



Australian  
Human Rights  
Commission

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# Mr NR v Commonwealth of Australia

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## (Department of Home Affairs)

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**[2024] AusHRC 172**

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July 2024

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

[2024] AusHRC 172

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

Mr NR complained of force used against him by Serco Australia Pty Ltd (Serco) officers while he was detained at the North West Point Immigration Detention Centre on Christmas Island.

As a result of this inquiry, I find that the force used against Mr NR on 30 March 2021 was not for the purpose of preventing injury, escape, or the destruction of property, and management of Mr NR's behaviour could have been achieved by other means. This was in light of the concerns that Mr NR raised for his personal safety, and because of the availability of the other suitable accommodation options that would not have required force to be used. Consequently, I find that this use of force was not utilised as a measure of last resort, and did not have sufficient justification to warrant it.

Accordingly, by using force at that time, Serco officers did not treat Mr NR with humanity or inherent respect for his dignity, contrary to article 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

On 4 April 2024, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 19 July 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, flowing style.

Emeritus Professor Rosalind Croucher AM FAAL

**President**

Australian Human Rights Commission

July 2024

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# 1 Introduction

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr NR against the Commonwealth of Australia, Department of Home Affairs (the Department) alleging a breach of his human rights. The inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr NR complains about force used against him by Serco Australia Pty Ltd (Serco) officers while he was detained at the North West Point Immigration Detention Centre (NWPIDC) on Christmas Island. Serco operates as a contractor for the Department to manage detention centres.
3. Mr NR's complaint raises possible breaches of articles 7 and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR) as scheduled to the AHRC Act.
4. The particular environment of immigration detention means that the use of force may occasionally be necessary. However, the use of force on detainees directly engages their rights. In particular, people who are deprived of their liberty have the right to be treated with humanity and with respect for their inherent dignity. For this reason, any use of force must be appropriately justified and necessary in the circumstances. Force should only be used as a measure of last resort. This means that available alternatives to using force, such as negotiation and de-escalation techniques should be employed and exhausted before there is a resort to force. Force should be used only for the shortest amount of time necessary. The degree of force used should not be excessive.
5. This document comprises a report of my findings in relation to this inquiry and my recommendations to the Commonwealth.
6. Mr NR has had a protection finding made by the Department in his favour, and this inquiry has considered sensitive information about him. I consider it necessary for the protection of Mr NR's privacy and human rights to make a direction under section 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 the force used against Mr NR on 30 March 2021 was not for the purpose of preventing injury, escape, or the destruction of property, and management of Mr NR's behaviour could have been achieved by other means. For these reasons, I find that the use

of force was not justified as reasonable and necessary, in breach of Mr NR's rights under article 10(1) of the ICCPR.

8. I make the following recommendations:

**Recommendation 1**

The Commission recommends that the Commonwealth apologise to Mr NR for the use of force against him on 30 March 2021, and provide to him a copy of the outcome of the internal review being conducted by the Department.

**Recommendation 2**

The Commission recommends that the Department ensures that Mr NR's incident history is updated to reflect that the unplanned use of force against him on 30 March 2021 was not a result of his own abusive or aggressive behaviour.

**Recommendation 3**

The Commission recommends that, as part of the Department's investigation into Mr NR's complaint, the Department examine the circumstances in which the body camera footage failed to be downloaded, yet Serco correspondence to Mr NR indicates that footage had been watched as part of its internal review, in order to ensure that footage is available for any future investigations.

**Recommendation 4**

The Commission recommends that the Department, as part of its investigation into Mr NR's complaint, consider whether sufficient steps were taken to consider any risk to Mr NR as a result of previous violence which had occurred between him and another detainee located in the Gold compound.

**Recommendation 5**

The Commission recommends that the Department consider revising the DSM to include specific examples of times when an unplanned use of force is unlikely to be justified, and directing officers to seek approval prior to engaging in force.



### 3 Background

9. On 10 April 2014, Mr NR's visa was cancelled pursuant to section 116(1)(g) of the *Migration Act 1958* (Cth) (Migration Act), and he was detained on 11 April 2014. He was released from immigration detention following the orders made by the High Court in the case of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 on 8 November 2023.
10. At the time relevant to his complaint, Mr NR was detained on Christmas Island. He was transferred there on 25 March 2021, and was initially held in High Care Accommodation (HCA), in accordance with the Department's standard procedure for incoming detainees.
11. The Department explained in its response to Mr NR's complaint that:

Placement into HCA allows stakeholders to engage with the newly arrived detainee and identify any potential issues and allow for a placement to be discussed and agreed by all stakeholders.
12. The following version of the facts surrounding the use of force on 30 March 2021 was provided by the Department to the Commission in its response to Mr NR's complaint. According to the Department, at around 8.10pm on 29 March 2021, a Serco officer informed Mr NR that he would be moving to the Gold compound. Two other detainees with Mr NR and known to Mr NR were transferred with him to Christmas Island. They were informed that they would be accommodated in the Blue compound.
13. Mr NR requested to go to the Blue compound instead of Gold. Serco's Emergency Response Team (ERT) officers informed him that a change in placement required management approval.
14. According to Serco, Mr NR started to display abusive behaviour and refused to accompany the officers. The Facilities Operations Manager was informed, who then made the decision that Mr NR would remain in the HCA overnight.
15. The following day, 30 March 2021, at 11.41am, ERT officers attended again to escort Mr NR to Gold compound. Mr NR, who was sitting in the common area of the HCA and was on his phone at that time, refused to go with them. At that point, an ERT officer made a decision to use force against Mr NR in order to move him.
16. The Enhanced Escort Position (EEP) was utilised, which involved two officers taking Mr NR by either arm at the elbow. Mr NR is alleged to have started swinging his arms and resisting the officers, and so they lowered him to the ground to stabilise him, and applied mechanical restraints to his wrists.

17. Upon placing Mr NR back on his feet, Mr NR is alleged to have kicked an ERT officer in the groin and attempted to spit on him. He was again ground stabilised, and a direction was given by the ERT team leader to move him back to his room in the HCA. Five or six officers then carried him horizontally to his room, where he was placed on the floor. The officers removed the restraints and exited the room.
18. At 1.39pm, ERT officers informed Mr NR that he was to be escorted with the use of restraints to the International Health and Medical Service (IHMS) clinic for assessment. Such assessments were standard procedure following any use of force incident. Mr NR refused to comply with the officers, who removed themselves from the situation by closing the door to Mr NR's room with no use of force utilised.
19. At 2.30pm, Mr NR agreed to be escorted to the clinic without any use of force. He was reviewed by an IHMS GP, whose notes record the assessment of Mr NR as follows:
  - Emotional distress from move of compounds
  - No obvious musculoskeletal issue from restraining today
  - Hypertension
  - Nausea and vomiting
  - GORD
20. The GP provided 'supportive counselling and empathetic listening, trying to bring some hope and happiness to his life' and recommended ongoing sessions with the mental health team.
21. At 7.45pm, ERT officers again informed Mr NR that he would be moving to Gold compound. Mr NR again refused, and this continued refusal was communicated to the ABF Detention Superintendent, who advised the ERT officers to inform him that he would stay overnight again in HCA 'until a decision [was] made regarding his placement on the oncoming shift'. According to the ERT officers, Mr NR became abusive and aggressive and made physical advances towards them while making verbal threats. They ushered Mr NR into the smoking/exercise area of the HCA and requested that the doors be closed temporarily to diffuse the situation.
22. Mr NR remained in the HCA for a further 24 hours, after which time he was transferred to the White One compound, which was deemed to be the most

appropriate placement for him at that time, with consideration of his Security Risk Assessment. It appears that force was not required to effect this transfer.

23. With respect to these events on 30 March 2021, Mr NR complained to the Commission that he had raised concerns about his safety in the Gold compound due to the presence of a detainee who had previously assaulted him. He says that in response, he was subjected to forced restraint and confined to his room in isolation for 24 hours. He alleges that while confined in his room, he was deliberately touched on his buttocks in order to embarrass and humiliate him, and that he was threatened that his situation would become worse if he continued to make complaints.

## **4 Legal framework**

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

24. 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.
25. 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.
26. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.
27. The rights and freedoms recognised by the ICCPR are 'human rights' within the meaning of the AHRC Act.<sup>1</sup>

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

28. The terms 'act' and 'practice' are defined in section 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
29. 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.
30. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or those acting on its behalf.<sup>2</sup>

## 5 Human rights of detainees

31. 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.
32. Article 7 of the ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
33. 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.
34. 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.
35. Article 10(1) imposes a positive obligation on States to ensure that detainees are treated with humanity and respect for their inherent dignity.<sup>3</sup> 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.<sup>4</sup> In this case, the relevant authority is the Commonwealth of Australia through the Department and the service providers who act on its behalf.
36. 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'.<sup>5</sup>

37. 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.<sup>6</sup>
38. 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,<sup>7</sup> including:
  - the *Nelson Mandela Rules*,<sup>8</sup> and
  - the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).<sup>9</sup>
39. 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.<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.
40. Several of the Mandela Rules are relevant to the use of force on detainees by detaining officers. Rule 82(1) of the Mandela Rules provides:

Prison staff shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Prison staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the prison director.
41. 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.
42. Rule 121 requires that civil prisoners 'shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order'.
43. From the above, the following conclusions may be drawn:
  - article 10(1) of the ICCPR imposes a positive obligation on State parties to take action to ensure that detained persons are treated with humanity and dignity
  - the threshold for establishing a breach of article 10(1) of the ICCPR is lower than the threshold for establishing 'cruel, inhuman or

degrading treatment' within the meaning of article 7 of the ICCPR, which is a negative obligation to refrain from such treatment

- article 10(1) of the ICCPR may be breached if a detainee's rights, protected by one of the other articles of the ICCPR, are breached – unless that breach is necessitated by the deprivation of liberty
- minimum standards of humane treatment must be observed in detention conditions, including immigration detention.

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

44. 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.
45. 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>11</sup>
46. 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>12</sup>
47. 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. The Department's duty of care is non-delegable.
48. 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.

49. 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.
50. 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>13</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 [Facilities and Detainee Services Provider] operational procedures.<sup>14</sup>
51. 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>15</sup>

## **7 Consideration**

### **7.1 Act or practice of the Commonwealth**

52. Serco was acting under a contract with the Department, and therefore the act or practice of Serco is an act or practice by or on behalf of the Commonwealth.
53. The relevant act or practice of the Commonwealth for the purposes of this inquiry is therefore the decision by an officer referred to below as ERT 1 at 11.47am on 30 March 2021 to use force against Mr NR.

### **7.2 Use of force incident on 30 March 2021**

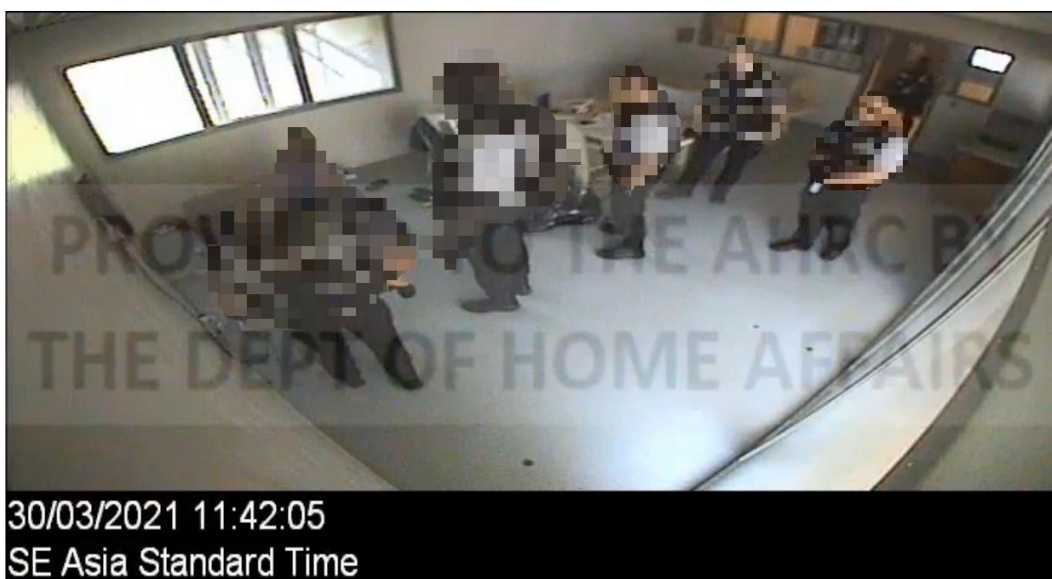
54. The Department provided three files containing footage of the events complained of by Mr NR commencing at 11.41am on 30 March 2021.
55. While body camera footage was taken of the incident, the Department informed the Commission that footage no longer existed, because 'at the time of the incident, Christmas Island used the older model body cameras which did not include automatic downloads when the devices were docked after shift, therefore, the footage was not downloaded'. However, Serco correspondence to Mr NR dated 14 April 2021 indicated that body camera footage from six ERT officers had been reviewed by the Residential Manager in Serco's internal investigation into his complaints made on 31 March and 7 April 2021. I asked the Department to provide the Commission with an explanation of this discrepancy, and a description of the method by which body camera footage is now retrieved, when responding to my preliminary view of Mr NR's complaint, but the Department provided no further explanation.
56. In light of this, only CCTV footage was able to be reviewed by the Commission, which does not include any audio recording of the discussions between Mr NR and officers prior to the use of force against him.
57. At 11.41am, Mr NR can be seen seated in the top left-hand corner of the footage (Figure 1).





**Figure 1:** Mr NR seated on floor in HCA immediately prior to entrance of Serco ERT officers

58. At 11.42am, officers enter the room, led by a person who I will refer to as ERT 1, seen in the image below as the second officer from the left of the screen (Figure 2).



**Figure 2:** Serco ERT officers enter room and talk to Mr NR

59. Between 11.42am and 11.46am, ERT 1 can be seen talking to Mr NR. At one point, ERT 1 lowers to a squat position – this appears to be a negotiation tactic of speaking with Mr NR at his level (Figure 3). At no point does it appear from their positions and reactions that Mr NR poses any threat of violence towards the officers. Between 11.45am and 11.46am, ERT 1 stands and exits the room for approximately one minute, before returning.



**Figure 3:** ERT officer attempts to negotiate with Mr NR

60. At 11.47am, ERT 1 gives the direction to two officers to use force against Mr NR, by engaging the EEP and lifting him to a standing position (Figure 4).



**Figure 4:** Direction is given to use force. Two officers engage EEP by taking Mr NR on either arm

61. It is unclear from the footage exactly what occurs between Mr NR and the officers, but it does appear that Mr NR physically resists being escorted, and the remaining officers close in around him, and a scuffle ensues (Figure 5).



**Figure 5:** Remaining officers attempt to take hold of Mr NR

62. The officers then ground stabilise Mr NR, with five officers holding him down (Figure 6). An additional officer then enters the room. Mechanical restraints (handcuffs) can be seen being applied to his wrists (Figure 7).



**Figure 6:** Officers ground stabilise Mr NR



**Figure 7:** Mechanical restraints are applied to Mr NR's wrists

63. After approximately one minute, the officers lift Mr NR to his feet. Again, he appears to resist their escort, during which time an officer's report indicates that Mr NR kicked him in the groin and attempted to spit at him (Figure 8). The footage is not clear enough to confirm whether this occurred.



**Figure 8:** Upon lifting Mr NR from the ground, he is alleged to have kicked an officer in the groin, and spat at him

64. The officers again stabilise Mr NR to the ground (Figure 9), where they remain for approximately three minutes, before lifting him and carrying him out of the room in a horizontal position (Figure 10).

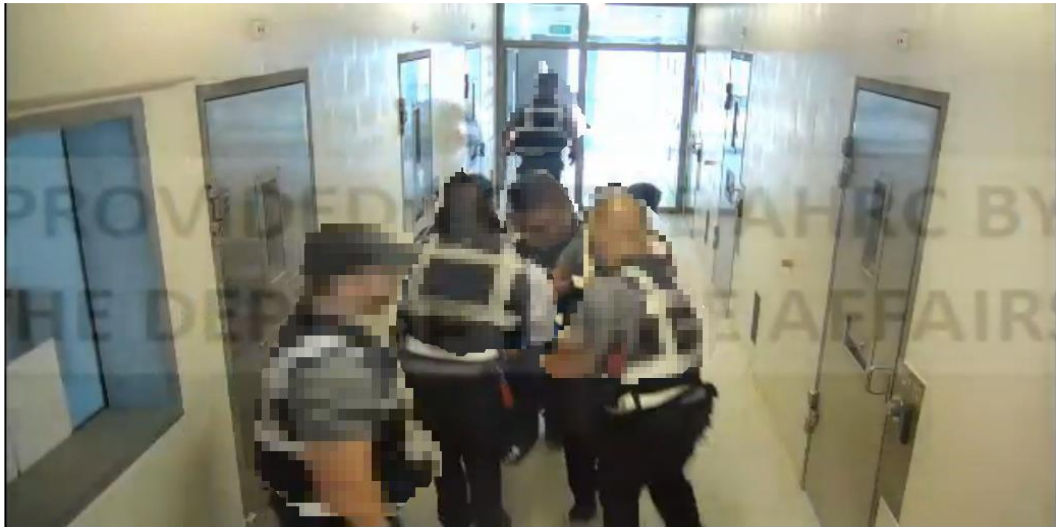


**Figure 9:** Officers ground stabilise Mr NR again



**Figure 10:** Mr NR is lifted by ERT officers and carried from the room

65. From there, two separate clips of CCTV footage from a corridor and another from a bedroom were provided to the Commission, showing Mr NR being carried towards, (Figure 11) and then into the bedroom (Figure 12), where he is placed on a mattress on the floor and left, after the restraints are removed from his wrists.



**Figure 11:** Mr NR is carried through a corridor



**Figure 12:** Mr NR is carried into a room and placed on a mattress on the floor

66. As noted above, there is no audio on any of the CCTV footage. However, other contemporaneous records provide evidence about what was said during this incident.
67. A Serco officer's report provided by the Department to the Commission contains the following description of the exchange between Mr NR and the officer, at approximately 11.40am:

I explained to detainee [NR] that his 24 hours of stay in HCA has finished and decision has been made by ABF to reallocate him to Gold 1 compound, detainee [NR] declined and stated that he had a fight with detainee [redacted] in Gold 1 and that Gold 1 was not safe for him, and that he will only except [sic] going to Blue 1 compound, I explained to detainee [NR] that he will be monitored by Gold 1 officers to make sure

his [sic] safe, I also told detainee [NR] that he can put a request form to move compound but for now the only option for him is to go to Gold 1...

68. In light of the corroboration by this officer's report, and the other officer's reports provided, I am satisfied that Mr NR did not want to relocate to the Gold compound from HCA on 29 and 30 March 2021 due to safety concerns that he held about another detainee there, and that he communicated this concern to the Serco officers.

69. The Commission requested that the Department provide information and supporting documentation about the decision to place Mr NR in the Gold compound, including any risk assessments carried out with respect to the concerns raised by him. Their response was as follows:

The Department advises the Commission that whilst Gold compound was considered as an alternative to placing Mr [NR] in Support Unit One on 30 March 2021, the ABF Detention Superintendent (North West Point IDC) approved his placement in Support Unit One and as such, Mr [NR] was not placed in Gold compound.

70. Aside from this statement, the Department did not provide the Commission with any record of the initial decision to place Mr NR in the Gold compound, or the reasons for that decision including any assessment of the risk that he may face there. The Department did provide the Commission with email correspondence dated 30 March 2021 between Serco and the ABF, seeking approval to place Mr NR in the HCA for a further 24 hours after he refused to be taken to the Gold compound.

71. The option of placing Mr NR in the Gold compound is discussed as an alternative option in the email from Serco to ABF. The risks associated with this alternative option are described as follows:

Detainee [NR] has demonstrated a willingness to commit violence and other harmful and disruptive acts to not be placed into this compound and remains in a highly agitated state and is likely to continue these acts if placed in this compound. Detainee will have access to the other detainees housed in Gold 1, potentially giving him access to weapons, drugs or other illicit substances and allowing other detainees to become involved in any adverse behaviour he may become involved in. However this is somewhat mitigated by Mr [NR] being moved away from his previously disruptive associates located in Blue 1 compound and not being able to directly access these individuals.

72. This email correspondence again confirms that Mr NR was highly agitated at the prospect of being transferred to the Gold compound. As noted above, I am satisfied that he communicated to Serco that this was because he was concerned for his personal safety. However, even after the use of force

incident, there again appears to have been no attempt to assess the nature of the risk posed to Mr NR or how any risk could be mitigated.

73. The materials provided to the Commission do not reflect Serco, ABF or the Department taking seriously the concerns raised by Mr NR about his fears of placement in the Gold compound.
74. ERT 1, according to his own record of the incident, acknowledged that Mr NR made these concerns known. However, he informed Mr NR that no other option was available, and that Mr NR could request a transfer after relocation.
75. Importantly, at the time that ERT 1 made the decision to use force on Mr NR, it is apparent that other placement options were available. These options included a further temporary stay in HCA while more permanent options were considered, or placement in the White compound. It is clear that both of these options were available because both were utilised. No suggestion is made that Mr NR objected to his placement in White compound, and it does not appear that force was required to relocate him there on 31 March 2021.
76. The excerpts of the DSM cited at paragraph 50 include that force may be reasonably used in situations involving the prevention of self-injury, injury to others, escaping or destruction of property. At the time that the direction to use force was given at 11.47am on 30 March 2021, Mr NR showed no indication of any of these risks arising from his behaviour.
77. I also consider that the aim of relocating Mr NR to the Gold compound from HCA involved no urgency, meaning that the officers involved had the opportunity to seek further direction from the ABF Detention Superintendent prior to deciding to initiate an unplanned use of force.
78. In its own review of the incident, Serco determined that the unplanned use of force against Mr NR was justified 'due to non-compliance and assaulting ERT Officer [redacted]'. However, the resistance displayed by Mr NR and the alleged assault against the ERT officer only occurred after force had already been instigated, and cannot provide retrospective justification for the decision to use force. I am satisfied, based on the materials before me, that force was used after Mr NR refused to comply with the direction to be relocated to a compound about which he held safety concerns. I am also of the view that reasonable alternatives to the use of force were available.
79. Ultimately, Mr NR was not transferred to a different compound on 30 March 2021. Instead, force was used to transfer him from the common area in the HCA to his accommodation room in the HCA while further consideration was



given to a more substantial move. My view is that this use of force was wholly unnecessary.

80. On 7 December 2023, I issued to the parties a notice under section 27 of the AHRC Act containing my preliminary view of Mr NR's complaint. The Department responded to the notice on 4 March 2024, indicating that they were not in a position to comment on whether the acts raised by Mr NR in his complaint were inconsistent with or contrary to his human rights. The Department indicated that they would investigate further the allegations, and provide the Commission with information of the outcome of the review as soon as completed.
81. I consider that the use of force against Mr NR at 11.47am on 30 March 2021, with the intention to move him to another compound, was not utilised as a measure of last resort, and did not have sufficient justification to warrant it, including because of the concerns that Mr NR raised for his personal safety and because of the availability of the other suitable accommodation options that would not have required force to be used. Further, the initial use of force in the form of EEP then escalated into further, more substantial uses of force when Mr NR resisted due to concerns for his personal safety. Those additional uses of force included twice lowering him to the ground, applying mechanical restraints, and physically carrying him to his accommodation area. Accordingly, by using force at that time, Serco officers did not treat Mr NR with humanity or inherent respect for his dignity, contrary to article 10(1) of the ICCPR.
82. I am not satisfied that any sexual or other inappropriate touching occurred during the incident, as alleged by Mr NR, having watched all the available footage provided to the Commission. Without any audio recording of the events, I am also unable to be satisfied that Mr NR was threatened with any retribution for his complaints.

## **8 Recommendations**

83. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.<sup>16</sup> The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.<sup>17</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.<sup>18</sup>

## **8.1 Apology and redress**

84. Contemporaneous records show that immediately following the incident, Mr NR felt humiliated, especially from his perception that he had been inappropriately touched.
85. In circumstances where I have found that the use of force against Mr NR was unnecessary, I consider it appropriate to recommend that the Commonwealth make an apology to Mr NR for any hurt and humiliation that was caused to him by the decision to use force on 30 March 2021.
86. I would also expect that, following the Department's internal review into the incident, that the reviewer's findings and recommendations be shared with Mr NR.

### **Recommendation 1**

The Commission recommends that the Commonwealth apologise to Mr NR for the use of force against him on 30 March 2021, and provide to him a copy of the outcome of the internal review being conducted by the Department.

### **Recommendation 2**

The Commission recommends that the Department ensures that Mr NR's incident history is updated to reflect that the unplanned use of force against him on 30 March 2021 was not a result of his own abusive or aggressive behaviour.

## **8.2 Body camera footage**

87. At paragraph 55 above, an issue was identified which led to body camera footage being unavailable. The Commonwealth Ombudsman has also made a recommendation to the Department regarding the availability of body worn camera footage at North West Point IDC.<sup>19</sup> Without any further information from the Department about how this came to be, and whether the issue has been resolved, I am unable to make any specific recommendations. However, it is clear that body camera footage of this incident would have been useful. Given the Department has indicated that it will investigate the matter further, I consider it sufficient to recommend that the issue be included in the Department's investigation.

### **Recommendation 3**

The Commission recommends that, as part of the Department's investigation into Mr NR's complaint, the Department examine the circumstances in which the body camera footage failed to be downloaded, yet Serco correspondence to Mr NR indicates that footage had been watched as part of its internal review, in order to ensure that footage is available for any future investigations.

### **8.3 Risk assessments**

88. It does not appear from the Commission's inquiry that a risk assessment was carried out when determining the best placement option for Mr NR upon his transfer to Christmas Island. Given that Mr NR complained only about the use of force against him, the Commission did not inquire into this issue any further. However, it seems that, given Mr NR alleged that he had been assaulted by another detainee who was housed in the Gold compound, a risk assessment should have been carried out prior to deciding to place him there. At least, this should have been conducted after he specifically raised his concerns to the Serco officers who sought to escort him to that place.
89. The Commission has previously made detailed recommendations to the Department regarding the importance of carrying out risk assessments when incidents of detainee-on-detainee violence have occurred.<sup>20</sup>
90. Those recommendations were noted, with the Department indicating that it considered its current processes sufficient for assessing risk to detainees following incidents of violence.
91. I do not repeat the recommendations in this report, but encourage the Department, as part of its investigation into Mr NR's complaint, to consider them again in light of the Commission's findings.

### **Recommendation 4**

92. The Commission recommends that the Department, as part of its investigation into Mr NR's complaint, consider whether sufficient steps were taken to consider any risk to Mr NR as a result of previous violence which had occurred between him and another detainee located in the Gold compound.

### **8.4 DSM and unplanned uses of force**

93. The DSM excerpt at paragraph 50 and discussed at paragraph 76 outlines permissible instances where an unplanned use of force may be considered justified. Mr NR's case in the Commission's view does not fall within these narrow categories.

94. It may be helpful for the training of officers for the DSM to include some specific examples of situations which do not justify an unplanned use of force. Relocating a detainee to another compound may be the type of situation where the unplanned use of force would rarely (if ever) be justified. Consideration could be given to including more guidance in the DSM, directing officers to:
- request that management consider the appropriateness of the placement in light of any concerns raised
  - engage in negotiation with a detainee who is resisting their relocation
  - seeking approval to engage in any proposed use of force as a last resort.

### **Recommendation 5**

The Commission recommends that the Department consider revising the DSM to include specific examples of times when an unplanned use of force is unlikely to be justified, and directing officers to seek approval prior to engaging in force.

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

95. On 4 April 2024, I provided the Department with a notice of my findings and recommendations.
96. On 19 July 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.

### **Recommendation 1 – Disagree**

*The Commission recommends that the Commonwealth apologise to Mr NR for the use of force against him on 30 March 2021, and provides to him a copy of the outcome of the internal review being conducted by the Department.*

The Department disagrees with recommendation one. The Department acknowledges the circumstances raised in the complaint, and while a

review remains underway, the Department does not consider it appropriate to issue an apology or provide Mr NR details of the internal review at this time.

### **Recommendation 2 - Partially agree**

*The Commission recommends that the Department ensures that Mr NR's incident history is updated to reflect that the unplanned use of force against him on 30 March 2021 was not a result of his own abusive or aggressive behaviour.*

The Department partially agrees to recommendation two. The Department will consider this recommendation as part of the internal review currently underway into the allegations made by Mr NR.

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

*The Commission recommends that, as part of the Department's investigation into Mr NR's complaint, the Department examine the circumstances in which the body camera footage failed to be downloaded, yet Serco correspondence to Mr NR indicates that footage had been watched as part of its internal review, in order to ensure that footage is available for any future investigations.*

The Department accepts and has already addressed recommendation three. The Department further acknowledges this failure in process and systems.

The Facilities and Detainee Services Provider's (FDSP) responsibility under reporting of incidents in the contract is to ensure that they internally audit 100% of major incidents (unplanned use of force is categorised as a major incident) to continuously improve their response to such incidents. This process is independent of the Department.

The FDSP has advised that, at the time, the body camera footage was reviewed by the FDSP Residential Manager, however, this recording was not properly downloaded and stored on a device, and therefore it is not available and no longer exists. As of October 2022, body camera systems have been updated by the FDSP. When a body camera is docked at the end of an officer's shift, it will automatically download onto the system and is stored electronically.

### **Recommendation 4 - Agreed**

*The Commission recommends that the Department, as part of its investigation into Mr NR's complaint, consider whether sufficient steps were taken to consider any risk to Mr NR as a result of previous violence which had occurred between him and another detainee located in the Gold compound.*

The Department agrees to recommendation four. The Department will consider this recommendation as part of the internal review currently underway into the allegations made by Mr NR.

**Recommendation 5 - Disagree**

*The Commission recommends that the Department consider revising the DSM to include specific examples of times when an unplanned use of force is unlikely to be justified, and directing officers to seek approval prior to engaging in force.*

The Department disagrees with recommendation five.

Under current policy settings, officers are already required to seek approval prior to any planned use of force, unless exceptional time critical circumstances present, such incidents then become unplanned use of force incidents.

Due to the operational nature of detention, not all use of force can be pre-approved. For the safety, security and good order of the centre, there may be situations where a response is immediately required, and it may be operationally impractical or potentially negligent to delay a response to an incident while approval is sought.

97. I report accordingly to the Attorney-General.



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

## Endnotes

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- <sup>1</sup> The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- <sup>2</sup> See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- <sup>3</sup> 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].
- <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> Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel, 2<sup>nd</sup> ed, 2005) 250.
- <sup>6</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>7</sup> 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].
- <sup>8</sup> 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).
- <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 General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by 'the Nelson Mandela Rules', UN Doc A/RES/70/175 (17 December 2015), preliminary observation 2(1), 7.
- <sup>11</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.
- <sup>12</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>13</sup> Department of Home Affairs, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [4].
- <sup>14</sup> Department of Home Affairs, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [5].
- <sup>15</sup> Department of Home Affairs, *Detention Services Manual – Chapter 10.18 – Safety and security – Use of force* (October 2018) [5].
- <sup>16</sup> *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') s 29(2)(a).
- <sup>17</sup> AHRC Act, s 29(2)(b).
- <sup>18</sup> AHRC Act, s 29(2)(c).
- <sup>19</sup> Commonwealth Ombudsman, *Monitoring Commonwealth Places of Detention: Annual Report of the Commonwealth National Preventive Mechanism under the Optional Protocol to the Convention Against Torture (OPCAT)* (Report, 2023) 62  
<[https://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0022/290137/Commonwealth-NPM-Report.pdf](https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/290137/Commonwealth-NPM-Report.pdf)>.

<sup>20</sup> *Mr RG v Commonwealth of Australia (Department of Home Affairs)* [2023] AusHRC 148, pp 50-52; *Mr Vakhobov v Commonwealth (Department of Home Affairs)* [2022] AusHRC 146, pp 23-26; *Mr Andrwias v The Commonwealth of Australia (Department of Home Affairs)* [2023] AusHRC 147, pp 38-40.