJ's window, taken by Mr CJ.

72. I do not have any video footage from when the ERT officers first arrived at Bass 2 compound and instructed all detainees to return to their rooms. I therefore cannot make a finding on whether detainees were provided an adequate explanation on why they were required to return to and remain in their rooms.
73. Bodycam footage from one ERT officer at 3.46 pm, shows around eight or nine ERT officers outside room 29 with a few officers at room 29 speaking to the detainee inside. Room 29 is next door to Mr CJ's room 28. There was an alarm sound repeating with a recorded message saying, 'Emergency, evacuate now'. All other detainees in that corridor were in their rooms, including Mr CJ. By 3.47 pm, the alarm has stopped. The ERT officers leave room 29, and most of the ERT officers move away from that corridor, leaving around four or five officers standing at the end of the corridor, near Mr CJ's room.
74. The bodycam footage at approximately 3.51 pm, shows that a detainee from room 33 in the same corridor opens his door, there is a brief conversation, and he is told to wait. He makes a comment about the riot gear and closes his door. One detainee shouts, 'I can't breathe' and there is some yelling and swearing from various detainees from within their rooms. At 3.52 pm, another detainee from room 30 opens his door, looks out and shuts his door again. A third detainee from room 31 at the end of the corridor opens his door and asks what is going on as he has an appointment with his lawyer. He is told to stay in his room, while in the background a detainee again yells multiple

times, 'I can't breathe'. Various detainees continue to yell and swear from their rooms. The detainee from room 31 repeats that he needs to talk to his lawyer and three ERT officers walk up to his door. CCTV footage shows ERT officers speaking to this detainee and closing his door.

75. The bodycam footage shows that at approximately 3.53 pm, Mr CJ opens his room door to speak to the ERT officer standing outside his room. The ERT officer tells him to stay in his room and Mr CJ asks how long he has to stay in his room. Two ERT officers with large shields stand around Mr CJ's door and one ERT officer who is the team leader speaks to him through the shield (Figure 2). A fourth ERT officer, ERT officer 2, comes around to speak to him by his door as well (Figure 3).



**Figure 2:** Mr CJ standing at his open door speaking to the ERT team leader.



**Figure 3:** CCTV footage showing Mr CJ's room with his door open at the entrance to the corridor.

76. The bodycam footage shows that Mr CJ is agitated and frustrated and speaks with a raised voice, using occasional profanity. He says, 'we are already in detention centre, you want to lock me in my room?'. The ERT team leader tells Mr CJ that if he comes out of his room, he will go to Shaw, and not to interfere with the operation. Mr CJ is holding a cigarette that he wants to light. ERT officer 2 explains to Mr CJ that there is something happening here, he can't give him a time, but he needed to stay in his room until they are done. Mr CJ's roommate, who is also in the room, starts shouting at the ERT officer asking, 'who give you authority, you are not cop, you are acting like you are cop'.
77. At this point, it is approximately 3.54 pm and the bodycam footage shows that Mr CJ has remained at his door and made no attempt to leave his room. He has raised his arm holding the cigarette a few times to point to where he wants to go to light his cigarette, but his body language does not appear aggressive. The ERT Team Leader then says that this is an AFP operation and tells Mr CJ again to stay in his room. This appears to agitate Mr CJ who repeats, 'I don't care, I need to light my cigarette f\*\*king, for how long do I have stay here. We already in detention centre'. The ERT team leader then instructs the ERT officer to take Mr CJ to Shaw.
78. According to the Serco 'Detainee or Staff Complaint Investigation Form', the Serco incident controller for the AFP operation, who was observing the CCTV footage from the emergency command centre, had observed Mr CJ's non-compliance on CCTV. He directed the ERT team leader to escort Mr CJ out of Bass 2 compound as Mr CJ's 'escalating' behaviour was 'jeopardising the good order, safety and security of the facility and potentially preventing the AFP operation to continue'.
79. CCTV footage of the corridor shows that following Mr CJ's removal, a few doors open and almost immediately shut.

(b) *Use of force*

80. At approximately 3.54 pm, the bodycam footage shows that Mr CJ is escorted from his room by three ERT officers in EEP. The Serco Post Incident Review Use of Force Report states that Mr CJ 'tried running towards AFP staff who were in front of room 44' and that it was due to his 'non-compliance' that ERT officers 'used force in the form of ground stabilising techniques and mechanical restraints'. The four use of force reports all refer to Mr CJ physically resisting their escort by pulling away and making contact with one of the ERT officer's head in an 'elbow strike' (ERT officer 3 report), before Mr CJ was ground-stabilised and restrained.
81. There is bodycam footage with audio from ERT officer 2, the officer restraining Mr CJ's right arm. There is also CCTV footage without audio.

82. While walking through Bass 2 compound, they cross what appears to be a volleyball court and duck under the volleyball net. They then come to a short flight of stairs. CCTV footage shows that as Mr CJ is escorted up the stairs, his right shoulder drops forward and ERT officer 2 on his right briefly loses his hold of Mr CJ (Figure 4). Mr CJ appears to shrug off the ERT officer’s hold and is then brought to the ground at the top of the stairs for ground-stabilising. The two ERT officers on either side of him restrain his arms, while the third ERT officer behind him pulls his legs out and puts his weight on Mr CJ’s legs to pin him down (Figure 5). The ERT team leader also runs over to assist with restraining Mr CJ.



**Figure 4:** Mr CJ’s left shoulder dropping, breaking ERT officer 2’s hold.



**Figure 5:** Mr CJ brought to ground for ground-stabilising and being restrained by 4 ERT officers.

83. Bodycam footage on ERT officer 2 shows ERT officer 2 losing his grip of Mr CJ's right arm as they climb the stairs, and then Mr CJ on the ground at the top of the stairs. Mr CJ starts yelling profanities and sounds in pain. He says what sounds like 'you break my hand'. ERT officer 1 has Mr CJ's left arm twisted more than 90 degrees and pinned behind Mr CJ's back, his wrist bent upwards at an angle. His right leg is crossed behind him and ERT officer 3 puts his weight on Mr CJ's legs. The ERT officers tell Mr CJ repeatedly, 'do not resist' and to 'comply with our directions'. For close to a minute, the ERT officers are attempting to secure Mr CJ's right arm and place handcuffs on Mr CJ while he is yelling (Figure 6).



**Figure 6:** Mr CJ's left arm is pulled back forcefully and held at almost a 90-degree angle.

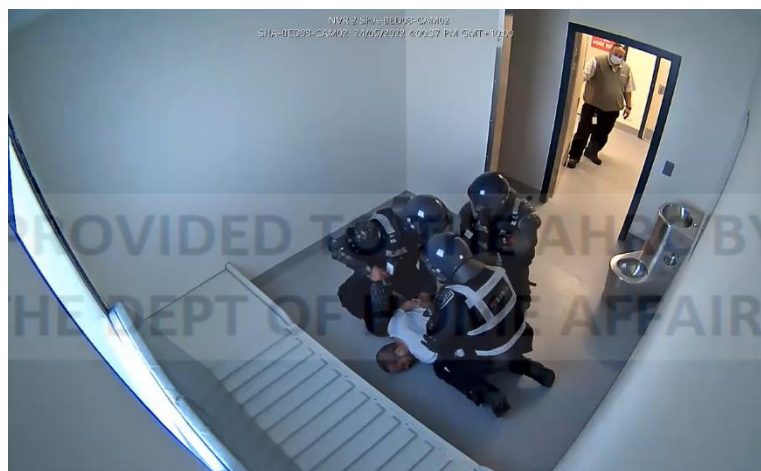
84. Both bodycam and CCTV footage show that by approximately 3.55 pm, the mechanical restraints are on, and Mr CJ is stood up and escorted to the transport van. He is held in a position where his arms are cuffed behind his back and he is doubled over as two ERT officers forcefully raise his arms, forcing his head down (Figure 7).



**Figure 7:** Mr CJ being escorted after the use of force incident.

(c) *Placement in High Care Accommodation*

85. Mr CJ is taken to Shaw HCA via a transport van. According to the ERT officer 1 report and ERT officer 2 report, Mr CJ attempted to stand up in the van and was told to stay seated. Once placed in room 8 in Shaw HCA, his mechanical restraints were removed at approximately 4.02 pm after a pat search. He was offered medical assistance, which he accepted.
86. There is bodycam footage in the van. It is unclear at what point Mr CJ attempted to stand and was told to stay seated. While in the van, the ERT officer seated next to him initiated conversation by saying to Mr CJ that he was told many times to just stay for half an hour and it would be finished. He repeated this at least three times stating to Mr CJ, 'you want to act all tough'. In response, Mr CJ repeated that he is not in prison but a detention centre. ERT officer 2 seated behind commented that Mr CJ just assaulted an officer by elbowing him in the face. Mr CJ responded asking 'I assaulted an officer?'. He then said 'F\*\*king you turned my hand' and attempted to look over his shoulder at ERT officer 2. He was told by the ERT officer next to him, 'It's ok, just stay there'.
87. At approximately 4 pm, Mr CJ is placed in room 8 at Shaw HCA. CCTV footage shows Mr CJ is placed on the ground, and it appears the ERT officers are using the fold restraint on him, where his face is pushed to the ground and his legs folded behind him with an officer placing their weight on them (Figure 8). The ERT officers carry out a pat search and wand search, before removing the handcuffs and locking him into the room. He is offered medical support, which he accepts.



**Figure 8:** Mr CJ in Shaw HCA while being held in the fold restraint.



88. In Mr CJ's complaint to the Commission, he included photographs that appear to have been taken inside a room at Shaw compound, and you can see he is bleeding on both knees and his left forehead (Figure 9).



**Figure 9:** Mr CJ's lacerations.

89. I note that, according to the CCTV footage of the Shaw HCA corridor outside room 8, at around 4.01 pm, another detainee is escorted using EEP to room 7. This appears to be Mr CJ's roommate referred to above.

*(d) Medical treatment*

90. On the evening of 24 May 2022, around 7.39 pm, an IHMS Primary Health Nurse went to Mr CJ's room in Shaw compound to assess his medical needs. According to the IHMS Clinical Record dated 24 May 2022, Mr CJ initially would not let the nurse come into his room to assess him and the nurse had to speak to him from outside his room. He complained of pain in his left hand and asked to see a GP. He got angry and the nurse left without assessing him. At approximately 8.00 pm, Mr CJ requested paracetamol as he had pain in his left elbow. He was unable to move his elbow and the pain had been increasing since the incident.

91. According to the IHMS Clinical Record dated 24 May 2022, at approximately 8.45 pm, the Primary Health Nurse returned, and Mr CJ was co-operative with the nurse. The four lacerations to his left knee, right hand, left forehead and right foot were dressed. He again complained of pain in his left elbow and minimal swelling around his elbow was noted. He was given ibuprofen and told he would be transferred to hospital for further assessment.
92. That evening, he was transferred to Northern Hospital Emergency Department but requested to be returned to MITA without seeing a doctor as the wait time would be eight or more hours.
93. On 26 May 2022, Mr CJ continued to have pain in his left shoulder and elbow, and he requested an x-ray. The x-ray was taken at MITA and showed no fracture. A month later, Mr CJ continued to experience pain along his left elbow, extending up to his forearm and he was referred to a physiotherapist.
94. According to Physio Plus consultation notes dated 21 July 2022, Mr CJ has epicondylitis (tennis elbow) and an infraspinatus strain around his shoulder. Mr CJ experiences pain with holding and grasping activities and therefore has difficulty holding and grasping and lifting weights. He is being treated with education on what activities to avoid and exercises to strengthen his wrist extensor muscles.
95. On 12 December 2022, Physio Plus consultation notes states that Mr CJ's left elbow pain has decreased a lot and is getting better. He is reminded that this is a 'chronic long term injury that requires conservative management over 6-12 months to come good and that every instance of pain in his elbow is a setback'. Mr CJ is advised to continue avoiding activities that include grasping and holding with his left hand.

## **7 Findings**

### **7.1 Acts or practices relevant to this inquiry**

96. I find that the following acts or practices of the Department and Serco as relevant to this inquiry:
  - a. the decision to escort Mr CJ from his room to Shaw HCA using EEP on 24 May 2022
  - b. the decision to use force to restrain Mr CJ and place mechanical restraints on him while escorting him to Shaw compound.

## 7.2 Use of force incident

97. I find that excessive force was used on Mr CJ in a manner that was not reasonable, necessary or proportionate to the risk he posed to himself or others.
- (a) *Interaction at Mr CJ's room*
98. In the lead up to the use of force incident, all detainees in the Bass 2 compound were in their rooms. Mr CJ opened the door of his room to ask how long he would have to stay in his room, and at least four ERT officers responded by standing around Mr CJ. After about a minute of conversation, the ERT team leader, apparently at the behest of the incident controller in the emergency command centre, instructed the ERT officers to escort Mr CJ to Shaw HCA. Three ERT officers used EEP to escort him.
99. According to the ERT Officer 3 report, Mr CJ 'tried to rush out of his room'. The ERT team leader's report also states that Mr CJ 'tried coming out of his room'. Both these reports also raise concerns about the impact of Mr CJ's non-compliant and escalating behaviour on other detainees in the compound. ERT Officer 3's report further states that Mr CJ's behaviour was 'disrupting the AFP operation and inflamed other detainee (sic) in Bass 2'. The team leader report stated that 'tensions in the corridor began to rise with other detainees in the other rooms also starting to raise their voices saying that they would come out of their rooms as well'. The indication is that this was a key consideration in the decision to remove Mr CJ.
100. However, the bodycam footage shows that after Mr CJ opened his room door, he did not try to leave his room. He stood in the same spot at the entrance to his room throughout the entire interaction before he was escorted from his room. I do not consider that he had attempted to rush out of or leave his room. I also question whether his behaviour was in fact escalating. While he spoke with a loud voice that was agitated, the bodycam footage does not show that he was getting louder as the interaction progressed. His body language was also not aggressive and the only times he raised his arm was when he was gesturing with his hand holding a cigarette and commenting that he needed to light his cigarette.
101. I do not consider that Mr CJ's behaviour was inflaming other detainees. In the minutes leading up to Mr CJ opening his room door, the bodycam footage shows three other detainees had already opened their room doors to ask questions about why they had to stay in their rooms and about the riot gear. Other detainees were also already yelling and swearing from their rooms, with one detainee repeating, 'I can't breathe', in a way that appeared to be invoking the Black Lives Matter slogan, from the last words of Eric Garner

when placed in a chokehold by a New York City Police officer. CCTV footage of the corridor also shows that once Mr CJ opened his door and was speaking with the ERT officers, no other detainees opened their doors until the ERT officers began to escort Mr CJ away.

102. I do not consider that Mr CJ's behaviour at his room door warranted the decision to escort him from his room to Shaw HCA. Mr CJ had initially complied with Serco instructions to return to his room during the AFP operation. He opened his room door when ERT officers stood outside his room while three other ERT officers went to speak to a detainee down the corridor. In asking how much longer he needed to stay in his room, he was clearly frustrated and agitated, and spoke in a heightened manner. However, the footage does not show Mr CJ engaging in physical aggression towards the ERT officers or other detainees, nor attempting to leave his room. The AFP operation also did not appear to be taking place in the vicinity of his room and therefore Mr CJ does not appear to be disrupting the AFP operation.
103. I consider that the decision to use EEP to remove Mr CJ from his room and take him to Shaw HCA was not necessary and appropriate in the circumstances. The ERT officers did not sufficiently attempt conflict resolution through negotiation and de-escalation as required by the Department's DSM. The ERT officer team leader and ERT officer 2 had only been speaking to Mr CJ for about one minute. Though he had not shut the door to his room and he was still standing at his doorway, he had made no attempt to leave his room. It appears that the command to escort Mr CJ from his room came from the incident controller at the emergency command centre, and I consider it unlikely that the incident controller could have adequately assessed the situation through CCTV footage. The Commission requested all relevant CCTV footage and based on the CCTV footage provided to the Commission, the incident controller could not see Mr CJ at his door. They could only see the ERT officers surrounding his door (see Figure 3 above). CCTV footage also does not contain audio, although in response to my preliminary view the Department said that the incident controller had audio from the communication line with responding ERT officers when the decision to move Mr CJ was made. I consider that the decision to remove Mr CJ from his room by placing him in EEP caused the situation to escalate into an avoidable use of force and increased the risk of harm to Mr CJ and others. Other communication, negotiation and conflict de-escalation strategies could and should have been attempted beyond the brief attempt to de-escalate by ERT officer 2. While the ERT officers remained calm in their voice and manner during their interaction with Mr CJ, the presence of multiple officers in riot gear and the decision to

pursue use of force action created threatening undertones that heightened the situation.

104. In its response to the preliminary view, the Department reiterated that the role of the ERT officers, referred to in their response as Facilities and Detainee Service Provider (FDSP) officers, was to conduct crowd control and ensure all detainees remained in their rooms during the AFP led operation. It said that it was due to the nature of the operation that all FDSP officers involved 'were required to wear personal protective equipment to ensure preparedness in the context of their safety and wellbeing'.

105. The Department further reiterated the following:

Mr [CJ] demonstrated behaviours that posed a risk to the safety of the operation, which included his escalating displays of non-compliance, by way of repeatedly arguing against the lawful direction of FDSP officers that all detainees must remain within their accommodation. Mr [CJ] became verbally abusive, distracting FDSP officers attending to him while inappropriately demanding to leave his accommodation for a cigarette. The Department advises the Commission that smoking indoors within an immigration detention facility is strictly prohibited and in addition to the need to ensure the safe and secure execution of the operation, it would be inappropriate to have allowed Mr [CJ] to exit his accommodation to light a cigarette and return to his accommodation.

106. The Department disputes the Commission's preliminary view that Mr CJ was not trying to leave his accommodation and maintain that his continued persistence arguing his desire for a cigarette was a clear indication of his intention to leave his accommodation despite the lawful direction of the FDSP officers. His behaviour was therefore deemed a risk to the AFP's operation and was said to pose a potential threat to the safety and security of the facility.

107. I accept that Mr CJ had opened his door and was requesting to leave his room for a cigarette, but he did not attempt to rush out of his room, as was recorded in the incident reports. I also do not consider that he was 'persistently' arguing nor that his behaviour demonstrated an intention to leave his room as the conversation took place over merely a minute. Having considered the additional submissions from the Department, I am of the view that other communication, negotiation and conflict de-escalation strategies could and should have been attempted, and may have resolved the situation without a need to remove Mr CJ from his room.

(b) *Use of force incident*

108. While Mr CJ was escorted from his room in EEP, an incident occurred that resulted in the use of force on Mr CJ, including ground-stabilising and the use of mechanical restraints. ERT officers allege that Mr CJ attempted to resist their escort by pulling away and striking ERT officer 2 in the head with his elbow. On the bodycam footage after the incident, you can also hear ERT officer 2 make the comment in the escort van that Mr CJ elbowed him in his face. CCTV footage shows Mr CJ's right shoulder dropping forward as he goes up a short set of stairs and ERT officer 2 losing grip of his arm. It is unclear if Mr CJ dropped his shoulder on purpose, or if he tripped on the stairs and fell forward. I consider that at the time when the ERT officer's hold of Mr CJ first slipped, Mr CJ may have been trying to break free. After the ERT officer lost his grip, Mr CJ appears to attempt to further shrug off the ERT officer's hold before he is brought to the ground for ground-stabilising. It does not appear from the footage, however, that Mr CJ was attempting to strike the ERT officer. Further, at all times, he was still restrained by another officer.
109. The Department's response to the preliminary view maintains that the unplanned use of force was used as a last measure and was proportionate to Mr CJ's escalating non-compliance, the risk posed and at the point when EEP became ineffective. The Department considers that the FDSP officers attempted to verbally engage with Mr CJ and de-escalate his non-compliant behaviour while on escort.
110. I find, however, that the force used to ground stabilise Mr CJ was not used as a last resort and therefore was not necessary and appropriate. It was open to the ERT officers to warn Mr CJ that they would restrain him if he was not going to be compliant, instead of going straight to their use of force. The ERT officers did not attempt to reestablish the EEP hold or direct Mr CJ to hold still before immediately bringing him to the ground. The technique used to bring Mr CJ to the ground appears to have used significant force to propel his body forward and down. It resulted in Mr CJ being held down on the ground by up to four ERT officers, his arms pulled back and his legs secured in a 'figure of four' leg lock. I consider the manner in which the ERT officers first used force may have escalated the physicality of the situation and the risk of harm to Mr CJ and others.
111. Once on the ground, Mr CJ appears to begin struggling while calling out what sounds like, 'you break my hand'. It takes almost a minute for the ERT officer to place handcuffs on Mr CJ and required the ERT team leader to come over to assist. I find that the decision at this point to restrain Mr CJ to be reasonable in light of his physical resistance on the ground following the initial use of force.

112. I find that the application of mechanical handcuffs for approximately eight minutes was reasonable, necessary and proportionate, given Mr CJ's resisting and lack of compliance with directions once force was used.
113. Based on the bodycam and CCTV footage, however, it appears that once restrained, Mr CJ was calm, compliant and no longer resisting the ERT officers. Having reviewed the bodycam footage, I do not accept that Mr CJ attempted to stand up in the escort van and had to be told to sit down. Once restrained, Mr CJ was calm and compliant in the van. The ERT officers, however, kept speaking to Mr CJ, saying to him, 'I told you so many times half an hour just stay there and it would be finished', and 'you want to act all tough'. Mr CJ did not initiate conversation. He only responded to the ERT officers, and it is likely he would have remained quiet had they not engaged with him.
114. I find that the manner in which Mr CJ was escorted in handcuffs, with his arms forced up and his head forced down, required more force than was necessary, once Mr CJ had been restrained. I also find that the manner in which Mr CJ was subject to the fold restraint once in his room at Shaw HCA before his handcuffs were removed to be excessive and unnecessary.

### **7.3 Injuries and conclusion**

115. I find that, for the most part, the injuries complained of by Mr CJ were caused by the use of force by the ERT officers. The four lacerations to Mr CJ's body were caused by the ERT officers tackling Mr CJ to the ground and applying the mechanical restraints.
116. I also consider that the injury to Mr CJ's left elbow was caused by the use of force, most likely from the manner in which his left arm was rotated and used to hold his body to the ground. The bodycam footage shows Mr CJ crying out in pain as the ERT officer holds his left arm in a tight lock behind his back and holding him to the ground while the other ERT officer attempts to secure his right arm in restraints. Subsequent IHMS records and physiotherapy documents show ongoing pain in Mr CJ's left elbow and the epicondylitis diagnosis.
117. Mr CJ, in his complaint, refers to a shoulder injury. Based on the medical records before me, I have no evidence that Mr CJ has a shoulder injury. I note, however, that although his complaint refers to his shoulder, all contemporaneous records, including IHMS records, make clear that Mr CJ's main complaint on the day of, and in the weeks following the use of force incident, related to his left elbow.
118. The Department's response to the preliminary view stated that injuries incurred should not be attributed to excessive use of force as there is an

increased risk of injury to both detainees and officers when there is non-compliant behaviour.

119. Despite this response, I find that the techniques used to restrain Mr CJ, viewed as a whole, were disproportionate and not properly executed so as to prevent injury. Further de-escalation techniques should have been used before resorting to the EEP escort and subsequent use of force.
120. I find that the use of force was inconsistent with and contrary to Mr CJ's right under article 10 of the ICCPR to be treated with humanity and with respect for his inherent dignity. I do not consider, however, that the use of force rises to the threshold required to establish a breach of article 7 of the ICCPR.

## **8 Recommendations**

121. 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 a notice on the respondent setting out its findings and reasons for those findings.<sup>29</sup> The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.<sup>30</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.<sup>31</sup>

### **8.1 Training**

122. The Department states in its response to the preliminary view that FDSP officers exercise their powers according to 'clear risk-based policy guidance, training and decision making by senior officers to maintain the objective of safe, secure and sustainable immigration detention facilities for all detainees, staff and visitors'.
123. The Department further states that the decision to move Mr CJ from his room was made taking into account various observed risk factors.
124. The Commission understands that there is specific ERT training required for Serco officers to be ERT qualified, which includes conflict de-escalation, communication and use of force techniques.<sup>32</sup>
125. I found above that the ERT officers involved in the incident with Mr CJ did not adequately engage in communication, negotiation and conflict de-escalation strategies with Mr CJ. I therefore do not consider that they made sufficient use of their training, but instead contributed to and escalated the situation.



126. The Commission recommends refresher training for Serco officers with a focus on communication and conflict de-escalation skills.

### **Recommendation 1**

The Department and Serco ensure that officers who may be required to use force in their roles be appropriately and periodically trained with an emphasis on communication, negotiation and conflict de-escalation strategies as alternatives to the use of force.

## **8.2 Incident reports**

127. It is a requirement that all use of force incidents are reported. Incidents therefore generate incident reports from each Serco officer involved.
128. It was noted above that there were some inconsistencies between the incident reports and video footage made available. For example, the ERT officer 3 report states that Mr CJ tried to 'rush' out of his room, but video footage does not support that. Mr CJ was asking to leave his room but did not make any move out of it. An Incident Detail Report (incident number 1-IQ1E810) created by the Facilities Operations Manager states that Mr CJ tried to run towards the AFP staff, before the ERT officers used force in the form of ground stabilising techniques. This is also not supported by video footage.
129. After an incident, there appears to be a review and checklist that is done by Serco to check the quality and completeness of incident reports called the 'Post Incident Review'. The Commission supports thorough reviews of incidents to ensure accurate reporting. The document includes a brief description of the incident, cause and contributing factors, analysis and evaluation of actions taken, identifying gaps and recommendations, and has a checklist confirming the following:
- a. Verbal report within timeframe (critical and major)
  - b. Written report within timeframe
  - c. Participants and witnesses
  - d. Date and time
  - e. Location
  - f. Detailed description of events
  - g. Correct incident category and type assigned
  - h. Actions taken

- i. Agencies notified
  - j. Comments on any failures, or positive qualities of the report
130. It is of concern that in Mr CJ's situation, the Post Incident Review has incorporated the inaccurate description of Mr CJ running towards AFP staff in its summary of the incident.
131. There is nothing in the Post Incident Review to suggest that available video footage from body cameras or CCTV footage is reviewed.
132. The Commission recommends that the Department and Serco incorporate into its post incident review checklist, an indicator of whether or not video footage of the incident was reviewed in preparing the report. The Commission does not suggest that footage must be reviewed for every incident, but it would be useful for the report to explicitly advert to whether or not footage was reviewed.
133. Further, where additional evidence such as video footage casts doubt on the veracity of contemporaneous incident reports, this should be noted in the post incident report and raised with the officers involved.

### **Recommendation 2**

The Commission recommends that the Department request Serco to update its 'Post Incident Review' template form to include a requirement to identify whether:

- a. body worn cameras had been turned on for the incident (and if not, why not)
- b. any footage (CCTV and/or body worn camera) of the incident was available
- c. if footage was available, whether it was viewed in the course of the review process.

### **Recommendation 3**

Where available evidence, such as video footage, suggests that a contemporaneous incident report was inaccurate, this should be raised with the officer creating the incident report as part of ordinary performance management.

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

134. On 8 April 2024, I provided the Department with a notice of my findings and recommendations.
135. On 19 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, articles 7 and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

### **Recommendation 1 - Accepted - already addressed**

*The Department and Serco ensure that officers who may be required to use force in their roles be appropriately and periodically trained with an emphasis on communication, negotiation and conflict de-escalation strategies as alternatives to the use of force.*

The Department accepts and has already addressed recommendation one.

The Department contracts the provision of garrison, facilities management, security, transport and escort and detainee welfare and engagement services to the Facilities and Detainee Service Provider (FDSP). FDSP officers hold and maintain a security accreditation provided by a registered training organisation and are trained in maintaining the safety and security of detainees, staff and visitors and the Immigration Detention Network (IDN).

All FDSP officers in detainee facing roles undertake a mandatory Initial Training Course (ITC) on commencement of their employment with the FDSP. The ITC covers all aspects of use of force utilising theory sessions and practical application of use of force techniques. Following the ITC, officers complete annual Ongoing Security Training. This training ensures that FDSP officers understand that use of force and/or restraint should be proportionate to the situation, objectively justifiable and only used as a measure of last resort. The current training package encompasses communication, negotiation and conflict de-escalation strategies which are assessed annually.

All officers working in the IDN must abide by a code of conduct. Allegations of staff misconduct are investigated and any cases that may involve criminal,

corrupt and/or serious misconduct are referred to Police, or to the Department's Integrity and Professional Standards.

### **Recommendation 2 - Accepted - already addressed**

*The Commission recommends that the Department request Serco to update its 'Post Incident Review' template form to include a requirement to identify whether:*

- a. *body worn cameras had been turned on for the incident (and if not, why not)*
- b. *any footage (CCTV and/or body worn camera) of the incident was available*
- c. *if footage was available, it was viewed in the course of the review process.*

The Department accepts and has already addressed recommendation two.

On 4 April 2024, the Australian Border Force (ABF) provided written correspondence to the FDSP regarding the use of body worn cameras (BWCs) within the IDN. This correspondence included the request that the FDSP update its Post Incident Review (PIR) template form to identify the following:

- d. BWC has been turned on for the incident (if not, why?)
- e. If any footage was available of the incident (CCTV and/or BWC)
- f. If footage was available, whether it was viewed in the course of the PIR process.

On 15 April 2024, the FDSP advised the ABF, in writing, that they are currently in the process of replacing their case management system. The FDSP intends to make the necessary requested amendments to the PIR template as part of development/implementation of their new case management system. The FDSP will cover these aspects in a free text field in the current PIR template as an interim measure until the new system is implemented.

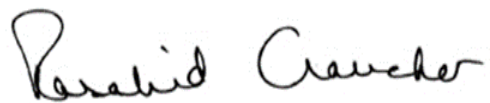
### **Recommendation 3 - Accepted - already addressed**

*Where available evidence, such as video footage, suggests that a contemporaneous incident report was inaccurate, this should be raised with the officer creating the incident report as part of ordinary performance management.*

The Department accepts and has already addressed recommendation three.

The ABF conducts monthly performance reviews at each immigration detention facility which identifies and addresses any inconsistencies or inaccurate FDSP reporting information; where appropriate, a financial abatement or penalty may be applied under existing contractual mechanisms.

136. I report accordingly to the Attorney-General.

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

Emeritus Professor Rosalind Croucher AM FAAL

**President**

Australian Human Rights Commission

July 2024

## Endnotes

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- <sup>1</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) articles 7 and 10.
- <sup>2</sup> See the definition of ‘human rights’ in s 3(1) of the Australian Human Rights Commission Act 1986 (Cth).
- <sup>3</sup> See *Secretary of the Department of Defence v Human Rights and Equal Opportunity Commission, Burgess & Ors* (1997) 78 FCR 208.
- <sup>4</sup> UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.9 (10 April 1992) 1 [3].
- <sup>5</sup> 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*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/845/1998 (26 March 2002) (*Kennedy v Trinidad and Tobago*); UN Human Rights Committee, *Communication No 684/1996*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) (*R.S. v Trinidad and Tobago*).
- <sup>6</sup> [2007] NZSC 70.
- <sup>7</sup> [2007] NZSC 70, [79]. This decision considered provisions of the New Zealand Bill of Rights which are worded in identical terms to articles 10(1) and 7(1) of the ICCPR.
- <sup>8</sup> United Nations Office on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) (*The Nelson Mandela Rules*).
- <sup>9</sup> 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, 6<sup>th</sup> Comm, 43<sup>rd</sup> sess, 76<sup>th</sup> plen mtg, Agenda Item 138, UN Doc A/43/49 (9 December 1988) Annex.
- <sup>10</sup> UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.9 (10 April 1992) [5].
- <sup>11</sup> UN Human Rights Committee, *Views: Communication No. 458/1991*, 51<sup>st</sup> sess, UN Doc CCPR/C/51/458/1991 (21 July 1994) 11 [9.3] (*Mukong v Cameroon*); UN Human Rights Committee, *Views: Communication No. 632/1995*, 60<sup>th</sup> sess, UN Doc CCPR/C/60/D/632/1995 (18 August 1997) 6 [6.3] (*Potter v New Zealand*). See also, UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United States of America*, UN GAOR, 50<sup>th</sup> sess, Supp No 40, UN Doc A/50/40 (3 October 1995) 55 [285], 57 [299].
- <sup>12</sup> UN Human Rights Committee, *Views: Communication No. 868/1999*, 79<sup>th</sup> sess, UN Doc CCPR/C/79/D/868/1999 (30 October 2003) 12 [7.3] (*Wilson v Philippines*).
- <sup>13</sup> UN Human Rights Committee, *Views: Communication No. 1020/2001*, 78<sup>th</sup> sess, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003) at 15 [7.2] (*Cabal and Bertran v Australia*).
- <sup>14</sup> See for example, Australian Human Rights Commission, *Use of force in Immigration Detention* [2019] AusHRC 130 (Report, May 2019); Australian Human Rights Commission, *Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention* (Report, April 2006).
- <sup>15</sup> Australian Human Rights Commission, *Use of force in Immigration Detention* [2019] AusHRC 130 (Report, May 2019) 28-31.
- <sup>16</sup> 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.

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- <sup>17</sup> 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.
- <sup>18</sup> Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [4].
- <sup>19</sup> Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [5].
- <sup>20</sup> Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [5].
- <sup>21</sup> Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [7].
- <sup>22</sup> Department of Immigration and Border Protection, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [4].
- <sup>23</sup> Department of Immigration and Border Protection, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [5].
- <sup>24</sup> Department of Immigration and Border Protection, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [5].
- <sup>25</sup> Department of Immigration and Border Protection, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [5].
- <sup>26</sup> Australian Human Rights Commission, *Use of force in Immigration Detention* [2019] AusHRC 130 (Report, May 2019) 31-34.
- <sup>27</sup> Department of Immigration and Border Protection, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [7].
- <sup>28</sup> 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 3.9(a)(i).
- <sup>29</sup> *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') s 29(2)(a).
- <sup>30</sup> AHRC Act, s 29(2)(b).
- <sup>31</sup> AHRC Act, s 29(2)(c).
- <sup>32</sup> Serco, *Policy & Procedure Manual – Emergency Response Team* (11 November 2022) [5.2].