



Australian
Human Rights
Commission

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

[2024] AusHRC 155

January 2024

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Report into use of force and arbitrary interference with family

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

Mr KX complains that the Department breached his human rights by transferring him from Melbourne Immigration Transit Accommodation (MITA) to Yonga Hill Immigration Detention Centre (YHIDC) without notice and by using force, contrary to his right to be treated with humanity and with respect for his inherent dignity under article 10 of the *International Covenant on Civil and Political Rights* (ICCPR). Mr KX also complains that his transfer to YHIDC arbitrarily interfered with his family and his family life, contrary to articles 17 and 23 of the ICCPR.


As a result of this inquiry, I have found that the Department's decision to transfer Mr KX from MITA to YHIDC, without notice and involving the use of force, was inconsistent with, or contrary to, articles 10, 17 and 23 of the ICCPR.

Pursuant to s 29(2)(b), I have included three recommendations to the Department.

On 10 November 2023, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 19 December 2023. That response can be found in Part 9 of this report.

I enclose a copy of my report.

Yours sincerely,



Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

January 2024

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1 Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint made by Mr KX against the Commonwealth of Australia, specifically the Department of Home Affairs (Department). This inquiry has been undertaken pursuant to s11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr KX's complaint relates to his transfer from Melbourne Immigration Transit Accommodation (MITA) to Yongah Hill Immigration Detention Centre (YHIDC). Mr KX complains about the use of force during the transfer, the provision of medical care afterwards, and the separation of his family that was caused by the transfer. He complains that these events constituted a breach of his human rights under Articles 7, 10, 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR).
3. Mr KX is an Iraqi refugee. He arrived in Australia on 13 August 1999 and was granted a permanent protection visa. He has complex mental and physical health needs.
4. On 23 August 2018, Mr KX's protection visa was mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) (Migration Act). He became an unlawful non-citizen and was detained at Villawood Immigration Detention Centre (VIDC). He was then transferred to MITA. His partner and stepchildren, aged 7, 9 and 11, moved to Melbourne to be closer to him.
5. On 27 September 2020, Mr KX was transferred to YHIDC, involuntarily and without notice. During the transfer, the Department used a range of force to restrain him, including mechanical and chemical measures.
6. Mr KX was assessed by an IHMS nurse later that evening, and then assessed by a doctor two days later.
7. The Department's decision to transfer Mr KX to YHIDC, involuntarily and without notice, involved the planned use of force on a detainee with existing mental and physical vulnerabilities, against medical advice.
8. This document comprises a notice of my findings in relation to this inquiry as required by s 29 of the AHRC Act and my recommendations to the Commonwealth.

2 Summary of findings and recommendations

9. As a result of the inquiry, I find that the following act of the Commonwealth is inconsistent with, or contrary to, articles 10, 17 and 23 of the ICCPR:

The Department's decision to transfer Mr KX from MITA to YHIDC, without notice and involving the planned use of force.

10. I find that the following act of the Commonwealth did not constitute a breach of Mr KX's rights under the ICCPR:

The provision of medical care to Mr KX by the Department following the use of force.

11. Section 8 of this report sets out the recommendations that I make to the Commonwealth as a result of this inquiry. They are as follows:

Recommendation 1

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

Recommendation 2

The Commission recommends that the Department explore placement options within the immigration detention network that would allow Mr KX to be detained in a facility where his partner and children could reasonably be able to visit him.

Recommendation 3

The Commission recommends that a Departmental policy is created to require Departmental officers to document their consideration of a detainee's welfare and family connections when making decisions in relation to the placement of detainees that may interfere with their family relationships. This Policy should require Departmental officers to document their consideration of a child's best interests with respect to all decisions which may affect a child including the placement of their parent within the immigration detention network.

3 Background

12. Mr KX arrived in Australia from Iraq on 13 August 1999 as an unauthorised maritime arrival. He was granted a permanent protection visa on 11 November 1999.
13. On 23 August 2018, Mr KX's AZ-866 visa was mandatorily cancelled under s 501(3A) of the Migration Act due to a conviction for contravening an Apprehended Violence Order (Domestic) for which he was sentenced to three years imprisonment, with a non-parole period of 18 months. The protected person on the AVO was not his current life partner.
14. Mr KX became an unlawful non-citizen on 24 August 2018. On 19 February 2019, upon release from custody, he was detained under s 189(1) of the Migration Act and transferred to VIDC.
15. On 15 January 2020, Mr KX was transferred from Villawood to MITA. His partner and stepchildren moved from NSW to Melbourne to be closer to him.
16. Mr KX suffers from a variety of physical health issues and psychiatric conditions, including chronic PTSD. He reports that he has a history of torture and trauma in Iraq. He has been classified by the Department as an 'extreme risk' detainee with a history of violent, non-compliant and aggressive behaviour.
17. On 27 September 2020, Mr KX was transferred, involuntarily and without notice, from MITA to YHIDC. The transfer involved the use of force, both planned and unplanned.
18. After the transfer, Mr KX's partner moved temporarily to Western Australia to be closer to him. However, she found it extremely difficult to find housing in or near Yongah Hill and to be separated from their children, who stayed in Melbourne with their aunt. Mr KX has not seen his stepchildren in many months, and complains that the transfer has had a significant negative impact on his wellbeing, his family and his marriage.

3.1 The decision to transfer

19. The Department says that due to 'behavioural concerns and his significant destabilising influence within MITA', Mr KX's ongoing placement there was no longer appropriate.¹ The Department also stated that all placement decisions are part of a process of assessing and minimising risk to detainees, service providers, visitors and staff.²

20. Detainees are assessed on a case-by-case basis to determine risk profiles, using a Security Risk Assessment Tool (SRAT). The Department says that decisions about detainee placement within the immigration detention network are guided and supported by the SRAT.³ According to the Department, appropriate placement decisions also take into account welfare issues – such as keeping families intact, recognising community links, health and welfare needs.⁴
21. The Department has provided a copy of Mr KX’s SRAT, which includes a list of incidents involving Mr KX while in detention. The incident history encompasses Mr KX’s entire time in immigration detention, and includes 85 incidents recorded during the period from 15 January 2020 until 15 September 2020 while he was in transit to, or placed at, MITA. The incidents comprise the following:
- Two critical incidents – both described by the Department as allegations of sexual assault. One of these lists Mr KX as the victim, and the other says that another detainee noted on a complaint form that Mr KX made ‘unwarranted sexual comments towards him’.
 - 26 major incidents – these included the unplanned use of force against Mr KX due to abusive, aggressive or non-compliant behaviour, the planned use of force during escorts, actual and threatened self-harm, and occasions where he was held in high care observation accommodation.
 - 57 minor incidents – these mostly included the possession of contraband or abusive or aggressive language or behaviour directed towards officers or other detainees. Some incidents included minor disturbances such as covering a camera, taking his shirt off in an aggressive manner, or demanding that medical staff give him eye drops.
22. Under the heading ‘temporary override comments’, the SRAT states that ‘Mr KX continues to be involved in behaviours that actively contributes to the destabilisation of the security environment wherever he is accommodated. This includes the regular manufacture of weapons, drug trafficking and the targeting of staff with whom he has grievances against.’

3.2 Planned use of force

23. Mr KX was classified as an extreme risk detainee with a long history of violent, non-compliant and abusive behaviour.⁵ Prior to the transfer, the

Department undertook an individualised risk assessment for the planned use of force.

24. The Department has provided an IHMS risk assessment for planned use of force (RAPUF) completed on 24 September 2020, in anticipation of the proposed transfer.⁶ On the form, the Clinical Team Leader marked 'yes' to the following statements:
 - a) IHMS advises that a mental health condition does exist and the use of force and restraints may exacerbate mental distress. It is strongly recommended that it NOT be employed.
 - b) IHMS advises that the Detainee is a known survivor of torture and/or trauma and the use of force and restraints may exacerbate trauma symptoms. It is strongly recommended that it NOT be employed.
25. The Department has also provided an 'IHMS Section B: Fitness to Travel' document signed by a doctor on 12 September 2020, stating that Mr KX is fit to travel, but that a 'doctor is required to mitigate the risks of the client acting out with self-harm and to provide medication as required'.⁷
26. In an email dated 25 September 2020, Serco sought approval from the MITA Australian Border Force Superintendent for the planned transfer and use of force, and the proposed risk mitigation strategies. Next to Mr KX's name, there is a note of the IHMS advice strongly recommending not to employ the use of force or restraints due to Mr KX's mental health concerns and history of trauma and torture.⁸ The proposed mitigation strategy was noted as 'SureLock Restraints to be applied prior to departing the centre and remain applied for the duration of the escort. EEP (enhanced escort position) to be applied throughout all unsecure areas of the escort and line of sight to be maintained for the duration of the escort.'
27. The Department has explained that the SureLock Restraint system is a 'body belt with arm restraints that can allow freedom of movement'.⁹ The Department has confirmed that the use of the SureLock system on Mr KX was approved by the MITA Australian Border Force Superintendent.
28. IHMS records provided by the Department refer to EEP as a 'procedure where an officer may need to physically touch a Detainee'.¹⁰
29. It appears from the material provided by the Department that the use of restraints was approved for the duration of the escort from MITA to YHIDC. The Serco 'Escort Operational Order' provided by the Department notes that 'mechanical restraints will be applied to the detainees as per attached manifest for the duration of the flight'.¹¹

3.3 Escalation and unplanned use of force

30. The Department has stated that:

Initially the restraints were applied as a risk mitigation strategy to ensure [Mr KX] could be escorted safely throughout unsecured areas of the Airport. However, [Mr KX] became increasingly non-compliant throughout the transfer process with [Mr KX's] behaviour directly resulting in multiple incidents and injury to several escorting officers. On that basis, a decision was made to keep [Mr KX] in restraints until he arrived at Yongah Hill IDC.¹²

31. This statement from the Department appears inconsistent with the Serco Escort Operational Order mentioned above at [29], which suggests that approval was sought for restraints to be applied for the duration of the flight.

32. The Department has provided Escort Observation notes from Detainee Service Officers which note that Mr KX had an altercation with an ERT (Emergency Response Team) officer in the van on the way to the airport. It is noted that he became physically violent, made verbal threats, threatened self-harm and refused to comply with directions. It is also noted that force was used in order to get him from the van to the aircraft and that during the struggle, Mr KX bit two officers. The officer reports that when Mr KX was taken to his seat, he began yelling 'I want my kids' and 'I'm not going anywhere'.¹³

33. The Department says that Mr KX demonstrated 'aggressive and combative' behaviour on the flight.¹⁴ His behaviour is reported to include biting, spitting, hitting his head against the window, threatening self-harm and kicking the airplane window. The Department says he made sexual comments towards the Captain, and disruptive comments to the other detainees.

34. Mr KX was offered oral anxiety medication, which he refused to take. He was then moved to the back of the plane by four Emergency Response Team Officers. The Department says that he continued to make threats of harm to himself and others.

35. At approximately 1.40pm, an IHMS doctor administered Haloperidol to Mr KX by an injection in the leg. Following this, his body belt was adjusted to allow him to sleep, and he moved to his seat, where he was reported to be 'calm, compliant and coherent'.¹⁵ He was then monitored for the duration of the flight. A spit mask was applied as he was taken off the aircraft.

36. After arriving at YHIDC, Mr KX was taken into an interview room where he was required to wait for several hours before being seen by a primary health nurse for a post use-of-force check. The Department says that took place at 9.23pm that evening, which is approximately 8 hours after the administration of the chemical restraint.
37. On 29 September 2020, 2 days after the transfer, Mr KX was reviewed by an IHMS nurse for a welfare check. He reported bruises and scratches and told the nurse that he had vomited blood. Later that day, he was reviewed by an IHMS General Practitioner, to whom he reported dizziness, double vision and pain. No active bleeding was observed and pain relief was provided.
38. On 9 October 2020, Mr KX was again reviewed by an IHMS General Practitioner. Mr KX reported having vomited blood four times since arriving at YHIDC. The doctor assessed him and concluded no obvious medical connection between the issues and the reported events of the transfer.

3.4 Timeline of transfer and medical care

39. The Department has provided detailed incident reports and escort observations setting out what they say occurred during the transfer. The Department has also provided video footage depicting some of the transfer. Below is a timeline of the events as they are presented in the documents.

Date and Time	Event
27 September 2020 6.20am	Mr KX subjected to pat and wand search procedure and placed in SureLock restraint system. ¹⁶
6.50am	Mr KX refused to go, had altercation with ERT, became abusive and aggressive and requested to see ABF officer.
7.15am	Mr KX said that he wasn't feeling well, provided water and assistance by ERT.

	Around this time, Mr KX mentions his blood pressure to the officers and asks several times to see the nurse before they leave. ¹⁷
7.58am	All detainees on coach leaving MITA, Mr KX in chase van vehicle.
8.15am	Arrival at Melbourne Airport Jet Base.
10.00am	Mr KX resisted to get out from van, ERT had to use force to get him to the aircraft. During the struggle, Mr KX bit two officers.
10.07am	Mr KX escorted to seat 22F, refused to sit down and started to shout.
10.50am	Mr KX shouted and made sexual comments.
11:09am	Mr KX shouted in a disruptive manner towards other detainees on the aircraft.
11.12am	Mr KX splashed water on the window.
11.17am	Mr KX appeared to be asleep.
1.26pm	Mr KX awoke and started to attack ERT officers. ERT officers attempted to apply spit hood and escorted Mr KX to the back of the aircraft and placed him in recovery position. During this incident, Mr KX called out 'He's hurting me'.
1.37pm	IHMS doctor and nurse attended.
1.40pm	IHMS doctor administered haloperidol.

1.44pm	Mr KX was escorted back to his seat by ERT officers.
2pm	Mr KX fell asleep.
4.23pm	Aircraft landed at Perth Airport
5.25pm	Mr KX was the last detainee escorted off the aircraft. Around this time, Mr KX was taken into an interview room where he was observed by officers. Mr KX told them things such as 'I need doctor' and 'It's killing me, brother'. ¹⁸
9.23pm	Mr KX assessed by an IHMS primary health nurse.
29 September 2020 1.41pm	Mr KX assessed by an IHMS primary health nurse.
29 September 2020 7.04pm	Mr KX assessed by an IHMS Doctor.
9 October 2020 6.26pm	Mr KX reviewed by an IHMS Doctor.

4 Legal framework for human rights inquiry

4.1 Functions of the Commission

40. 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.
41. 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.

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

4.2 Scope of 'act' and 'practice'

43. 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.
44. 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.
45. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or those acting on its behalf.¹⁹

4.3 What is a human right?

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

5 Act or practice of the Commonwealth

47. I consider the following acts of the Commonwealth as relevant to this inquiry:
- (a) The Department's decision to transfer Mr KX from MITA to YHIDC, without notice and involving the planned use of force.
 - (b) The provision of medical care to Mr KX by the Department following the use of force.

6 Human rights in detention

6.1 Treatment in detention, use of force and provision of medical care

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.

53. Article 10(1) imposes a positive obligation on States to ensure that detainees are treated with humanity and respect for their inherent dignity.²⁰ 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.²¹ In this case, the relevant authority is the Commonwealth of Australia through the Department and the service providers who act on its behalf.

54. 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'.²²

55. 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.²³
56. 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,²⁴ including:
- the *Standard Minimum Rules for the Treatment of Prisoners* (Nelson Mandela Rules),²⁵ and
 - the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).²⁶
57. 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.²⁷ 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.
58. Several of the Mandela Rules are relevant to the safety of detainees in respect of the behaviour of other detainees, and the general security and good order of detention facilities, including the following:
- Rule 1: All prisoners shall be treated with the respect due to their inherent dignity and value as human beings ... the safety and security of prisoners ... and visitors shall be ensured at all times.
- Rule 2: ... prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings.
- Rule 12: ... Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the prison.
- Rule 36: Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well ordered community life.
59. Other rules are relevant to the use of force on detainees by detaining officers. Rule 54(1) of the Mandela Rules provides:

Officers of the institutions 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. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

60. 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.
61. Rule 94 requires that civil prisoners 'shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order'.
62. 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
 - article 10(1) of the ICCPR requires that detainees and prisoners are provided with a minimum of services to satisfy their basic needs.

6.2 Service provider contractual obligations

63. Since November 1997, the provision of detention services has been outsourced by the Department to private organisations.²⁸ The Department's Immigration Detention Facilities and Detainee Services Contract with Serco (Contract) in effect during Mr KX's detention recognises the duty of care owed to detainees and requires that Serco complies with a Code of Conduct.²⁹ The Code of Conduct requires Serco to carry out its duties with care and diligence, maintain a safe working environment and 'be alert for Detainees who are or appear to be,

traumatised and/or vulnerable to self-harm and by the actions of others, and manage and report on these'.³⁰

64. The Contract enumerates several obligations on Serco which are relevant to ensuring the safety of detainees. Under the Contract, Serco is required to:
- provide and maintain a safe and secure environment for detainees,³¹ which also supports their individual health and safety needs³²
 - in exercising its responsibility to allocate accommodation:
 - take into consideration the individual welfare, cultural, family and security related needs and circumstances of the detainee and requests of the detainee³³
 - participate in reviews and notify the Department where it believes that an existing placement is inappropriate for a detainee, including where it believes the Detainee should be moved within the existing Facility or should be transferred to another Facility³⁴
 - immediately report to the Department any concerns that it may have regarding a Detainee's safety and security³⁵
 - establish processes to:
 - promote the welfare of Detainees and create a safe and secure environment at each Facility³⁶
 - prevent detainees being subjected to illegal, anti-social or disruptive behaviour by detecting and managing those behaviours in other detainees³⁷
 - manage and defuse tensions and conflicts before they become serious or violent³⁸
 - identify if a detainee is emotionally distressed or at risk of self-harm or harm to others, ensuring the system accounts for advice from the Detention Health Services Provider and includes risk identification and mitigation strategies.³⁹

65. In relation to the use of force, the Contract provides that:
- (a) The Service provider must:
 - (i) ensure that force is not used unless as a measure of last resort when all other methods have failed or have been assessed as inadequate, and then only with the reasonable level of force necessary to resolve the situation in accordance with directions given by the Department;
 - (ii) ensure that, whenever force is used on Detainees that are frail, elderly or Minors, Service Provider Personnel take all reasonable precautionary measures to ensure the safety of the Detainee that are appropriate to the circumstances of that Detainee;
 - (iii) ensure that Service Provider Personnel who use force are trained and accredited in the use of force in accordance with applicable law;
 - (iv) monitor and control the use of force in each Facility; and
 - (v) ensure that Service Provider Personnel apply the use of force in accordance with applicable law.
 - (b) When the use of force is planned by the Service provider, the Service Provider must:
 - (i) consult with the Detention Health Services Provider prior to using any planned use of force against a Detainee to ensure that no medical reasons preclude the use of force against the relevant Detainee; and
 - (ii) seek the Department's approval for that planned use of force, prior to such force being used against a Detainee.⁴⁰
66. 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.⁴¹
67. The Department has also issued a Detention Services Manual dealing with the use of force. The manual is a procedural instruction that gives policy and procedural guidance to Australian Border Force and Serco officers on the use of force in immigration detention facilities (IDFs). The following principles, taken from the manual, are consistent with the Commonwealth's human rights obligations in relation to the use of force on detainees in their care:

- **there is a presumption against the use of force**, including restraints, during movements within an IDF, transfers between IDFs, and during transport and escort activities outside of IDFs
- conflict resolution through **negotiation and de-escalation, where practicable, must be considered** before the UoF and/or restraint is used
- UoF and/or restraint should **only be used as a last resort**
- the amount of force used and the application of restraints **must be reasonable**.⁴²

[emphasis in original]

68. As described in the Department's Detention Services Manual, both the Department and 'facilities detention service providers (FDSPs)' such as Serco owe a duty of care to all persons in all types of held immigration detention. This means that they are legally obliged to exercise reasonable care to prevent detainees from suffering reasonably foreseeable harm.⁴³ The Department's duty of care is non-delegable, which means that it cannot be delegated or transferred to anyone else.⁴⁴
69. When the Department contracts out the provision of services to people in held detention to third parties, the Department has a responsibility to ensure the contracted service providers are qualified and can meet the standards outlined in the contract. 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 does not substitute, the Department's duty of care responsibilities.⁴⁵
70. 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.⁴⁶ As noted above, these international standards require that detainees are treated fairly and reasonably within the law and that conditions of immigration detention ensure the inherent dignity of the human person.
71. The Department has also provided an IHMS Practice Guideline in relation to Severe Behavioural Disturbances, which sets out the general principles regarding sedation. The guideline states that sedation is used as a clinical intervention of last resort after all other options have been considered and trialled. It further states that parenteral sedation (as opposed to oral

sedation) is only to be used in extreme circumstances and is 'likely to result in subsequent urgent transfer to hospital for assessment and treatment'.⁴⁷

6.3 Arbitrary interference with family

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

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

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

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

74. For the reasons set out in the Australian Human Rights Commission report, *Nguyen and Okoye v Commonwealth* [2007] AusHRC 39 at [80]–[88], the Commission is of the view that in cases alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person's family, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).

7 Findings

7.1 Use of force on 27 September 2020

75. Mr KX complains about the force used during the transfer from MITA to YHIDC on 27 September 2020.

76. As noted above, on 27 September 2020, considerable force was used on Mr KX during the transfer from MITA to YHIDC. This included the planned use of force as approved by the Australian Border Force Superintendent, and the unplanned use of additional force following an escalation during transit. The force used included the prolonged use of body restraints, physical restraint and manoeuvring by multiple officers, and the administration of a chemical restraint without Mr KX's consent.

77. The SureLock restraint system was applied at 6.20am. The information provided by the Department does not specify when the SureLock system was removed. The Department stated in their correspondence dated 25 March 2021 that, 'at 16:20, while within the perimeter of Yongah Hill IDC, restraints

were removed from [Mr KX]'. However, this seems unlikely given that the other material provided by the Department indicates that he was still on the aircraft at this point. The body camera footage provided by the Department indicates that Mr KX was still in the restraint system when he was in the interview room at YHIDC. Accordingly, it appears likely that the Surelock restraint was on from 6.20am until at least 7.30pm that evening, being at least 13 hours.

78. The decision to transfer Mr KX was made by the Department in the knowledge that the transfer would entail the use of force. The Australian Border Force Superintendent approved the use of the SureLock restraint system for 'the duration of the escort'. The Department's decision to proceed with the use of force was made against explicit advice from IHMS that force should not be used on Mr KX because of his physical and mental health conditions and background of torture and trauma. The Department decided to proceed with the transfer in any event without providing Mr KX with any notice.
79. The Commission accepts the submission made by the Department in response to my preliminary view that a health provider cannot direct or make decisions with respect to the use of force or application of restraints on detainees. Any concerns a health provider may have in relation to the use of force should be referred to the ABF Detention Superintendent for consideration and decision. This is because there may be other matters to consider such as safety and the security of the community or the detainee.
80. However, in my view, the Department has not provided sufficient information to show that the transfer, without notice, involving the planned use of force, can be objectively justified.
81. The Department says that due to 'behavioural concerns and his significant destabilising influence within MITA', Mr KX's ongoing placement there was no longer appropriate. The Department commenced seeking the necessary approvals at least 15 days before the transfer.
82. However, the Department has not identified that it explored less restrictive alternatives to a transfer, without notice, involving a planned high level of restraint on a detainee with mental and physical vulnerabilities. For example, the Department has not shown that it explored the option of transferring Mr KX back to Villawood, a facility with high security areas. Mr KX's family were able to reside in NSW and maintain a relationship with him while he was in Villawood. The separation from his family that would result from his transfer to YHIDC was the basis of Mr KX's objection to the transfer. There is no

information before me that the Department considered the separation of family that would result from the transfer and its impact on Mr KX at all. The Department submitted in response to my preliminary view that due consideration was given to Mr KX's family links in considering his transfer from MITA, but no evidence was provided in support of this.

83. Further, the Department has not identified that it explored options with IHMS, considering his physical and mental health conditions. For example, the Department has not identified that it explored with IHMS the option of providing notice to Mr KX in order to reduce the shock of the transfer and see what accommodations could have been made for him. In response to my preliminary view, the Department stated that, where appropriate, detainees should be advised of a decision to move them no later than the day prior to the intended transfer. An operational decision was made to reduce this notification period in the case of Mr KX given the assessed risk he posed. The Department has not indicated that this decision took into consideration Mr KX's mental health conditions, any advice from IHMS, and/or his likely reaction to being transferred away from his family.
84. I am not satisfied that the decision to transfer, involving the planned use of force, can be objectively justified. I do not consider that the planned use of force in these circumstances was a measure of last resort as required by both Serco's contract with the Department, and by the Department's DSM. I am also not satisfied that the decision considered the welfare of Mr KX and his family needs as required by the Serco contract. The Department's decision to proceed with the transfer involving a planned use of force, without notice, led to an escalation and the need for further force including the administration of a chemical restraint without consent. The Department likely anticipated that an escalation may occur during the transfer and further force may be required. In this regard I note the advice provided by IHMS 15 days before the transfer that a 'doctor is required to mitigate the risks of the client acting out with self-harm and to provide medication as required.'
85. In response to my Preliminary View, the Department stated that a decision to transfer a detainee within the immigration detention network is not required to be a 'measure of last resort.' Whilst I accept this is true, I note that the 'act' the Commission is inquiring into is the Department's decision to transfer Mr KX from MITA to YHIDC, without notice and in a manner involving the planned use of force. The planned use of force must be a measure of last resort and I'm not persuaded that it was in the circumstances outlined above.
86. In my view, the decision to transfer Mr KX from MITA to YHIDC, without notice and involving the planned use of force cannot be objectively justified and was not a measure of last resort, and was therefore inconsistent with, or contrary to, Mr KX's rights under Article 10 of the ICCPR

to be treated with humanity and respect for inherent dignity. Although I am concerned by the escalation in the level of force used that was likely anticipated by the Department and led to the involuntary administration of a chemical restraint, I am not persuaded that the level of force used rises to the threshold required to be inconsistent with article 7 of the ICCPR.

87. The Department stated that the decision to administer the chemical restraint, Haloperidol, while on board the flight was a clinical decision relating to the treatment of a severe disturbance, and that it was in line with widely utilised emergency sedation protocols. The Department stated that sedation is used as a medical intervention of last resort to protect the individual and others. Further, the Department stated that the dosage was appropriate 'considering the clinical need'. The Department stated that, prior to the sedation, an attempt to de-escalate the situation was made by the escort doctor who offered Mr KX oral medication, but he refused.
88. I accept that medical intervention to protect Mr KX and others may have been necessary once he was on board the flight. However, had the Department considered options other than a transfer to YHIDC without notice and with planned force, the administration of a chemical restraint may not have been required.

7.2 Provision of medical care

89. Mr KX also complains about the lack of medical care following the use of force. The information provided by the Department shows that physical force was used during the transfer, including the administration of a chemical restraint at 1.40pm. Following this, he was seen by an IHMS nurse at 9.23pm that night, and then seen by an IHMS doctor and a nurse two days later.
90. I am concerned that Mr KX did not see a doctor for 2 days following the use of force, particularly when the force included the administration of a chemical sedative. This is particularly so in light of Mr KX's pre-existing physical and mental conditions, and his repeated insistence throughout the day that he was not feeling well.
91. In my preliminary view, I noted that the provision of medical care appears to be inconsistent with the IHMS Guideline that states that parenteral sedation (as opposed to oral sedation) is only to be used in extreme circumstances and is 'likely to result in subsequent urgent transfer to hospital for assessment and treatment'. In response to my preliminary view, the

Department stated that the IHMS guideline was followed. The Department stated:

Whilst the guideline states the use of parenteral sedation is likely to result in subsequent urgent transfer to hospital for assessment, [Mr KX] was clinically stable throughout the rest of the transfer and urgent transfer to hospital for assessment was not clinically indicated in this instance. The need for transfer to hospital for a medical review was assessed by an appropriately qualified medical escort in line with observation of [Mr KX's] vitals following the administration of the sedative.

92. I accept that Mr KX was monitored by a qualified medical escort for the duration of the flight. I also accept that following his escort from the plane at about 5.30pm he was seen by an IHMS nurse some four hours later at about 9.30pm.
93. In all the circumstances, including that Mr KX was monitored during the flight by a doctor and nurse and saw a nurse again that evening, I am not satisfied that the fact that he did not see a doctor again for 2 days constitutes a breach of his rights under article 10 of the ICCPR.

7.3 Separation from family

94. Mr KX claims that the Department's decision to transfer him from MITA to YHIDC was inconsistent with his rights under articles 17(1) and 23(1) of the ICCPR.'

(a) 'Family'

95. To make out a breach of article 17 of the ICCPR, complainants must be identifiable as a 'family'. The United Nations Human Rights Committee has confirmed that, while the term 'family' is to be interpreted broadly,⁴⁸ an effective family life or family connection must still be shown to exist.⁴⁹
96. For example, in *Balaguer Santacana v Spain*,⁵⁰ after acknowledging that the term 'family' must be interpreted broadly, the United Nations Human Rights Committee went on to say:

Some minimal requirements for the existence of a family are, however, necessary, such as life together, economic ties, a regular and intense relationships, etc.⁵¹

97. Mr KX and his partner met and began their relationship in 2003. They had periods of separation due to family differences, but were united in an islamic marriage ceremony on 8 June 2019. Mr KX has three stepchildren who he has loved and raised as if they were his own. They all lived together as a family prior to Mr KX 's detention.

98. Mr KX's partner and stepchildren moved from NSW to Melbourne to be close to him when he was transferred to MITA. When he was transferred to YHIDC, Mr KX's partner moved temporarily, but struggled with the economic and logistical obstacles of finding permanent housing and being separated from her children.
99. In his complaint before the Commission, Mr KX has on multiple occasions raised concerns about the impact that the ongoing separation from his partner has had on his wellbeing and mental health. He has expressed his grief about being separated from his partner and stepchildren.
100. I am satisfied, on the basis of all of the above, that Mr KX and his partner and stepchildren have a relationship that is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

(b) 'Interference'

101. There is no clear guidance in the jurisprudence of the United Nations Human Rights Committee as to whether a particular threshold is required in establishing that an act or practice constitutes an 'interference' with a person's family. However, in relation to one communication, they appeared to accept that a 'considerable inconvenience' could suffice.⁵²
102. Interpreting the word 'interference' using its ordinary meaning, as explained in the Commission report [2008] AusHRC 39,⁵³ I am satisfied that interference with the family is demonstrated by the Department's transfer of Mr KX from MITA to YHIDC. When Mr KX was in MITA his partner and stepchildren were located in the same State and were able to visit him and maintain a relationship with him. This ended when Mr KX was transferred to YHIDC.

(c) 'Arbitrary'

103. In its General Comment on article 17, the United Nations Human Rights Committee confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the Covenant and is reasonable in the particular circumstances.⁵⁴
104. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness.⁵⁵ In relation to the meaning of reasonableness, the United Nations Human Rights Committee stated in *Toonen v Australia*:⁵⁶

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

105. Whilst the *Toonen* case concerned a breach of article 17(1) in relation to the right of privacy, these comments would apply equally to an arbitrary interference with the family.
106. In *Deepan Budlakoti v Canada*,⁵⁷ the United Nations Human Rights Committee considered the interference caused by removing one family member from a country, stating that:

The relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned, and on the other hand, the degree of hardship the family and its members would encounter as a consequence of such removal.
107. The interference with Mr KX's family was a direct consequence of the decision to transfer him from MITA to YHIDC. The transfer caused a substantial obstacle to maintaining any sense of normal family life and connection, and denied Mr KX the family support network that was important to his wellbeing. In particular, the transfer created logistical and emotional barriers for his relationship and stopped him from being able to see his three stepchildren. Mr KX has consistently expressed his grief about being separated from his partner and stepchildren.
108. In response to my Preliminary View, the Department stated that Mr KX's family links were given due consideration when deciding to transfer him to YHIDC. The Department reiterated that 'where a transfer is required to address a matter of security or good order, or other operational reasons, family links, whilst considered, are not a barrier to transfer'. The Department, however, provided no documents or other evidence to indicate the consideration it gave to Mr KX's family relationships when deciding to transfer him to YHIDC. The Department has also provided no information to suggest that it considered the alternatives to transfer to YHIDC which could have addressed the security concerns whilst maintaining Mr KX's family links.
109. For the reasons set out above, I do not consider that the decision to transfer Mr KX, involuntarily and without notice, has been justified by the department as reasonable and proportionate in all the circumstances. Accordingly, I find that the family separation was also arbitrary and was contrary to Mr KX's rights under Article 17 of the ICCPR.
110. Given my finding that the interference with Mr KX's family life is arbitrary in breach of article 17(1), I find that there has also been a breach of article

23 of the ICCPR in this matter.

8 Recommendations

111. 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.⁵⁸ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.⁵⁹ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.⁶⁰
112. Recommendations for compensation are expressly contemplated in the AHRC Act.⁶¹ In considering the assessment of a recommendation for compensation under section 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.⁶²
113. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.

Recommendation 1

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

Recommendation 2

The Commission recommends that the Department explore placement options within the immigration detention network that would allow Mr KX to be detained in a facility where his partner and children could reasonably be able to visit him.

Recommendation 3

The Commission recommends that a Departmental policy is created to require Departmental officers to document their consideration of a

detainee's welfare and family connections when making decisions in relation to the placement of detainees that may interfere with their family relationships. This Policy should require Departmental officers to document their consideration of a child's best interests with respect to all decisions which may affect a child including the placement of their parent within the immigration detention network.

9 The Department's response to my findings and recommendations

114. On 10 November 2023, I provided the Department with a notice of my findings and recommendations.
115. On 19 December 2023, the Department provided the following response to my findings and recommendations:

The Department of Home Affairs (the department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings identified in this report and the recommendations made by the President of the Commission.

The department does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, articles 10(1), 17(1) and 23(1) of the International Covenant on Civil and Political Rights (ICCPR).

Recommendation 1 -Disagree

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

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

Recommendation 2 - Agree (already implemented)

The Commission recommends that the Department explore placement options within the immigration detention network that would allow Mr KX to be detained in a facility where his partner and children could reasonably be able to visit him.

Mr KX was released from immigration detention on 11 November 2023.

Recommendation 3 - Partially Agree

The Commission recommends that a Departmental policy is created to require Departmental officers to document their consideration of a detainee’s welfare and family connections when making decisions in relation to the placement of detainees that may interfere with their family relationships. This Policy should require Departmental officers to document their consideration of a child’s best interests with respect to all decisions which may affect a child including the placement of their parent within the immigration detention network.

The Department partially agrees with this recommendation.

The Department maintains that endorsed operational policy is already in place which describes the procedure for determining the most appropriate placement option for detainees within the Immigration Detention Network, including record keeping requirements.

All detainee placement decisions are made in consultation with key stakeholders, including the Australian Border Force, Status Resolution, the Facilities and Detainee Services Provider and Detention Health Services Provider to consider all aspects of a detainee’s personal circumstances including, but not limited to the detainee’s health and welfare needs, as well as operational safety and security requirements.

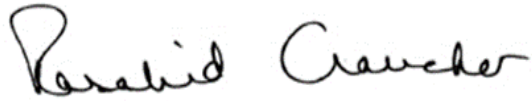
Placement decisions are supported through use of the Detention Placement Assessment. This tool provides transparency and accountability of individual detainee placement decisions, with delegate authorisation required on the decision record.

Detention Services Manual – Procedural Instruction – Detainee placement - Assessment and placement of detainees in an IDF (DM-5126) is currently under review by the ABF; the ABF agrees to consider the Commission’s recommendation as part of this review.

Table 1 - Summary of Department’s response to recommendations

Recommendation number	Department’s response
1	Disagree
2	Agree and already implemented
3	Partially agree

116. I report accordingly to the Attorney-General.

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

January 2024

Endnotes

- ¹ Department of Home Affairs correspondence dated 25 March 2021 OHR-20-00321.
- ² Department of Home Affairs correspondence dated 25 March 2021 OHR-20-00321 at [12]
- ³ Assessment and Placement of Detainees in Immigration Detention Facilities in Australia, Detention Standard Operating Procedure DM-01-O/3248.
- ⁴ Assessment and Placement of Detainees in Immigration Detention Facilities in Australia, Detention Standard Operating Procedure DM-01-O/3248.
- ⁵ Department of Home Affairs correspondence dated 25 March 2021 OHR-20-00321
- ⁶ IHMS Request- Risk Assessment for Planned Use of Force, dated 24/09/2020
- ⁷ IHMS, 'Section B: Fitness to Travel', dated 12/09/2020.
- ⁸ Email dated 25/09/2020, subject "FW:SENSITIVE-CHARTER REMOVAL – MR OR ALTERNATIVE RISK MITIGATION/ESCORT APPROVAL – 27 SEP 20 [SB].
- ⁹ Department of Home Affairs correspondence dated 25 March 2021 OHR-20-00321
- ¹⁰ Risk Assessment for Planned Use Of Force by FDSP Procedure, IHMS Procedure 3.5.2, Effective 12 June 2017.
- ¹¹ SERCO Escort Operational Order.
- ¹² Department of Home Affairs correspondence dated 25 March 2021 OHR-20-00321
- ¹³ Serco, Transport and Escort documents.
- ¹⁴ Department of Home Affairs correspondence dated 25 March 2021 OHR-20-00321.
- ¹⁵ Department of Home Affairs correspondence dated 25 March 2021 OHR-20-00321 at [10].
- ¹⁶ SERCO Escort Operational Order.
- ¹⁷ AXON_Body_2_Video_2020-09-27_0734- AXON BODY 2 X81262784.
- ¹⁸ AXON_Body_2_Video_2020-09027_0718- AXON BODY 2 X81144003.
- ¹⁹ See *Secretary, Department of Defence v HREOC, Burgess and Ors* (1997) 78 FCR 208.
- ²⁰ Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
- ²¹ Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
- ²² Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel, 2nd ed, 2005) 250.
- ²³ Human Rights Committee, *Walker and Richards v Jamaica*, Communication No. 639/1995, UN Doc CCPR/C/60/D/639/1995 (28 July 1997); Human Rights Committee, *Kennedy v Trinidad and Tobago*, Communication No 845/1998, UN Doc CCPR/C/74/D/845/1998 (26 March 2002); Human Rights Committee, *R.S. v Trinidad and Tobago*, Communication No 684/1996, UN Doc CCPR/C/74/D/684/1996 (2 April 2002).
- ²⁴ Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/ Rev.1 at 33 (10 April 1992) [5].
- ²⁵ 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).
- ²⁶ 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.
- ²⁷ 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,

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- 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.
- ²⁸ Allen Hawke and Helen Williams, *Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre*, 31 August 2011 (Hawke-Williams Report), p 79. Available at: <http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/independent-review-incident-christmas-island-villawood-full.pdf#search=hawke%20williams%20report> (viewed 19 April 2017).
- ²⁹ Immigration Detention Facilities and Detainee Services Contract between the Commonwealth of Australia and Serco Australia Pty Ltd dated 10 December 2014 (Serco Contract), cl 13(a) and (b), 3.9.
- ³⁰ Serco Contract, cl 2.4(a)(vi) of Annexure C to Schedule 2 (Code of Conduct).
- ³¹ Serco Contract, cl 1.1(a), 3.1(a)(i) and 3.6(a) of Section 4 of Schedule 2 (Security Services); cl 7(a) of Section 2 of Schedule 2 (Garrison Services).
- ³² Serco Contract, cl 6(b) of Section 2 of Schedule 2 (Garrison Services); cl 1.2(d) and 7.1(a) of Section 6 of Schedule 2 (Welfare and Engagement Services).
- ³³ Serco Contract, cl 6.12(a) and (b)(i) and (iii) of Section 6 of Schedule 2 (Welfare and Engagement Services).
- ³⁴ Serco Contract, cl 6.13 of Section 6 of Schedule 2 (Welfare and Engagement Services).
- ³⁵ Serco Contract, cl 3.6(d) of Section 4 of Schedule 2 (Security Services).
- ³⁶ Serco Contract, cl 1.2(e) of Section 6 of Schedule 2 (Welfare and Engagement Services).
- ³⁷ Serco Contract, cl 7.1(a)(iii), 7.9(a)(ii) and 7.10(a) of Section 6 of Schedule 2 (Welfare and Engagement Services).
- ³⁸ Serco Contract, cl 7.9(a)(i) of Section 6 of Schedule 2 (Welfare and Engagement Services).
- ³⁹ Serco Contract, cl 7.13(a) of Section 6 of Schedule 2 (Welfare and Engagement Services).
- ⁴⁰ 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.
- ⁴¹ 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.
- ⁴² Department of Home Affairs, *Detention Services Manual – Safety and security management – Use of force*, 10 October 2018, p 4.
- ⁴³ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) at [4].
- ⁴⁴ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) at [5].
- ⁴⁵ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) at [5].
- ⁴⁶ Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) at [7].
- ⁴⁷ Practice Guideline, Severe Behavioural Disturbances, International Health and Medical Services, Practice Guidelines.
- ⁴⁸ UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy) The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.1 (8 April 1988) 1–2 [5]; UN Human Rights Committee, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 39th sess, UN Doc HRI/GEN/1/Rev.1 (27 July 1990) 1 [2]; UN Human Rights Committee, *Views: Communication No 201/1985*, 33rd sess, UN Doc CCPR/C/33/D/201/1985 (27 July 1988) [10.3] (*Hendriks v Netherlands*).

- ⁴⁹ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press, 2013) 670.
- ⁵⁰ *Communication No 417/1990*, UN Doc CCPR/C/51/D/417/1990(1994).
- ⁵¹ *Ibid* [10.2]. See also *AS v Canada, Communication No 68/1980*, UN Doc CCPR/C/OP/1 at 27 (1985), where the UN Human Rights Committee did not accept that the author and her adopted daughter met the definition of 'family' because they had not lived together as a family except for a period of 2 years approximately 17 years prior.
- ⁵² *Mauritian Women v Mauritius*, Communication No 35 of 1978, UN Doc CCPR/C/OP/1 at 67 (1985) at [9.2(b)].
- ⁵³ Human Rights and Equal Opportunity Commission, *Nguyen and Okoye v Commonwealth (Department of Immigration and Multicultural Affairs) and GSL (Australia) Pty Ltd* [2008] AusHRC 39 (1 January 2008), at [95]-[97].
- ⁵⁴ UN Human Rights Committee, *General Comment 16* (1988) at [4].
- ⁵⁵ S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004), 482-3.
- ⁵⁶ *Communication No 488 of 1992*, UN Doc CCPR/C/D/488/1992 at [8.3].
- ⁵⁷ *Deepan Budlakoti v. Canada* CCPR/C/122/D/2264/2013
- ⁵⁸ AHRC Act, s 29(2)(a).
- ⁵⁹ AHRC Act, s 29(2)(b).
- ⁶⁰ AHRC Act, s 29(2)(c).
- ⁶¹ Australian Human Rights Commission Act 1986 (Cth) s 29(2)(c).
- ⁶² *Peacock v The Commonwealth* (2000) 104 FCR 464 at 483 (Wilcox J).