



Australian
Human Rights
Commission

FZ v Commonwealth of Australia (Department of Home Affairs)

[2019] AusHRC 135

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FZ v Commonwealth of Australia (Department of Home Affairs)

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*Report into use of force against Mr FZ
in immigration detention*

Australian Human Rights Commission 2019



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**Australian
Human Rights
Commission**

The Hon Christian Porter 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) into the human rights complaint of Mr FZ, concerning the use of force against him on two particular occasions in immigration detention.

I have found that the uses of force against Mr FZ, and the conduct of a strip search, were inconsistent with and contrary to the requirements of article 10 of the *International Covenant on Civil and Political Rights* (ICCPR). This article provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

I made ten recommendations which seek to remedy the loss or damage caused to Mr FZ by the breach of his human rights. I also made some systemic recommendations aimed at reforming the way in which force is used in immigration detention.

The department provided its response to my findings and recommendations on 8 November 2019. It did not agree that the use of force was excessive. However, it noted that certain policies and procedures governing the planned use of force in immigration detention were not followed, as pre-approval was obtained from a person who did not hold the relevant delegation. The department has advised that relevant staff have since been reminded that only an Australian Border Force Superintendent can grant pre-approval for a planned use of force.

In relation to the forcible removal of Mr FZ's clothing, the department has responded that these actions constituted a strip search and were not within the appropriate policies and procedures. It stated that a former detention service provider manager was counselled in relation to the matter and has since ceased employment. The removal of clothing of Mr FZ has also been utilised as a case study for Serco personnel at a management level.

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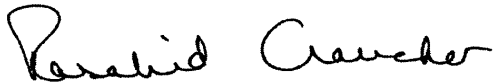
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The department also responded that it has implemented eight recommendations made by its Detention Assurance Team in response to the incidents, and that it will continue to work with Serco in the ongoing development of operational policy instructions related to the use of force and restraint, to provide optimal directions and guidance to service provider personnel.

I have set out the department's response in Part 8 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
President
Australian Human Rights Commission

November 2019

1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr FZ against the Commonwealth Department of Home Affairs (the Department) alleging a breach of his human rights.
2. Mr FZ complained that force was used against him by staff of Serco Australia Pty Ltd (Serco)—being a detention service provider of the Department—while detained at Villawood Immigration Detention Centre (VIDC), in contravention of articles 7 and 10 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
3. In particular, on 5 October 2016, force was used against Mr FZ by eight Serco Emergency Response Team (ERT) officers on two separate occasions. On both occasions, he was pushed to the ground, held face down, and restrained by his head, arms, and legs. Handcuffs were applied and he was pat searched on both occasions. He was searched with a metal detector and strip searched on one occasion. Mr FZ alleges that he suffered a fracture to his right hand and a fracture to his right ankle as a result of the force used.
4. Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
5. The content of these rights is informed by other principles including the *Standard Minimum Rules for the Treatment of Prisoners* and the *Body of Principles for the Protection of all Persons under Any Form of Detention*.
6. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
7. As a result of this inquiry, I find the following:
 - a) excessive force was used on Mr FZ by ERT officers on two occasions. At the time of the two incidents, Mr FZ was isolated in a secure room and did not pose a serious and imminent threat to others. Even under the belief that Mr FZ possessed a razor blade and warranted concerns about a potential for self-harm, the number of ERT officers deployed—seven officers with up to six using force at one time—and the manner in which they swiftly entered the room in tight formation, pushed him to the floor, and restrained his head and limbs face down, was disproportionate to the need to protect him, the safety of staff and to maintain good order at the centre
 - b) the injuries sustained to Mr FZ's right hand, and potentially to his right ankle, were a result of the excessive use of force

- c) the level of force was not used as a last resort and escalated the physicality of the situation—further communication, negotiation and conflict de-escalation strategies could and should have been attempted
 - d) the manner in which the strip search of Mr FZ was carried out did not pay due regard to his dignity and privacy.
8. These actions are contrary to Mr FZ's rights under article 10 of the ICCPR, to be treated with humanity and with respect for his inherent dignity when deprived of liberty.
9. As set out in Part 7 of this report, I have made 10 recommendations to address the breach of Mr FZ's human rights and help to prevent excessive uses of force in immigration detention.
10. Mr FZ has requested that his name not be published in connection with this inquiry. I consider that the preservation of his anonymity is necessary to protect his privacy and human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and refer to him by the pseudonym 'Mr FZ' in this document.

2 Background

2.1 Immigration detention

11. On 16 November 1999, Mr FZ arrived in Australia with his mother and siblings as the holder of a Global Special Humanitarian visa (subclass 202) (GSH visa). He was approximately 16 years old.
12. Mr FZ has described how his childhood in Sudan and Egypt were marked by violence, cruelty and hardship. He has stated that he is a survivor of torture and trauma and was a child soldier.
13. On 23 April 2015, Mr FZ's GSH visa was mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) (the Migration Act), on the basis of holding a substantial criminal record.
14. Mr FZ's criminal record includes convictions for common assault, driving under the influence of alcohol or other substances, non-aggravated robbery, theft and breach of an apprehended violence order. He served more than five years in prison altogether for all offences committed.
15. On 29 May 2015, Mr FZ made an application for revocation of his GSH visa cancellation, which was ultimately refused.

16. On 27 July 2016, Mr FZ was taken into immigration detention at VIDC under s 189(1) of the Migration Act, following the completion of his criminal sentence.
17. Mr FZ was scheduled to be transferred to Christmas Island Immigration Detention Centre on 8 September 2016. This transfer did not go ahead as he was deemed unfit to travel by the International Health and Medical Services (IHMS) staff, the Department's immigration detention health service provider, due to asthma.
18. A second transfer to Christmas Island was scheduled for Mr FZ on 6 October 2016. This transfer did not go ahead due to the incidents on 5 October 2016 which are the subject of this inquiry.
19. On 8 February 2017, Mr FZ was transferred from VIDC to Perth Immigration Detention Centre. He was later transferred back to VIDC, where he currently remains detained in the Blaxland compound.
20. On 23 February 2017, Mr FZ made an application for judicial review in relation to the decision not to revoke the cancellation of his GSH visa.
21. On 2 March 2018, the Federal Circuit Court upheld the decision as valid and dismissed Mr FZ's application.
22. On 5 April 2018, Mr FZ sought an application for extension of time to appeal. On 20 December 2018, Mr FZ's application was dismissed.²

2.2 Use of force

23. On 5 October 2016 at approximately midday, Mr FZ was moved from his accommodation in the Blaxland compound at VIDC to a high care room in the Hotham compound at VIDC, in preparation for transfer to Christmas Island.
24. At this time, Mr FZ had been detained in closed immigration detention at VIDC for approximately six weeks. Before this, he had been serving a criminal sentence, or had otherwise resided with his family since arriving in Australia at the age of approximately 16 years old.
25. The circumstances leading up to the subsequent uses of force by ERT officers are contested between the Department and Mr FZ.
26. The Department, Serco and IHMS staff have stated that they believed Mr FZ had a razor blade in his possession, and had exercised force to locate the razor blade in response to concerns about potential self-harm. This belief was based on an IHMS nurse reportedly seeing Mr FZ with a razor blade at one point in time, and alleged oral statements made by Mr FZ at the time.

27. The Department, Serco and IHMS also allege that Mr FZ was behaving aggressively and abusively towards detention staff. They also claim that he had a minor cut to his wrist as a result of committing self-harm. He was allegedly making repeated threats to kill himself and Serco officers.
28. These facts are disputed by Mr FZ. In particular, Mr FZ alleges that the item thought to be a razor blade was a piece of plastic. He alleges as part of his complaint that he never possessed a razor blade. However, there is information indicating that, even if Mr FZ did not have a razor blade, Mr FZ at least wanted to give the impression that he possessed and swallowed a razor blade. As a result, I find that the concerns of detention staff about the potential for self-harm were legitimate.
29. Following a thorough search of his person and the room, and later medical scans of Mr FZ, a razor blade was never located. A SIM card cover was found in the room, and there appears to have been some confusion amongst staff themselves as to whether the SIM card cover was mistakenly thought to be a razor blade.
30. The relevant factual dispute, along with the lack of or poor quality video footage and the delayed or scant reporting of the incidents, has made it difficult to establish certain findings to the requisite degree of satisfaction.
31. In reaching my findings, I have therefore placed more weight on the available contemporaneous documents and CCTV footage, and noted where contradictory views have been put forward.
32. Broadly, Mr FZ was subjected to two separate incidents of use of force by a team of seven ERT officers at approximately 2.44pm and 3.10pm on the afternoon of 5 October 2016 at VIDC.
33. The force used included Mr FZ being pushed to the ground face down and physically restrained by up to six ERT officers holding down his arms, legs, head and body. Handcuffs were applied to Mr FZ on two occasions, and his person searched by pat search on two occasions and a metal detector and strip search on one occasion.
34. Following the incidents, Mr FZ complained of a fractured right hand and fractured right foot, for which he received medical treatment. He underwent surgery to treat his hand injury.
35. Mr FZ subsequently lodged a complaint with Serco and the Australian Federal Police (AFP) stating that he had been subjected to assault and aggravated sexual assault by Serco staff. Serco discontinued their consideration of the complaint, saying that it was now a matter for the police. However, the AFP ultimately declined to investigate on the basis that the CCTV footage showed 'no evidence' of an offence.
36. On 19 October 2016, Mr FZ lodged a human rights complaint with the Commission.

3 Legal framework for human rights inquiry

3.1 Functions of the Commission

37. Section 11(1) of the AHRC Act identifies the functions of the Commission. Section 11(1)(f) of the AHRC Act, as at the time of Mr FZ's complaint, gave the Commission the following functions:

[T]o inquire into any act or practice that may be inconsistent with or contrary to any human right; and

- (i) where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
- (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement—to report to the Minister in relation to the inquiry ...

38. Section 20(1)(b) of the AHRC Act requires the Commission to perform its function under s 11(1)(f) when a complaint is made in writing alleging that an act or practice is inconsistent with or contrary to any human right.

39. Section 8(6) of the AHRC Act provides that the functions of the Commission under s 11(1)(f) are to be performed by the President.

40. The rights and freedoms enumerated in the ICCPR are 'human rights' within the meaning of the AHRC Act.³

3.2 Scope of 'act' and 'practice'

41. 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.

42. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an 'act' includes a reference to a refusal or failure to do an act.

43. 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,⁴ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

3.3 Rights of detainees

44. Persons subject to immigration detention enjoy all of the human rights protected by the ICCPR, including special protections as persons deprived of their liberty by the state.

45. 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.

46. Further, article 10(1) of the ICCPR provides:

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

47. General Comment No 21 of the United Nations Human Right Committee (UN HR Committee) concerns article 10(1) of the ICCPR, and states:

Article 10, paragraph 1, imposes on State Parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons.⁵

48. This General Comment supports the conclusions that:

- a) article 10(1) imposes a positive obligation on State Parties to take action to prevent the inhumane treatment of detained persons
- b) the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR
- c) article 10(1) may be breached if a detainees' rights under other articles of the ICCPR are breached, unless that breach is necessitated by the deprivation of liberty.

49. The above conclusions are also supported by the jurisprudence of the UN HR Committee, which emphasises the difference between the article 7(1) obligation not to engage in 'inhuman' treatment and the article 10(1) obligation to treat detainees with humanity and respect for their dignity.⁶

50. In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,⁷ the Supreme Court of New Zealand further explained the difference between these two concepts as follows:
- A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment ... the words 'with humanity' are I think properly to be contrasted with the concept of 'inhuman treatment' ... The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts 'inhuman' with 'inhumane'.⁸
51. The content of article 10(1) has been developed through a number of UN instruments that articulate minimum international standards in relation to people deprived of their liberty, including:
- a) the *Standard Minimum Rules for the Treatment of Prisoners* (Standard Minimum Rules)⁹
 - b) the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).¹⁰
52. The UN HR Committee invites State Parties to indicate in their periodic reports the extent to which they are applying the Standard Minimum Rules and the Body of Principles.¹¹ 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.¹²
53. Rule 54(1) of the Standard Minimum 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.
54. 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.
55. Standard Minimum 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'.
56. 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.

57. In the case of *Wilson v Philippines*, the UN HR Committee found a breach of article 7 of the ICCPR where a prisoner was treated violently in detention:

The Committee considers that the conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7.¹³

58. 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.¹⁴
59. Previous inquiries of the Commission, including the Thematic Inquiry in relation to the use of force in immigration detention, have concluded that the use of force by detention service providers on detainees in immigration detention amounted to a breach of their human rights in certain instances.¹⁵

4 Legal and policy framework for use of force and restraints in immigration detention

4.1 Use of force

60. Part 3 of the Thematic Inquiry report sets out the applicable legal and policy framework for the use of force in immigration detention.¹⁶ I refer to and rely on the applicable aspects of that report, without repeating them here.
61. In summary, Serco's contract with the Department to run immigration detention facilities, and the Department's Detention Services Manual (DSM), are the primary documents that set out the obligations of Serco and departmental staff with respect to use of force.
62. 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.¹⁷

63. 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.¹⁸
64. As described in the 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.¹⁹ The Department's duty of care is non-delegable.²⁰
65. 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.
66. 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.²¹
67. In addition to the Department's duty of care, the Department explicitly recognises in the DSM that international human rights standards can inform the standard of care a detainee is to receive while detained in an immigration detention facility.²² The DSM states that this includes human rights under the ICCPR, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. The Commission welcomes this recognition of the application of human rights standards.
68. The Department's DSM also provides that:
 - a) conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force and/or restraint is used
 - b) reasonable force and/or restraint should only be used as a measure of last resort
 - c) reasonable force and/or restraint may be used to prevent the detainee inflicting self-injury, injury to others, escaping or destroying property
 - d) 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
 - e) if the management of a detainee can be achieved by other means, force must not be used
 - f) the use of force and/or restraint must not include cruel, inhumane or degrading treatment
 - g) the use of force and/or restraint must not be used for the purposes of punishment

- h) the excessive use of force and/or restraint is unlawful and must not occur in any circumstances
 - i) the use of excessive force on a detainee may constitute an assault
 - j) all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant FDSP operational procedures.²³
69. The Department's DSM provides that 'reasonable force' means 'no more than the minimum amount of force necessary to achieve legislative outcomes and/or ensure the safety of all detainees, staff and property'.²⁴
70. Reasonable force is to be used only if no other reasonable options are available or to protect an officer or other person from injury, or to prevent harm to property. The use of force is considered to be reasonable if it is objectively justifiable and proportionate to the risk faced.²⁵
71. The Department also provided the Commission with a redacted version of its Use of Force Detention Standard Operating Procedure dated 2 September 2016 (reviewed on 2 September 2017) (Use of Force DSOP).
72. The numerous redactions make it difficult to read, but the Use of Force DSOP appears to set out the step-by-step actions applicable to uses of force in immigration detention, including aftercare, use of equipment and reporting.
73. The Use of Force DSOP provides the following guidance on how to treat a person following a use of force:
- a) the use of restraints must always be necessary, proportionate and reported
 - b) the person's human rights must be respected, and the officer must act responsibly, fairly, compassionately and with only as much force as is reasonably necessary
 - c) ensure effective communication with the person to ensure that the person understands what has occurred and why
 - d) consider implementation of support to the detainee as appropriate in consultation with HSP [Health Services Provider]
 - e) observe the person and ensure that, amongst other things, the person's mental state, demeanour, breathing, welfare and general health are carefully monitored to ensure appropriate and timely responses to any deterioration
 - f) medically examine the person immediately
 - g) complete a Use of Force incident report form and lodge on the CCMD [Compliance, Case Management and Detention] portal.²⁶

74. These aspects of the DSM and DSOP are in line with human rights principles and welcomed by the Commission.
75. The DSM states that a written incident report must be made within four hours or before the officer completes their shift, whichever is earlier.
76. Where a use of force is 'planned', additional requirements apply. The DSM states that wherever practicable, the entire incident is to be recorded on video. The DSM further states that the Detention Health Services Provider must be consulted prior to using any planned use of force, to ensure that no medical reasons preclude the use of force against the relevant detainee. It states that the provider must seek the Department's approval for a planned use of force, prior to force being used against a detainee.²⁷

4.2 Searches and restraints

77. There are three distinct search powers under the Migration Act which empower service providers to conduct searches of detainees: pat down searches, their clothing and property under their immediate control (s 252), strip searches (s 252A) and screening procedures (s 252AA).
78. The exercise of these powers is regulated by the Migration Act, *Direction No. 51—Strip search of immigration detainees* made by the Minister under s 499 of the Migration Act, and detailed policy guidance.
79. The Department's DSM acknowledges that a strip search of a detainee can be an intrusive and humiliating experience, and highlights the guiding principle of maintaining the inherent dignity of the human person while conducting a strip search.
80. Section 252A(1)(a) of the Migration Act provides that a strip search procedure may be conducted on a detainee 'by an authorised officer, without warrant, to find out whether there is hidden on the person, in his or her clothing or in a thing in his or her possession a weapon, or other thing, capable of being used ... to inflict bodily injury'.
81. Under s 252A(3), the authorised officer is required to: suspect on reasonable grounds that the detainee is hiding a weapon; suspect on reasonable grounds that it is necessary to conduct a strip search to recover that weapon; and obtain authorisation in advance from the Secretary or a Senior Executive Service (SES) Band 3 employee in the Department where they are satisfied that there are reasonable grounds for the relevant suspicion.

82. Section 252B(1) of the Migration Act sets out rules for conducting a strip search. This includes that:
- a) a detainee must not be subject to greater indignity than is reasonably necessary
 - b) the strip search must be conducted in a private area
 - c) the authorised officer must be of the same sex as the detainee
 - d) the search must not be conducted with greater force than is reasonably necessary to conduct the strip search
 - e) a strip search must not involve a search of the detainee's 'body cavities'—the Department has stated that this provision prohibits searching inside a detainee's mouth
 - f) a strip search must not involve the removal of more items of clothing, or more visual inspection, than the authorised officer conducting the search believes on reasonable grounds to be necessary.
83. The Department's DSM sets out a comprehensive policy for authorising a strip search, summarised as follows:
- a) prior to requesting authorisation for a strip search, the service provider must consult the Health Services Manager (HSM)
 - b) the authorising person should be made aware of all health-related issues and the potential impacts that a strip search may have on the detainee
 - c) where authorisation has been obtained for a strip search of a detainee with health-related issues, the HSM should, wherever possible, be on hand or physically present during the strip search
 - d) a written request for the authorisation of the strip search of detainees must be provided to the centre manager by the detention service provider using the prescribed form
 - e) the centre manager will liaise with the Department in relation to obtaining authorisation from the Secretary of the Department or an SES Band 3 officer
 - f) a strip search must not be conducted until relevant authorisation has been given either in writing, or orally in extreme circumstances
 - g) the Secretary or SES Band 3 officer is required to record and sign the written request for authorisation within one business day after it is given (s 252A(4)(b)).

84. If a detainee refuses to undergo a strip search procedure under s 252A of the Migration Act, the authorised officer must advise the detainee of various things, including that the Act allows reasonable force to be used in order to conduct a strip search. A detainee must be allowed a reasonable period in which to voluntarily remove their clothing.
85. The DSM requires that a detainee be provided with information before a strip search in a language that they understand explaining certain things including: the reason for the strip search, the process for conducting the strip search, and their rights.
86. Before a strip search is conducted, the detainee must be asked to sign a form acknowledging that they have been given the relevant information and have had adequate time to read the information.
87. The DSM specifically recognises the importance of humanity, dignity and privacy, stating that: 'every endeavour must be made to try and preserve the humanity and dignity of the person being searched. For example, ensure privacy from anyone not required to be involved.'
88. The DSM provides that a record of each strip search must be made, documenting information including: why the strip search was conducted, the names of the officers involved, the names of all other persons present during the strip search and the reason they were present, and whether a partial or full strip search was conducted.
89. In addition, the record should include whether the detainee co-operated or not, the circumstances surrounding the use of force and whether a weapon or other thing was obtained from the strip search.
90. The acknowledgment form from the detainee should be attached to the record. A copy of this record should be maintained as part of the central file of the records of strip searches, and a copy placed on the file of the detainee.
91. The relevant Assistant Secretary in the National Office is responsible for notifying the Minister and the Secretary within 24 hours of the authorisation for the strip search being given.
92. The policies applicable to the use of mechanical restraints are discussed in Part 4 of the Thematic Inquiry report.²⁸ I refer to and rely on the applicable aspects of that report, without repeating them here.

93. In summary, the Department's DSM provides that instruments of restraint must:²⁹
- a) never be applied as a punishment or for discipline
 - b) never be applied as a substitute for medical treatment
 - c) never be used for convenience or as an alternative to reasonable staffing
 - d) be removed once the threat has diminished and the officer believes that the detainee is no longer a threat to themselves, others or property.³⁰
94. Serco's contract with the Commonwealth provides that Serco must 'ensure that restraints are not used in a manner which is likely to cause injury, serious discomfort or potential danger to a detainee'.³¹

5 Events of 5 October 2016

5.1 Incident overview

95. At approximately 12.30pm on 5 October 2016, Mr FZ was moved from the Blaxland compound at VIDC to the Hotham compound. He was placed in isolation in a secure room of the High Care Accommodation Unit, in apparent preparation for transfer to Christmas Island.
96. Mr FZ was subjected to pat searching and screening with a metal detector wand at Blaxland compound prior to being moved, as well as upon entry to Hotham compound. According to departmental records, no concealed items were detected.
97. Mr FZ was subsequently subjected to two separate uses of force by ERT officers. The first use of force incident occurred at approximately 2.44pm. The second use of force incident occurred at approximately 3.10pm. The events leading up to each use of force are discussed below. These events are disputed.
98. In the first incident at 2.44pm, seven ERT officers wearing Personal Protective Equipment (PPE)—being tactical gear typically used for riot and crowd control—ran into the room to deploy force on Mr FZ, along with four additional Serco staff.
99. At least six ERT officers lowered Mr FZ to the ground, turned him face down and restrained his limbs, head and body by way of downward force to the floor. Handcuffs were applied to Mr FZ and a pat search, metal detector search and strip search conducted to try and locate what officers believed to be a razor blade.
100. During the strip search, Mr FZ's clothes were removed. He was re-clothed in standard issue clothing. The room was also searched. Following the searches, no razor blade was located. All staff left the room at 2.54pm.

101. At 2.55pm, CCTV footage shows Mr FZ taking a small, rectangular, grey item from his mouth and presenting it to the CCTV camera. He places the item back in his mouth and appears to swallow it.
102. In the second incident at 3.10pm, seven ERT officers again wearing PPE gear quickly entered into the room in tight formation, accompanied by two additional Serco staff.
103. In this instance, Mr FZ was already lying on the floor of the room face up. At least six ERT officers rolled him face down and restrained him on the floor in a similar fashion, holding down his limbs, head and body. They applied handcuffs again, conducted a pat search, and then lifted him into a sitting position on the bed. Mr FZ was then guarded by at least one ERT officer until an ambulance arrived to transport him to hospital.
104. No razor blade was ultimately found in the searches conducted of Mr FZ or the room, or following medical scans and treatment. There was also no physical evidence of him ingesting a razor blade or any recorded injury to his mouth.
105. I have considered the following particular aspects of the two separate uses of force for compliance with human rights:
 - a) use of physical restraint
 - b) use of handcuffs
 - c) conduct of pat searches
 - d) conduct of a screening search with a handheld metal detector
 - e) conduct of a strip search.

5.2 Disputed facts

106. The Department and Mr FZ are in disagreement about certain key facts. The main differences regard the circumstances leading up to, and therefore contextualising, the uses of force against Mr FZ.
107. In Mr FZ's complaint to the Commission dated 19 October 2016, he describes the events as follows:

On 5th October 2016, I expected a visit by my mum at the Centre. The SERCO officers denied me seeing my mum. I protested and said that I am stressed and anxious and demanded to see a mental health person from the IHMS. They took me to the IHMS and a medical staff there said that I am to commit self-harm. Then there were 8 SERCO officers jumped on me and pushed me on to the ground and sitting on me. While I was screaming in agony from pain on my arm and ankle, they kept pushing me onto the ground without notice. They then handcuffed me and put me into a locked room. While I was there and shouting from pain, they were outside looking at me through a little window. Then they came and checked my arm which was swollen and changing colour. They noted that my arm may have been fractured. They called an ambulance and took me to Liverpool hospital. I had fractured arm and ankle.

108. A central aspect of the Department's account of events is Mr FZ's alleged possession of a razor blade.
109. According to the Department, Serco and IHMS staff, Mr FZ informed an IHMS nurse that he had a razor blade, showed the nurse the razor blade, cut his right wrist in a self-harm attempt, and said that he did not want to go to Christmas Island.
110. They say that Mr FZ was behaving abusively and aggressively towards detention staff, making repeated threats to kill himself and Serco officers.
111. The use of force was apparently exercised to obtain the razor blade and prevent Mr FZ from self-harming.
112. The Department has said that the CCTV footage timestamped 2.55pm on 5 October 2016 confirms that Mr FZ was in possession of a razor blade.
113. The Department appears to accept that Mr FZ sustained an injury to his right hand during the period of the ERT response. In a letter to the Commission dated 18 July 2017, the Department said: 'Mr FZ refused to hand over the razor blade and Serco's Emergency Response Team (ERT) responded to prevent Mr FZ harming himself or others. However, during this period Mr FZ appears to have sustained an injury to his right hand and an ambulance was called. Mr FZ was transferred to hospital.'
114. Medical records show that Mr FZ suffered a fracture to his fourth right metacarpal and underwent surgery to fit a plate into his hand.
115. About a week later, on 11 October 2016, Mr FZ complained of pain and swelling in his right ankle. He stated that this injury was also caused by the incidents on 5 October 2016. An x-ray revealed a fracture to the right lateral malleolus and he was treated with an immobilising splint. The Department does not accept that this ankle injury was caused by the uses of force.
116. The key differences between the account of Mr FZ and the account of the Department are summarised in a letter from his then lawyer to the Commission dated 6 November 2017, which asserts that Mr FZ:
 - a) did not possess a razor blade; the item shown to the camera is a piece of plastic that he found in the room
 - b) did not threaten to commit self-harm and did not commit self-harm either by cutting his right wrist or swallowing a razor blade
 - c) did not act extremely abusively and aggressively towards Serco officers
 - d) did not make repeated threats to kill himself and Serco officers.

5.3 Consideration of records of incidents

117. Two CCTV cameras captured the two use of force incidents in part or whole in colour footage, albeit in low quality, which I have viewed closely.
118. The first camera was inside Room 3 in which Mr FZ was detained—a locked, isolated observation room typically used for high needs detainees.
119. The second camera was in the common area outside Room 3, which shows service provider activity in the lead up to the uses of force. When the door to Room 3 is opened, it is also possible to see into the room partially, but not very clearly.
120. Overall, despite this footage, I have found it difficult to ascertain precisely what exact actions were taken, given the distance and positions of the camera, the numerous persons exercising force, and the fact that many of the officers are positioned with their backs to the camera in a manner that blocks visibility of their specific actions and of Mr FZ. There is also no audio to accompany the visual recording.
121. Notably, there is no footage from inside the room of the moments leading up to the first use of force incident, or the initial moments of this use of force, as Mr FZ had covered the CCTV camera lens with toilet paper. The first available footage from inside the room shows the point in time when Mr FZ is pinned down on the floor by ERT officers.
122. The Department has confirmed that no body-worn camera footage was taken by any of the Serco ERT officers of the incidents.
123. Noting these gaps, the available CCTV footage and the documents provided by the Department which include incident reports, service provider reports, use of force records and medical records, record the following key events on 5 October 2016.

(a) Lead up to the use of force

124. This is my summary of events based on viewing the CCTV footage. At 12.32pm, CCTV footage shows Mr FZ entering Room 3 of the Hotham High Care Unit, escorted by seven Serco staff. The staff then exit the room and the door is locked. Various Serco staff enter and exit the common room outside the room, and speak with Mr FZ through a rectangular slot in the door.
125. At 12.56pm, Mr FZ covers the camera lens inside the room apparently with toilet paper so that nothing is visible. He later removes and reapplies the paper to the camera lens approximately three times.

126. At approximately 1.18pm, CCTV footage from the camera in the common room shows a female IHMS staff member attending and speaking with Mr FZ through the slot in the door. She is later joined by another IHMS staff member. Approximately six Serco staff stand behind her in the common area. Over the course of the next 40 minutes, staff enter and exit the common room and at times speak with Mr FZ through the slot in the door (Figure 1).

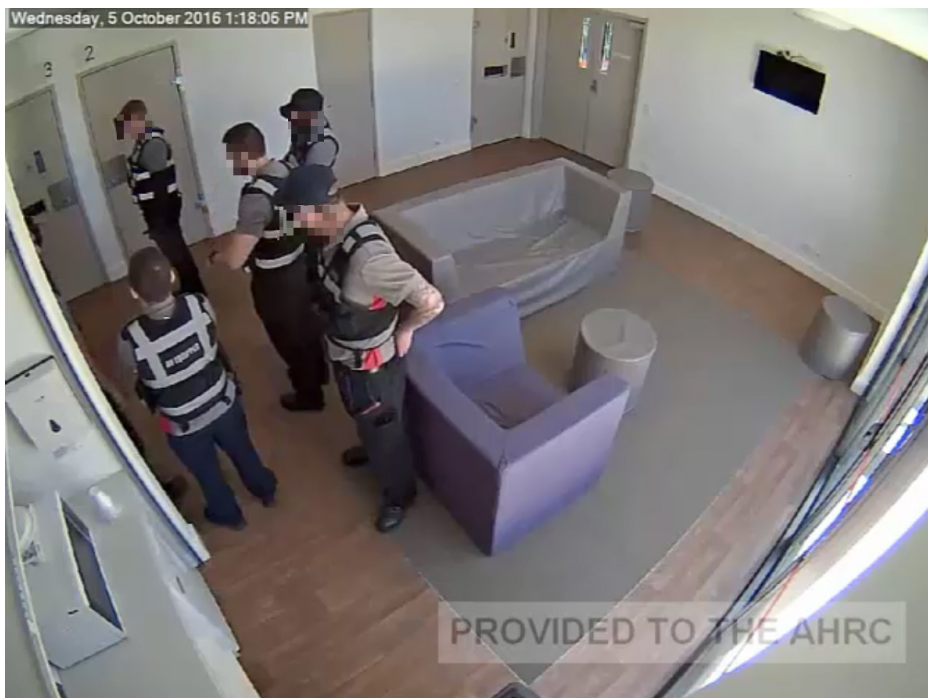


Figure 1: CCTV still from the camera in the common room showing Serco staff speaking to Mr FZ, held in Room 3, through the slot in the door.

127. An IHMS Consultation Note, written by a registered primary health nurse on the evening of the day of the incidents, timestamped 8.54pm, states that:

Subjective: 32 year old male in Hotham, voiced concerns about his health to SERCO. RN attended and was informed by client that he had a razor blade, on arrival to Hotham, was told that he had cut his wrist in an attempt of self-harm. Client became increasing[ly] agitated but was calmed down by IHMS nurses, once allowed in we spoke with the client but after a while and denying that he had a razor blade he asked us to leave ...

It is not entirely clear at what time this conversation occurred, but appears that it could correlate with the events at 1.18pm captured on CCTV.

128. On 14 October 2016 at 4pm, some nine days after the incidents, an email was sent by an IHMS nurse to Serco providing more detail, including about the basis for staff believing that Mr FZ possessed a razor blade:

I was advised by Serco officers that [Mr FZ] required his asthma medication. Then when I went down to give it to him he said (in more words or less) 'no I don't want the puffers. I can't go to Christmas Island. I have a razor blade and I will use it on myself' and at the same time he showed me the actual razor blade held in his fingers which I could clearly see through the little open window in the door. Then I advised Serco of his possession of a razor blade and advised the team leader [redacted] and HSM [redacted] and the three of us were there while ERT requested the razor from him. He then denied having the razor each time he was asked (multiple times). He then got searched by the ERT team twice and afterwards I was informed that he showed the razorblade to the camera in his room. Also after the second search I could hear him say he swallowed it. I didn't witness the actual search but I also heard him say 'my wrist is broken'. Then I left while the team leader stayed and called the ambulance.

129. A Serco Officer Report also states that at approximately 1.36pm, Mr FZ stated to a Serco Detainee Service Officer (DSO) that he had cut his wrist, and showed two officers a superficial cut on his right wrist and seemed to wipe some blood on the door.
130. From approximately 1.00pm–2.30pm, from what is visible to me when the CCTV camera inside the room is not covered, Mr FZ paces around the room, kicks the door several times with his feet, removes the mattress from the bed and places it in the corner of the room, and attempts to loosen the air-conditioning unit from the ceiling using his hands and the drawstring of his sweatshirt which he removed from his sweatshirt. His mood appears to me frustrated and agitated.
131. At approximately 2.26pm, CCTV footage shows Serco staff opening the door to Room 3. Mr FZ can be seen standing in the middle of the room and pacing. He speaks to staff and steps backwards into the room as they walk in.



Figure 2: Serco staff open the door and enter Room 3. IHMS staff stand in the common area with medical equipment.

132. Four Serco staff and one IHMS staff member enter Mr FZ's room. Three further IHMS staff stay in the waiting area with medical equipment. Mr FZ stands on the bed for a period then sits on the bed and speaks with staff, including two IHMS staff who appear to conduct a medical examination. Behind a door leading to the common room, seven Serco ERT officers wearing PPE are waiting, likely out of sight of Mr FZ.
133. At approximately 2.41pm, the IHMS staff in the common room move furniture around, appearing to make room for the passage of ERT officers. Seven ERT officers in PPE enter the common room in a tight two-by-two formation, and wait against the wall adjacent to Mr FZ's door, out of his line of sight (Figure 4).



Figure 3: Serco staff speak with Mr FZ in Room 3 who is sitting on the bed. IHMS staff are in the common area with medical equipment. ERT officers are visible in the corridor.



Figure 4: Seven Serco ERT officers wait in tight formation outside Room 3.

(b) First use of force

134. At 2.43pm, after approximately 15 minutes with Mr FZ in the room, the three Serco staff remaining with Mr FZ exit. They walk slowly out of the door of Room 3 into the common room, with their backs turned to Mr FZ, and do not appear to me to be distressed or threatened (Figure 5).



Figure 5: Serco staff leave Room 3; seven ERT officers await entry. IHMS staff stand in the common room with medical equipment.

135. As the staff leave, Mr FZ stands from sitting on the bed. He follows the staff to the door of the room, speaking and gesturing with his hands. He does not attempt to leave through the open door of the room into the common room, but stops at the threshold of the door and turns to walk back into the room.
136. The Serco Centre Manager of Blaxland compound provided a statement on 27 October 2016, as evidence that they would be prepared to give in Court, providing the following information about the decision to deploy ERT officers:

Based upon previous incidents with significant injuries inflicted by razor blades, the violent and aggressive behaviour of the detainee, the lack of response to over 60 minutes of negotiation by staff, and consultation with A/FOM [redacted] and [redacted], as well as ERT Team Leader [redacted], I directed that welfare clothing be brought to Hotham and that ERT were to wear PPE and activate body cameras. I also directed that the room camera was to be made operational upon entry to the room by removing the wet paper from the lens cover ...

- 137. Subsequent events indicate that welfare clothing was brought for Mr FZ and that ERT officers wore PPE. The toilet paper was removed from the room camera. However, despite the instruction from the Centre Manager, ERT officers did not either wear or activate their body cameras.
- 138. At 2.44pm, immediately after the last staff member leaves Mr FZ's room, the seven ERT officers enter Mr FZ's room at speed in tight formation (Figure 6). The front officer has a large plastic shield. The officers are followed by three Serco staff. Four IHMS staff wait outside in the common room.



Figure 6: Seven ERT officers enter into Room 3 at speed in tight formation.

- 139. At 2.45pm, the camera in Mr FZ's room is uncovered by an ERT officer. Six ERT officers can be seen surrounding Mr FZ from above, obscuring his visibility from the camera. The officers appear to be forcibly restraining Mr FZ face down on the floor, restraining his head and limbs (Figure 7). A further four Serco officers are also present.

140. As noted above, this is the first available footage from the camera inside the room. There is no footage from this camera of the immediate lead up to and the initial moments of the first use of force. A Serco Use of Force Record states that, upon entering the room, an ERT officer directed Mr FZ to get on the floor but he did not comply and instead 'came at ERT aggressively'.



Figure 7: CCTV footage still from inside the room, showing six ERT officers restraining Mr FZ face down on the floor, holding down his limbs and head.

141. The CCTV footages shows that a search of Mr FZ's person and the room was conducted. At least one ERT officer conducts a pat search of his body, while at least four other ERT officers hold Mr FZ down on the floor. The officers are pinning down his arms, legs, and head. One ERT officer appears to be directing the search, by standing above and giving instructions to other officers. A search of Mr FZ is also conducted with a hand-held metal detector.
142. It becomes apparent that handcuffs have been applied to restrain Mr FZ's hands behind his back, although it is unclear at what point this has occurred.
143. At approximately 2.47pm, while still pinned face down on the floor, Mr FZ's buttock and groin area is pat searched. His shorts and underwear are then removed by two ERT officers, with his legs stretched outwards and his clothes pulled downwards (Figure 8). Mr FZ is re-dressed in different shorts by two officers.

144. Despite the officers clearly executing a strip search on Mr FZ, the Department has confirmed that there are no records of written authorisation approving either the strip search or the force used on Mr FZ, despite the policy requirements. A subsequent departmental review described the use of force on Mr FZ as 'unplanned'.



Figure 8: ERT officers strip search Mr FZ while he is restrained on the floor, removing his shorts and underwear.

145. At 2.48pm, Mr FZ is moved to a sitting position on the floor. Four ERT officers continue to restrain him, including by holding down his legs. His shirt is removed by an ERT officer; it appears that his shirt is torn or cut to allow removal over the handcuffs.
146. At 2.49pm, Mr FZ is lifted to a standing position. A further metal detector test is carried out. He is then escorted to the bed by three ERT officers. He is seated on the edge of the bed, and forcibly pushed into a downwards position by at least one ERT officer so that his head is on his knees (Figure 9). He remains shirtless, with his hands cuffed behind his back. Two officers continue to restrain Mr FZ by holding his shoulders down. No item is found with the metal detector.

147. In his statement, the Serco Centre Manager of Blaxland states that the decision to remove Mr FZ's clothing was based on the failure to detect any contraband following the pat search and metal detector search:

I made a telephone call to Inspector and informed her of the exigent entry to Unit 4 as well as the provision of welfare clothing to the detainee. This was based upon the detainee having been pat-searched and screened with two separate magnetic detention wands and stands with no concealed items detected ...



Figure 9: ERT officers restrain Mr FZ in a seated position on the bed.

148. At 2.53pm, the ERT officers appear to prepare to leave the room. Five ERT officers lower Mr FZ onto the ground face down. One officer holds Mr FZ's legs in a crossed position, forcibly pushing them towards Mr FZ's back (Figure 10). Two other ERT officers hold down Mr FZ's arms and torso area. He remains shirtless.



Figures 10 and 11: ERT officers restrain Mr FZ face down on the floor, with his legs crossed, preparing to exit the room.

149. At 2.54pm, Mr FZ's handcuffs are removed. Two ERT officers continue to restrain Mr FZ's legs while the others exit the room. One officer appears to sit on Mr FZ's legs in the forcibly crossed position, while the other officer adds additional force by standing and pushing the first officer's shoulders down (Figure 11). The remaining two ERT officers then release Mr FZ's legs and quickly exit the room. The door is shut.
150. In an undated document titled 'Chain of Events', a record of the incidents on 5 October 2016 is set out, with approximate times. It appears to be written by a Serco staff member who is not an ERT officer. It is unclear whether this record was created on the day, soon after the day, or at a later time. The document summarises the first incident as follows:

14:45hrs – ERT entered the room and restrained [Mr FZ] with cuffs and commence the search of the razor in the room.

14:46 – I entered the room to help the officers in their search for the razor that may have been stashed in the toilet area or in the food he had. As I went in the officers had found a phone on his person and a SIM card and a piece of the SIM cover (Silver holder)

As I continued to search I went and spoke to the IHMS nurse to ask again if she was sure she saw a razor and she advised with confirmation that [Mr FZ] had shown her the razor when she checked his wrists. I showed her the sim card cover from the phone and said if it could have been that and she advised no it was a razor. I entered the room once again and continued to search for the razor and to no avail. I checked the way the officers had restrained [Mr FZ] and he was held in a position facing down with his head to the side, the officers then lifted him up to a sitting position and then took his jumper off. Once the officer had his jumper they placed the wand over it and to no avail no razor.

I then asked the nurse one more time if it could have been a little silver sim cover and she was very confident and adamant it was a razor.

I then asked [redacted] if he is positive he has no razor in his possession and [redacted] confirmed yes. I then passed the judgement to withdraw from the detainee's room first with taking off his cuffs.

14:57hrs – As the ERT were leaving the room he was swearing and screaming that we are fucken going to get it. The ERT then left the room and re-grouped outside the officer's station. As the doors were shut [Mr FZ] continued to be abusive and aggressive and kicking the door. The findings were then liaised to [redacted] by [redacted] and [redacted] ...

(c) Intervening period

- 151. When the officers leave, the CCTV footage shows that Mr FZ stands, walks to the door, looks through the door, gestures and speaks. He kicks the door with the back of his left foot.
- 152. At 2.55pm, Mr FZ approaches the camera. He appears to take a small, rectangular, grey object from his mouth (Figures 12 and 13). He shows it to the camera and appears to place the item back in his mouth.
- 153. A Serco Officer Report states that at approximately 2.55pm, Mr FZ was viewed through the CCTV camera showing a razor to the camera and placing it in his mouth. The report states that he swallows the item and claims that he has swallowed a razor.





Figures 12 and 13: Mr FZ appears to remove an object from his mouth, and shows it to the camera.

154. For approximately the next 15 minutes, Mr FZ appears to cough, retch, double over and touch his chest and face in apparent pain. He sits on the floor next to the door slumped over. He lies on the floor in a curled up position (Figure 14), or sits on the bed, and rocks. At various times he looks through the slot in the door into the common room and kicks the door several times with his left foot.



Figure 14: Mr FZ lies on the floor of the room in a curled up position.

155. At 3.03pm, Serco and IHMS staff speak with Mr FZ through the slot in the door for about five minutes. Seven ERT officers return to the common area, in the same formation against the wall leading to Mr FZ's door, out of his sight.
- (d) Second use of force
156. At 3.10pm, Mr FZ gets down on the floor and lies face up, just as seven ERT officers in PPE enter into the room at speed in tight formation (Figures 15 and 16). The first ERT officer carries a plastic shield. Three Serco staff also enter the room after the ERT officers.



Figures 15 and 16: Seven ERT officers enter Room 3 for the second time; IHMS staff can be seen waiting in the common room.

157. Mr FZ is rolled face down, with five ERT officers pinning him to the ground in the same manner as before. His limbs and head are held down, and a pat search is conducted (Figure 17). One ERT officer is standing above Mr FZ and giving instructions to the others. Handcuffs are applied and Mr FZ is lifted to a sitting position on the bed.



Figure 17: Five ERT officers restrain Mr FZ face down on the floor for a second time, holding down his limbs and head.

158. At approximately 3.12pm, an IHMS staff member enters the room and inspects Mr FZ and speaks with him. Four ERT officers hold Mr FZ in a seated position on the bed while the IHMS staff member speaks to him.
159. At approximately 3.18pm, Mr FZ's handcuffs are removed and replaced so that his hands are restrained from the front rather than the back. The IHMS staff member briefly inspects his hands. Mr FZ holds his right wrist with his left hand (Figure 18), suggesting that at this point the injury to his hand may have been sustained.
160. A Serco Use of Force Record states that Mr FZ was offered medical assistance but refused.



Figure 18: Mr FZ can be seen holding his right wrist with his left hand; an IHMS staff member and ERT officers look on.

161. Between approximately 3.26pm–3.45pm, various ERT officers, Serco staff and IHMS staff can be seen to enter and exit Mr FZ’s room and converse with each other in the common room. At least two ERT officers remain with Mr FZ. He is not handcuffed, but guarded from a distance.
162. At approximately 3.57pm, three paramedics attend and speak with IHMS staff in the common room. One paramedic enters Mr FZ’s room and observes him; they do not appear to carry out any physical medical assessment of Mr FZ at this time. Mr FZ’s handcuffs are removed to allow him to use the bathroom. All staff leave the room.
163. At approximately 4.00pm, Mr FZ is escorted out of the room into the common room and handcuffs are applied again with his hands at the front. He is directed to a seat in the corner of the room. He appears agitated and does not want to sit at times. He stands and gestures with his hands while speaking. At approximately 4.06pm, he appears to be talking about his hands.
164. At 4.07pm, Mr FZ exits the common room with the paramedics and staff.

165. In his statement, the Serco Centre Manager of Blaxland states that the decision to deploy the ERT team a second time was made as follows:

Around 1455hrs I was watching the camera monitors in Hotham where I saw detainee [Mr FZ] stand up on the bed and hold a razor blade to the camera before placing it into his mouth. I immediately consulted with HSM [redacted], A/ FOM [redacted], and DSO [redacted]. The detainee continued making threats to self-harm as well as harming staff whilst banging on the door with his hands and feet.

Based upon the imminent threat to the detainee's safety, the possession of the razor blade, and the lack of response to another round of negotiations, I directed the ERT to re-enter the room and prevent the detainee from harming himself. This was again in accordance to legislative obligations under the Migration Act, 1958, to use force to prevent harm to a person or others.

Around 1510hrs I saw the ERT team open the door and give directions to the detainee to release the razor blade and comply with their further directions. The detainee yelled threats and abuse to the DSO's and stated that he had swallowed the razor blade. I remained outside however I was aware that HSM [redacted] attended to the detainee and the NSW Ambulance was called and attended a short time later. I had a conversation with A/ FOM [redacted] around raising reports, collecting officer's reports and downloading footage.

At the time of this incident I had genuine concerns for the safety of detainee [Mr FZ] as a result of self-inflicted injuries that he may sustain. This was based upon his physical stature and aggression, the nature of his threats to himself and to others, the characteristics of the weapon that he was in possession of (razor blade), and the ability to conceal that weapon in clothing or an internal cavity. I was also conscious that as a detainee with criminal antecedents he was very aware of previous successfully aborted removals by other detainees who had made threats with a razor blade. I have experience with other detainees who had successfully concealed razor blades upon their person, within their clothing, or internal cavities. Replacement with welfare clothing reduced the detainee's ability to possess pre-concealed weapons or razor blades. Razor blades are sufficiently sharp enough to slice upon an artery where death could occur within minutes.

During this incident I relied upon the powers of an authorised officer under the Migration Act, 1958, to use reasonable force to prevent self-harm to a person or to others.

166. An IHMS Consultation Note written by a primary health nurse dated 5 October 2016 at 8.54pm summarises the incidents as follows:

SERCO then attempted to get the Razor blade off the client x 2 with no success he then stated that he had swallowed the razor blade.

Objective: Superficial cut to R wrist not actively bleeding post alleged attempt of self-harm. He also c/o of painful R wrist had swelling to the hand, unable to make a fist and clench his hand, visibly in pain.

167. The document titled 'Chain of Events' summarises the second incident as follows:
- 15:00hrs – The officer yelled out 'he has the razor and now he has swallowed it (don't know who this officer was). I entered the officers station checked the CCTV and it showed he had the razor and placed it in his mouth – [redacted] was notified by me because I had seen it on the camera. I returned to the officer's station to monitor [Mr FZ]. ERT were then told again to go in and get the razor because I saw them began to kit up again
- 15:15hrs – The ERT team went back in to try and get the razor back and to keep him calm until IHMS assessed him. They placed cuffs on him to ensure he would not attempt to assault IHMS or SERCO officers with the razor
- 15:17hrs – IHMS entered and then [Mr FZ] became calm, [redacted] came out and advised he needs to go to hospital because he has admitted he swallowed the razor. [Mr FZ] was seated on the bed he was now calm but still abusive and swearing.
- 15:55hrs – Ambulance arrived to take [Mr FZ] to hospital
168. A Serco Use of Force Record states that force was used in both incidents to 'prevent harm to any person (including self-harm and assault)'.

(e) Medical treatment

169. An attendance record from Liverpool Health Service shows that Mr FZ attended Liverpool Health Service and following an x-ray was diagnosed with a fracture of the shaft of the metacarpal bone on 5 October 2016. The summary of progress states that Mr FZ's right hand was injured in an 'altercation with staff at Villawood'.
170. The 'summary of progress' section states that Mr FZ claimed that he had not swallowed a razor blade. It records that no razor blade was found following x-rays. It notes that Mr FZ was feeling frustrated by his situation and wanted to see his mother. It states that he took a razor blade to his mouth but then spat it out. It states that this was an impulsive reaction to being angry, rather than suicidal feelings.
171. In an IHMS clinical record dated 8 October 2016, a mental health nurse notes Mr FZ's alleged comments about the incidents as follows:
- a) he had threatened self-harm in the form of swallowing a razor blade
 - b) at no time did he intend to harm or kill himself
 - c) his intention was rather to abort transfer to Christmas Island; he was in shock at the news of the transfer and his first thought was to threaten to harm himself with a razor blade
 - d) it is common knowledge among detainees that the way to abort transfer is with a razor blade.

172. A further x-ray report from Fairfield Medical Imaging of Mr FZ's right hand dated 10 October 2016 shows a fracture to his fourth metacarpal bone.
173. An IHMS clinical record dated 11 October 2016 notes that Mr FZ presented on that day with a 'very swollen' right ankle. The diagnosis states 'possible fracture, tender and warm to touch, unable to bear weight on whole foot and balancing on toes'. It notes that Mr FZ told the nurse that the injury was from the incident on 5 October 2016, but that it had become swollen in the past two days and gradually worsened.
174. An attendance record from Liverpool Health Service dated 11 October 2016, titled 'ED Discharge Referral', states that Mr FZ attended Liverpool Health Service and was diagnosed with a very minimal fracture to his ankle (right lateral malleolus) following a scan. The Summary of Progress states:
- [Mr FZ] c/o that his right ankle was twisted by officers one week ago, initially he didn't have pain or swelling, able to walk from the beginning, noted swelling to ankle and foot since yesterday, still able to walk normally ...
- Right foot, NV intact, swelling to foot and lateral aspect of the ankle noted, mild tenderness to lateral aspect of ankle, ROM of the ankle is normal ...
175. A CT scan report from Fairfield Medical Imaging dated 11 October 2016 states that 'a few small bony fragments are seen distal to the lateral malleolus which could suggest previous avulsion injuries. The exact nature of which cannot be defined ... could be recent ...'. The clinical history portion of the report states 'pain and swelling noted since yesterday'. Mr FZ was treated with a camboot and crutches.
176. An ED discharge referral record from Fairfield Hospital dated 11 October 2016 states that Mr FZ was diagnosed with 'a minimal fracture to lateral malleolus'. The clinical history portion of the report notes that Mr FZ said his right ankle was 'twisted by officers one week ago, initially he didn't have pain or swelling', and that the swelling started yesterday.
177. On 12 October 2016, an operation report from Fairfield Hospital shows that Mr FZ underwent surgery on his hand, where a plate and screws were fitted into his right hand to treat the fracture.
178. An IHMS clinical record dated 14 October 2016 states that Mr FZ's right foot was showing improvement with minimal swelling.
179. An IHMS clinical record dated 30 November 2016 states that Mr FZ suffers from complex Post-Traumatic Stress Disorder, and was re-traumatised by the use of force incidents.
180. A referral to trauma counselling dated 8 February 2017 further states:
- [Mr FZ] stated he had been a child soldier in Sudan. His father died when he was age 4. His siblings all live in Sydney. Moved here on Humanitarian visa with his mother and siblings when [Mr FZ was] aged 16.

[Mr FZ] experienced PTSD [from] early childhood living in a country which was in war. He was exposed to significant violence and cruelty. He was forced to become a soldier when he needed education and supported environment. It seems that [Mr FZ] could not move on [from] past after he migrated to Australia with his family. He wanted to see his sic[k] mother who came to visit him that day. He refused to go. He says he was surrounded by a number of officers who pushed him on the ground and took his clothes off to search him. He resisted and that made them to be more forceful. He says he felt humiliated and degraded. He experienced massive emotional and physical pain. He was left injured (broken metacarpal in R hand and broken foot). He felt traumatised with this incident.

It seems that he was traumatised again when he refused to go to CI [Christmas Island]. It reminded him his past and he re-experienced the traumatic childhood.

...

Complex PTSD

Re-experiencing PTSD symptoms after the incident – nightmares and flashbacks ...

(f) Review Report findings

181. In 2017, the Department's Detention Assurance Team undertook its own inquiry into the uses of force against Mr FZ, including by interviewing staff at VIDC and reviewing compliance with reporting and other policies. It delivered a report on 16 May 2017 (the Review Report), finding that:

- a) the use of force was necessary and a measure of last resort
- b) IHMS were sufficiently consulted
- c) the number of ERT officers using force was 'probably reasonable' in the circumstances
- d) it is unclear when and how Mr FZ sustained his injuries, in particular whether the fracture to his ankle was sustained during the use of force incidents
- e) there was no evidence to suggest that the screening and search procedures carried out were not conducted lawfully and in accordance with policy and procedures
- f) some reporting by service providers was inadequate and did not meet contractual obligations, including concerns about the low quality of post incident review documentation.³²

182. It describes the relevant ERT officer policies governing ERT deployment and use of force techniques as follows:

The use of force DSOP and Serco ERT policy and procedure manual (PPM) do not provide details about the number of ERT officers required or appropriate when applying force. Serco advised the review team that the number of ERT officers using force will depend on the situation and there are certain use of force techniques that require four or five officers. On 5 October 2016, seven ERT officers entered [Mr FZ's] room and up to five officers appear to use force on [Mr FZ] at any one time. The number of ERT officers applying force at any one time also decreases as the officers take control of the situation. Following consideration of [Mr FZ's] apparent strength, level of aggression and advice from the ABF and Serco officers, the review team is of the view that the number of ERT officers using force on [Mr FZ] on 5 October 2016 was most likely reasonable given the circumstances [redacted].³³

183. Regarding Mr FZ's injuries, the Review Report states that '[t]he review team is unable to definitely determine whether Mr FZ's injuries were sustained during the use of force incidents that occurred on 5 October 2016 or whether the injuries were self-inflicted, for example, as a result of Mr FZ kicking the door'.³⁴ In particular, the Review Report states:

Following analysis of [Mr FZ's] medical records, the review team has not been able to definitely determine whether or not the injury to [Mr FZ's] right ankle occurring on 5 October 2016. CCTV footage immediately following the incident and prior to [Mr FZ] being transported to hospital did not show him limping.³⁵

184. The Review Report found that there was no evidence to suggest that screening and searching procedures were not conducted lawfully and in accordance with policies and procedures.
185. However, the Review Report found issues with lack of appropriate authorisation for the uses of force. In particular, it found that an ABF on call officer authorised the first use of force verbally, but that this level of officer did not have the delegation to approve a use of force. Rather, as stated in the Use of Force DSOP, Serco must seek approval from the ABF Superintendent prior to a planned use of force.
186. The report further found that there was no record of the ABF authorising the second use of force at all. The report found that the use of force on both occasions was 'unplanned' rather than 'planned'.
187. The Review Report also found that reporting of the incidents by Serco did not meet its contractual obligations, particularly in relation to the quality of post incident reviews.
188. It found that Serco had completed written reports for only eight out of the ten relevant reportable incidents that occurred on 5 October 2016. It further found that each ERT officer that applied force was required to submit a written report within six hours of the incident, but that not every officer had done so.

189. The Review Report makes eight recommendations.
190. In relation to reporting on the use of force, the Review Report recommended that incidents involving the use of restraints include a mandatory reporting requirement in relation to the time restraints are applied and removed to allow verification of removal at the first reasonable and practicable opportunity.
191. In relation to strip searches, three recommendations were made: that Serco review their strip search related training competencies and certification requirements, that the ABF review the amount of time taken to obtain authorisations for strip searches with a view to minimising delays, and the Integrity and Professional Standards Branch consider whether applicable frameworks had been breached by Serco officers.
192. In relation to audio-visual recording, the Review Report recommended that Serco review whether ERT officers are unable to use body camera systems while wearing PPE—because the vest does not fit over the top. Further, that the ABF consider amending advice in the AV recording detention standard operating procedures to clarify which types of AV recording devices are appropriate in different circumstances.
193. In relation to incident reporting, the Review Report recommended that the Department's Onshore Contracts Branch examine whether abatement sanctions should apply to Serco for not complying with the incident reporting requirements stipulated in the contract and relevant procedural documents. It was further recommended that the Services Management Branch and Detention Operations Branch put in place quality assurance processes to monitor Post Incident Review reporting to ensure compliance with contractual and operational requirements.

6 Findings

194. I find that, on balance, excessive force was used against Mr FZ by ERT officers in a manner that was not reasonable, necessary or proportionate to the risk he posed to himself or others.
195. At the relevant time, Mr FZ had been in immigration detention for about six weeks. He had otherwise lived his adult life in New South Wales, where his family is based, including serving his prison sentence.
196. It is not clear exactly when detention staff advised Mr FZ of his pending relocation to Christmas Island. This seems to have occurred around the time he was moved into isolation in the Hotham Compound, with little advance notice.

197. In the IHMS clinical record dated 8 October 2016, Mr FZ stated that he was ‘in shock’ at the news of the transfer. Mr FZ was likely apprehensive about being moved to Christmas Island, far away from his home, family and social connections. In his complaint to the Commission, Mr FZ also stated that he was expecting a visit from his mother on the day he was scheduled for transfer, and was agitated after he was not allowed to see her.

6.1 First incident

198. With respect to the first use of force, I consider that IHMS and Serco staff reasonably believed that Mr FZ possessed a razor blade. It was also reasonable and appropriate for staff to be concerned about the danger of self-harm.
199. According to the email dated 14 October 2016 from an IHMS nurse to Serco, an IHMS nurse apparently saw or believed that she saw Mr FZ holding a razor blade through the open window in the door to Room 3. According to that email, Mr FZ also stated that he had a razor blade and would use it to self-harm. She then told Serco officers that Mr FZ had a razor blade.
200. According to a clinical record dated 8 October 2016, being three days after the incidents, Mr FZ also told mental health staff that he had threatened self-harm but never intended to harm himself, but rather wanted to prevent being transferred from Villawood IDC to Christmas Island IDC. I consider that Mr FZ wanted staff to believe that he was in possession of a razor blade.
201. In its response to my Preliminary View dated 8 April 2019, the Department said that it:

[C]ontinues to be of the view that [Mr FZ’s] claim not to be in possession of a razor blade is not an accurate representation of the events of 5 October 2016, including the risk presented by [Mr FZ] and the response of Serco. The Department previously presented the Commission CCTV footage and contemporaneous officer reports demonstrating that [Mr FZ] was in possession of a razor blade. This evidence combined with [Mr FZ’s] claims to be in possession of a razor blade; [Mr FZ’s] threats to harm Serco officers; [Mr FZ] inflicting a laceration on his arm using a razor blade as declared by [Mr FZ]; [Mr FZ’s] claim to have ingested a razor blade; and a staff member from IHMS sighting the razor blade effectively demonstrates the risk environment in which Serco officers were required to respond. The Department respectfully requests that the Commission provide appropriate weighting to this information and update its preliminary view to reflect this.

202. In its response to my Preliminary View dated 8 April 2019, the Refugee and Immigration Legal Centre, acting for the complainant, submitted that:

We understand that whether or not [Mr FZ] was in possession of a razor blade is a point of contention. We are instructed, however, that at no time was [Mr FZ] invited to agree to a search, a pat search or by using metal detectors. It is also unclear why a strip search was deemed necessary when the pat search and the metal detector did not indicate any metal objects.

203. I am satisfied that IHMS and Serco staff reasonably believed that Mr FZ possessed a razor blade. However, on the basis of the information provided to the Commission, I cannot conclude that Mr FZ was actually in possession of a razor blade because:

- no razor blade was found in the room or on his person after extensive searches were carried out, including a strip search and metal detector search
- no razor blade was found in the x-rays or medical checks carried out on Mr FZ at hospital
- there is a plausible alternative explanation that the item in question was a piece of plastic or a SIM card cover, which was found in the room
- as per the email sent by an IHMS nurse, Mr FZ later denied having a razor blade several times when asked by ERT officers.

204. Nonetheless, even under the belief that Mr FZ possessed a razor blade, I consider that the number of ERT officers deployed in the first instance was, on balance, not reasonable, necessary or proportionate to the goals of protecting Mr FZ, staff or other detainees at Villawood IDC, or to maintain the good order of the centre. Nor was the manner in which the officers quickly entered the room in tight formation, pushed him to the floor face first, and restrained him.

205. I note that there is no CCTV footage of the first moments inside the room during the first incident.

206. On the basis of the available CCTV footage, I consider that Mr FZ was behaving in a manner that intended to cause a nuisance in the lead up to the first use of force. It seems that he wished staff to believe that he had a razor blade. He kicked the door of the room on several occasions, tried to dismantle the air-conditioning unit from the roof and moved the mattress from the bed. He is of tall and solid build, and appears to be physically strong.

207. However, the footage does not show Mr FZ engaging in physical aggression towards service provider staff. He may have been making verbal threats, however I am not able to confirm this as the CCTV footage contains no audio recording.

208. There are also limited contemporaneous written records describing how Mr FZ was behaving before the first use of force. One use of force report from an ERT officer states that upon ERT entering the room, Mr FZ was directed to get on the floor but he did not comply and 'came at ERT aggressively'. The later statement of the Serco Centre Manager of Blaxland dated 27 October 2016, and the undated document titled 'Chain of Events', state that Mr FZ was swearing, screaming and acting abusively and aggressively *after* ERT staff used force against him.

209. In its response to my Preliminary View dated 8 April 2019, the Department said that:

At the time of the use of force incident, [Mr FZ] was identified as being in an emotionally elevated state, having committed self-harm with a weapon that he declared to be a razor blade and had shown IHMS that he was in possession of a razor blade immediately prior to the use of force. [Mr FZ] had also threatened to swallow the razor blade in order to avoid his transfer. He was making open threats that he would commit further self-harm, and threatened to harm Serco officers. The decision to apply force was taken after extensive efforts to de-escalate the situation via conversations through the door of the High Care Accommodation room as demonstrated within documented reports and footage that was provided to the Commission.

The number of Serco ERT officers deployed was in direct response to the risks presented by [Mr FZ] and ... there are certain use of force techniques that require four or five officers. The resultant use of force was rapid in nature so as to provide little warning to [Mr FZ] that this was about to occur, as he was believed to be in possession of a dangerous weapon (a razor blade) which he could easily use in combination with his known criminal history, his involvement in a number of incidents prior to the events of 5 October 2016, including abusive aggressive behaviour, contraband found and minor damage and his physical strength to cause serious harm to himself or others at any time. The Department is of the view that the number of Serco ERT officer[s] using force was most likely reasonable given the circumstances and requests the Commission gives appropriate consideration to [Mr FZ's] known violent and non-complaint behaviour prior to entering immigration detention as evidenced by his criminal history and his involvement in a number of incidents prior to the events of 5 October 2016.

210. I accept that, as part of the assessment of Mr FZ's threat level, it was appropriate for staff to consider his criminal record which includes violent offending. Service provider staff had a duty to ensure Mr FZ's safety, and those of other detainees and staff. However, on the basis of the information provided to the Commission, I consider that Mr FZ was behaving in a disorderly manner that was intended to create a nuisance and prevent his transfer, rather than in a highly aggressive and physically threatening manner. I consider that the primary risk of harm in the circumstances was to himself, as opposed to a serious and imminent threat to others.

211. In its response to my Preliminary View dated 8 April 2019, the complainant's representative submitted that:

We disagree that the evidence supports the contention that the 'use of force' was objectively necessary to prevent an imminent risk of harm.

We submit that it is not appropriate to consider one aspect of the detained person's past history, such as criminal history, without also considering other factors such as evidence of a person's mental health.

We believe the 'use of force' in the circumstances was in breach of the Department's own policies and procedures.

We are highly concerned about the lack of contemporaneous reports in relation to this incident.

...

In relation to both incidents involving the use of force we submit the use of force was not reasonable and appropriate in the circumstances...

212. With respect to the first incident, the complainant's representative conceded that he was in an emotionally elevated state, as he was upset that he had been denied his planned visit from his mother and the news that he would be imminently transferred to Christmas Island. However, they considered that the evidence, particularly the CCTV footage, indicated that Mr FZ did not present a physical threat to other staff and that 'there is no evidence he attempts to harm himself'. In particular, the footage showed Serco staff leaving the room with their backs turned and no signs of being distressed or threatened. They submitted that the evidence 'does not support the Department's assertion that the use of force was in direct response to the risks presented'.

213. The complainant's representative also took issue with the Department's assertion that Mr FZ had a history of 'violent and non-compliant behaviour... as evidenced by his criminal history, and his involvement in a number of incidents [in immigration detention]'. They submitted that there was no evidence of relevant incidents in immigration detention, and that the complainant's distress and known mental health issues are factors that should have weighed against the decision to use force. They submitted:

[While he] does have a past criminal record, it is a complex history in which his past history of mental ill-health and past drug and alcohol addictions is equally relevant. [Mr FZ] was in a very vulnerable position, having completed his sentence for the criminal offence, he then finds himself in immigration detention due to the cancellation of his visa and he must deal with complex legal issues while isolated from his family and community. He, as with other detainees, have no control over their physical location or access to their family and the period of time they must remain in immigration detention is uncertain, all of these are factors that adversely affect a person's mental health and their ability to cope in stressful situations. We submit that regardless of the person's history the use of force should only be used in circumstances where it is necessary to prevent an imminent risk of harm.

214. I find that Mr FZ was already isolated in a secure room before the uses of force by ERT officers. CCTV footage showed that Serco staff were able to calmly walk out of the room immediately before the first use of force incident, with their backs turned. This suggests that his behaviour did not result in any apparent fear by staff for their own personal safety, including fear of the alleged razor blade being used as a weapon against staff.
215. While a razor blade could be used to cause serious self-harm, the amount of time that transpired before Mr FZ was physically attended to on both occasions also suggests that the staff were not concerned about this being an imminent high risk.
216. In relation to the number of ERT officers deployed, in its response to my Preliminary View dated 8 April 2019 the Department said that:
- The Department's detention related operational instructions do not include specific guidance on how to determine the appropriate number of ERT officers to deploy in response to a specific situation or incident or the techniques that will be applied or how to properly use those techniques.
217. The Review Report also states that the relevant Departmental and Serco policies do not specify how many ERT officers are appropriate for a use of force. Rather, that this depends on the situation but that certain techniques require four or five officers. I am concerned that, despite the high level of detail in these policies, they do not prevent potentially excessive use of force in terms of the number of officers deployed and the techniques used. Alternatively or in addition, I am concerned about non-compliance with the policies as a matter of practice, particularly in fast-moving emergency situations. Mr FZ's complaint suggests that there may variously be issues with the level of discretion afforded to decision-makers or persons using force, inadequate safeguards in practice, or lack of adequate training of relevant staff.
218. It is not clear that such a high number of ERT officers were necessary to deploy force on Mr FZ in the circumstances. I do not agree with the finding in the Review Report that the number of officers deployed was 'probably reasonable'. Further, I consider that the manner in which the ERT officers entered into the room and used force may have escalated the physicality of the situation and the risk of harm to Mr FZ and others.
219. While the element of surprise may have been considered necessary, for example to assist with locating and seizing the alleged razor blade, it is not clear that the show of force in entering the room quickly in large numbers and the restraint techniques deployed by the ERT officers were proportionate to the risk posed. Again, this risk was primarily to Mr FZ himself.

220. I consider that the 'control and restraint' technique used on Mr FZ, whereby his limbs and head were forcibly held down with significant force, has not been shown to be necessary and appropriate in the circumstances. This technique was highly forceful, hostile and intimidating, and involved Mr FZ being held face down on the floor by up to six ERT officers, and his legs being pushed down in a crossed position against his back.
221. I further consider that force was not used as a last resort. According to CCTV footage, prior to the first instance Serco and IHMS staff were present in Mr FZ's room for a period of 17 minutes in apparent attempts to de-escalate the situation.
222. On the basis of the information provided, including CCTV footage, it appears to me that there were earlier de-escalation attempts through the shut door by IHMS staff and possibly Serco staff. However, I consider that further in-person communication, negotiation and conflict de-escalation strategies could and should have been attempted as opposed to speaking through the door, in addition to the 17 minutes of attempted in-person attendance.
223. I find that the manner in which the strip search was carried out on Mr FZ was also not reasonable, necessary and proportionate. There is no evidence of any prior written authorisation being provided to conduct a strip search, as is required by Departmental policy. I consider that the inappropriate conduct of the strip search was a direct result of, and part of the sequence of, the disproportionate use of force.
224. In particular, Mr FZ's shorts and underwear were forcibly removed by at least one ERT officer while he was held face down on the floor. Five other ERT officers were holding down his body, with a sixth officer present in the room. Five other service provider staff were also present in the room at various times.
225. This means that up to 12 people were in the small room at any one time while the strip search of Mr FZ was undertaken. I consider that Mr FZ was subject to greater indignity than was reasonably necessary to conduct the strip search procedure. It is not clear that every endeavour was made to preserve his humanity and dignity. No efforts were made to afford Mr FZ any privacy, such as ensuring only necessary persons were present in the room.
226. Even if Mr FZ was physically non-cooperative, I consider that the strip search could have been conducted in a way that was more compliant with his human rights. This could have included initially affording Mr FZ a reasonable period in which to voluntarily remove any items of clothing necessary to conduct the strip search, and ensuring greater privacy.
227. The Department and its service providers were also aware of Mr FZ's mental health history, including that he is a survivor of trauma and torture. Additional care should have been taken to ensure his physical and mental welfare during the uses of force and searches.

228. In its response to my Preliminary View dated 8 April 2019 the Department said:

[T]he Department's review found that de-escalation techniques were attempted and that IHMS was sufficiently consulted, having been present throughout the events of 5 October 2016 ...

229. It is not clear that Mr FZ's relevant health and other history were properly considered *in advance* in consultation with IHMS. I accept that IHMS staff were nearby during the uses of force, should medical assistance have been required. However, it is not clear that they were consulted about Mr FZ's medical history, for example his claimed status as a torture survivor, with respect to whether and how to use force and to perform a strip search. Such advance consultation may have resulted in a more proportionate use of force and exercise of strip search powers.

6.2 Second incident

230. In relation to the second use of force, I consider that it is even less clear that the number of ERT officers deployed and their actions were reasonable, necessary and proportionate to the level of risk posed.

231. The document titled 'Chain of Events' states that an officer observing Mr FZ through CCTV stated that 'he has the razor and now he has swallowed it'. It also states that ERT officers placed handcuffs on Mr FZ 'to ensure he would not attempt to assault IHMS or SERCO officers with the razor'. This suggests that detention staff considered that Mr FZ had either swallowed the razor blade, or had pretended to do so.

232. As shown in the CCTV footage, Mr FZ appeared to have swallowed an item and was lying in a curled up position on the floor. He was not displaying any signs of physical aggression, but instead presented as physically weak and in pain. At this time, Mr FZ and the room had already been searched numerous times during the preceding incident, without a razor blade being located.

233. Had Mr FZ swallowed a razor blade, or even intended or pretended to do so, I consider that he would likely have been in a vulnerable and desperate state, either physically or mentally or both. Again, the greatest risk appeared to be to Mr FZ's own health and safety.

234. I consider that the actions of ERT officers should have addressed Mr FZ's physical and mental safety as the primary concern. Instead, they appear to have repeated the same, standardised actions in entering the room and deploying forceful techniques.

235. With respect to the second use of force, in its response to my Preliminary View dated 8 April 2019, the complainant's representative submitted that:

[The officers] had already searched [Mr FZ] twice including with a metal detector so it should have been clear he did not possess razor blade by this stage.

...

In any event, if there was any reason to believe a person had harmed himself including by swallowing a razor blade we submit the most appropriate response would be to immediately seek medical treatment and avoid subjecting the person to the use of force which would likely cause further injury. Prior to the second use of force [Mr FZ] was lying on the ground and appeared in pain and vulnerable, he was not being aggressive or threatening to any member of staff and the only risk at this time was to himself.

236. There does not appear to have been any consideration or adaptation of the ERT response to account for the different circumstances and lowered risk level when compared to the first incident. It is not clear that running into the room at speed and deploying the control and restraint technique was necessary.

237. I consider that pinning Mr FZ to the ground in such a forceful manner may have exacerbated any harm actually caused by swallowing a razor blade, if that had occurred, as well as his potentially vulnerable mental state. Again, it is not clear that IHMS were adequately consulted regarding his health history before force was used.

6.3 Injuries and conclusion

238. I consider that at least some of the injuries complained of by Mr FZ were caused by the uses of force, most likely from the manner in which Mr FZ's limbs were forcibly held down by ERT officers and/or the application of handcuffs.

239. In particular, the injury to his hand is consistent with its having occurred during the ERT response. The CCTV image of him holding his right wrist around 3.52pm, following the second use of force, is strong evidence that he was experiencing pain. In later footage, he also appears to be talking about and pointing at his right hand, and at least one IHMS staff member inspects his hand. The contemporaneous x-ray record also shows that he sustained a fracture to his right hand on 5 October 2016.

240. Mr FZ first reported his ankle pain on 11 October 2016, I have been unable to form a concluded view as to whether the fracture to his ankle occurred as a result of the use of force incidents. The CCTV footage shows significant pressure forcibly being applied to Mr FZ's legs and feet while he is pinned to the floor. It does not show him limping or indicating pain in his foot after the uses of force.

241. In its response to my Preliminary View dated 8 April 2019 the Department said:

The Department has no further evidence to submit to the Commission other than what has already been provided, including [Mr FZ's] medical report.

The Department notes that there is no evidence to suggest that the use of force events were the cause of [Mr FZ's] injuries. As such, it is the Department's position that, based on evidence presented, it is not possible to attribute [Mr FZ's] injuries to one specific action.

The Department requests the Commission carefully consider [Mr FZ's] actions throughout the sequence of events including kicking at the walls and the door of the High Care Accommodation room and attempting to damage the air vent prior to attributing his injuries to a particular event.

242. I note that, as discussed above at [113], the Department at one stage appeared to accept that Mr FZ's hand injury may have been sustained during the uses of force.
243. I consider that the available information, including the CCTV footage, does not establish that Mr FZ took action that would otherwise cause such an injury to himself. For example, video footage shows Mr FZ kicking the door of the room, but not with enough force to cause such a serious injury.
244. Overall, I find that reasonable care was not exercised to prevent Mr FZ from suffering harm. The number of officers that deployed force was not proportionate to the risk posed, and the techniques used to restrain him disproportionate and not properly executed so as to prevent injury. Further de-escalation techniques should have been used before resorting to force.
245. I find that both uses of force, and the strip search, were inconsistent with and contrary to Mr FZ's right under article 10 of the ICCPR to be treated with humanity and with respect for his inherent dignity.
246. I am also concerned that the force used and the strip search were not carried out in compliance with relevant law and policy requirements.
247. In particular, I consider that the force used on Mr FZ was planned, rather than spontaneous. Before the first incident, ERT officers were waiting in the hallway for approximately 20 minutes before entering the room. Approximately half an hour then passed between Mr FZ allegedly swallowing the razor blade and the re-entry of ERT officers to the room during the second incident.
248. This was adequate time for authorisation to be sought and obtained, and for the use of force to be 'planned', on both occasions. The Serco Operational Safety Policy & Procedure Manual dated 19 February 2015 also states that where officers use PPE, the use of force is categorised as 'planned'.

249. Planned uses of force are subject to additional authorisation and requirements. This includes compulsory recording of the use of force by ERT officers through a body-worn camera. This did not occur, despite the statement from the Serco Centre Manager that he gave instructions for body cameras to be activated.
250. It is also unclear on the material provided to the Commission that authorisation for both uses of force, or the strip search, were obtained in advance. In non-compliance with the requirements of the Department's DSM, there is no record of any written authorisation for the uses of force or the strip search.
251. In further non-compliance with the DSM, Mr FZ was not provided with information in advance of the strip search being conducted.
252. It is also concerning that no incident report provided to the Commission records that a strip search was even carried out on Mr FZ. As found in the Review report, I consider that Serco also did not comply with other incident reporting requirements.
253. I otherwise consider that the application of handcuffs, and the periods for which they were used, were reasonable, necessary and proportionate.
254. In the case of the metal detector search, the pat searches and the strip search, I am satisfied that these searches were appropriate to conduct to ascertain whether Mr FZ possessed a razor blade.
255. In its response to my Preliminary View dated 8 April 2019, the complainant's representative expressed significant concern about 'the lack of contemporaneous reports in relation to this incident'.

7 Recommendations

256. 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 the reasons for those findings.³⁶
257. The Commission may include any recommendation for preventing a repetition of the act or a continuation of the practice.³⁷ The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.³⁸

258. I consider that it is appropriate to make recommendations directed both at remedying or reducing the loss and damage suffered by Mr FZ, and at preventing a repetition of the acts or a continuation of the practices that are described in my findings, as set out below.
259. I have made a recommendation for the payment of compensation to Mr FZ. While the loss and damage suffered will not be able to be fully addressed by the payment of money, I consider that it is important that he be provided with compensation to acknowledge the impact that this treatment by the Commonwealth has had on him.
260. In considering the assessment of a recommendation for compensation under s 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.³⁹ 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.⁴⁰

The Commission has set out in other inquiries the jurisdictional basis for the Commission to make recommendations for the payment of compensation and the available administrative avenues for the payment of such compensation by the Commonwealth.⁴¹ I do not repeat those matters again here.

Recommendation 1

The Commonwealth pay to Mr FZ an appropriate amount of compensation to reflect the loss and damage he has suffered as a result of the breach of his human rights identified in this inquiry.

Recommendation 2

The Commonwealth provide a formal apology to Mr FZ for the breach of his human rights identified in this inquiry.

Recommendation 3

To avoid excessive use of force and harm to detainees, the Department develop more detailed operational instructions and policy guidance about:

- a) communication, negotiation and conflict de-escalation strategies to avoid use of force where possible
- b) how to determine the appropriate number of ERT officers to deploy in response to a situation in immigration detention that requires use of force
- c) how to select and properly deploy use of force techniques.

Recommendation 4

The Department and Serco should ensure that officers who may be required to use force in their roles be appropriately and periodically trained on communication, negotiation and conflict de-escalation strategies to avoid using force where possible. They should also receive training about how to determine the appropriate number of ERT officers to deploy and how to select and properly deploy use of force techniques, so as to avoid harm to the person against whom force is used.

Recommendation 5

In its operational instructions and policy guidelines, the Department reiterate that all use of force incidents in which Protective Personal Equipment is used be treated as a 'planned' use of force, meaning that video recording of the entire incident is required through body worn cameras.

Recommendation 6

The Department and Serco should ensure that officers who may be required to use force in their roles be appropriately and periodically trained on how to identify situations in which use of force is appropriate, and how to properly select and deploy use of force techniques. Mr FZ's complaint could be used as a training case study to explore lessons learned.

Recommendation 7

Additional training be provided to Serco staff who conduct or may conduct strip searches of detainees regarding how to reduce adverse impacts on the privacy and dignity of detainees, including affording detainees a reasonable period in which to voluntarily remove items of clothing and ensuring that only necessary and limited staff are present during a strip search.

Recommendation 8

The Department and Serco review their use of force and search authorisation requirements and practices, to ensure that appropriate authorisation is being obtained in advance in accordance with operational, contractual and other requirements, and that consultation with IHMS in advance is being carried out regarding the appropriateness and manner of deploying force having regard to the physical and mental health of the relevant detainee.

Recommendation 9

The Department and Serco review their use of force and search incident reporting requirements and practices, to ensure that timely and detailed reporting is being carried out in accordance with operational, contractual and other requirements. These reports should be periodically reviewed to identify and rectify any systemic improvements to the use of force in immigration detention.

Recommendation 10

The eight recommendations made by the Department's Detention Assurance Team in the Review Report dated 16 May 2017 into use of force against Mr FZ be revisited and checked to ensure implementation.

8 The department's response to my findings and recommendations

261. On 3 September 2019, I provided the department with a notice of my findings and recommendations.
262. On 8 November 2019, the department provided the following response to my findings and recommendations:

Recommendation 1

The Commonwealth pay to Mr FZ an appropriate amount of compensation to reflect the loss and damage he has suffered as a result of the breach of his human rights identified in this inquiry.

Response

As the Department has previously stated, the Department is required to manage claims for compensation in accordance with Appendix C of the Legal Services Directions 2017. Appendix C stipulates that claims can only be resolved in accordance with legal practice and principle, which requires at least the existence of a meaningful prospect of liability. It would not be within legal principle and practice to resolve this matter on those terms and on the basis of the information currently available, the Department is unable to agree to this aspect of the conciliation proposal.

In cases where there is no legal liability to pay compensation, the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme is a discretionary compensation scheme, which provides a mechanism for the Commonwealth to compensate persons who have experienced financial detriment as a result of the defective administration of certain Commonwealth entities, as outlined in Resource Management Guide 409 (the guide). The CDDA Scheme is generally an avenue of last resort and is not used where there is another viable avenue available to provide redress. It is open for Mr FZ to make a claim for discretionary compensation and his claim will be assessed in accordance with the guide. Making a claim does not guarantee that compensation will be paid.

However, it remains open to Mr FZ to make a claim for compensation from the Department. Information on claiming compensation from the Department can be found on the Department's website at: <https://www.homeaffairs.gov.au/help-and-support/claiming-compensation-from-us>.

Recommendation 2

The Commonwealth provide a formal apology to Mr FZ for the breach of his human rights identified in this inquiry.

Response

On the basis of the information currently available, the Department is unable to agree to this aspect of the conciliation proposal.

Recommendation 3

To avoid excessive use of force and harm to detainees, the Department develop more detailed operational instructions and policy guidance about:

- a) *communication, negotiation and conflict de-escalation strategies to avoid use of force where possible*
- b) *how to determine the appropriate number of ERT officers to deploy in response to a situation in immigration detention that requires use of force*
- c) *how to select and properly deploy use of force techniques.*

Response

The Department's operational policy instructions on use of force for immigration detention were most recently updated in 2018 and came into effect on 10 January 2019. These operational policy instructions are included in the Department's Policy and Procedure Control Framework (PPCF) and are centrally available to all staff. It remains a contractual requirement that the Facilities and Detainee Service Provider's (FDSP) Policy and Procedure Manuals (PPM) are consistent (and support compliance) with departmental policy and instruction, and are consistent with relevant accepted industry best practice.

These operational policy instructions make it clear that there is a presumption against the use of force (i.e. as a last resort) and that conflict resolution through negotiation and de-escalation, where practicable, must be considered before the use of force and/or restraint is used. Decisions on the appropriate response to varying situations will be based on the specific circumstances, an assessment of risk, current protocols and staff training. All officers are accountable and must be able to objectively justify their use of force and all incidents must be accurately reported.

The PPM suite of documents are subject to annual review based on stakeholder feedback and operational requirements. The Department will continue to work with Serco in the ongoing development of those documents so that they remain consistent with the current operational environment and provide optimal directions and guidance to Service Provider personnel.

Recommendation 4

The Department and Serco should ensure that officers who may be required to use force in their roles be appropriately and periodically trained on communication, negotiation and conflict de-escalation strategies to avoid using force where possible. They should also receive training about how to determine the appropriate number of ERT officers to deploy and how to select and properly deploy use of force techniques, so as to avoid harm to the person against whom force is used.

Response

Serco Detention Service Officers (including Emergency Response Team (ERT) personnel) complete an initial training course and regular refresher training which includes content relating to communication, negotiation and conflict de-escalation. The content of the training courses provided is reviewed by the Department when necessary.

Use of force events that occur within the Immigration Detention Network are based on specific events that occur from time to time. Unplanned use of force can be undertaken by any officer trained to do so and is not the exclusive remit of the ERT personnel. Unplanned use of force can be applied for the purposes of maintaining the safety and security of all detainees, visitors, service provider personnel and Departmental officers. For unplanned use of force events, the incident response utilises available resources, which may include ERT, and is applied based on the immediate threat and risk assessment undertaken by the team leader responsible for managing the incident at that time. Team leaders assess the threat and risk based on all the known factors at the time and with regard to the immediate environment. Use of force is always expected to be applied as a last resort in order to mitigate the threat and maintain the safety and security of all.

Existing training does not dictate specific thresholds for the number of ERT personnel to be used for a particular type of operation, but does provide guidance on how to assess threat and risk, both to the individual who use of force is to be applied and all other persons within the vicinity who may be at risk should the use of force not be applied. Allocation of resources would be established on a case by case basis by the team leader, who is likely to be an ERT officer, who is informed by a risk and threat assessment, and considers the information known about the proposed operation (at that point in time) in order to determine what number of ERT personnel and action is reasonable, necessary and proportionate to the risk posed.

The existing flexibility is considered reasonably necessary in order to cater for unforeseeable circumstances.

Recommendation 5

In its operational instructions and policy guidelines, the Department reiterate that all use of force incidents in which Protective Personal Equipment is used be treated as a 'planned' use of force, meaning that video recording of the entire incident is required through body worn cameras.

Response

The Department's operational policy instructions on use of force for immigration detention were most recently updated in 2018 and came into effect on 10 January 2019. These instructions provide clear guidance on the planning, approval and reporting processes for the planned and unplanned use of force.

The planned use of force may only be applied to a detainee where an individual assessment of their risk shows that it is warranted, and the relevant ABF Detention Superintendent has provided written approval for such force to be used in the particular circumstances, prior to that force being applied. The need for Protective Personal Equipment (PPE) is considered in the planning process. Where an officer in possession of PPE is required to respond to an incident, any use of force applied in these circumstances will be treated as unplanned.

Under Departmental operational policy and the Immigration Detention Facilities and Detainee Services Contract, the FDSP is obliged to undertake audio-visual (AV) recordings in a range of circumstances, including any pre-planned use of force. The recording of operational activity using handheld devices, body cameras and vehicle mounted devices include both visual and sound recording. The Body Camera System (BCS) is used by selected and appropriately qualified and experienced FDSP officers in Immigration Detention Facilities. The BCS is worn in a designated AV vest, identified by a label on the vest to be carrying AV equipment. The vest and associated equipment is routinely used by members of the Emergency Response Team (ERT) in support of search activities, incident response and management. Immediately prior to arrival at an incident or at the first available opportunity in the event of an incident, FDSP officers wearing BCS are to turn on the BCS to AV record the entire event.

It is the Department's view that current operational policy instructions on the use of force for immigration detention, the security risk assessment process, supporting training programs and operational planning processes provide clear guidance and flexibility to departmental and FDSP officers, in the use of force.

Recommendation 6

The Department and Serco should ensure that officers who may be required to use force in their roles be appropriately and periodically trained on how to identify situations in which use of force is appropriate, and how to properly select and deploy use of force techniques. Mr FZ's complaint could be used as a training case study to explore lessons learned.

Response

Serco Detention Service Officers (including ERT personnel) are subject to an initial training course and regular refresher training which includes content relating to the hierarchy of force (i.e. force as a last resort and only when reasonably possible efforts to de-escalate, negotiate etc. have been unsuccessful). The content of the training courses provided is reviewed by the Department when necessary.

The aspect of the matter which involves the removal of clothing from the detainee has been utilised as a case study for Serco personnel at a management level. However, Detention Service Officers (distinct from Detention Service Managers or Facility Operations Managers) are not considered to be an appropriate audience for the case study, as those officers would not be managing a situation such as that of Mr FZ on 5 October 2016.

The complaint to the Commission relates to alleged excessive use of force. Serco do not consider this instance to be appropriate as a case study for training purposes as the matter was referred to the appropriate police agency who reviewed the incident and concluded that there was no evidence of an offence. Further, Serco do not consider that the physical force was excessive in considering the threat and immediate danger of self-harm posed by Mr FZ to himself.

Recommendation 7

Additional training be provided to Serco staff who conduct or may conduct strip searches of detainees regarding how to reduce adverse impacts on the privacy and dignity of detainees, including affording detainees a reasonable period in which to voluntarily remove items of clothing and ensuring that only necessary and limited staff are present during a strip search.

Response

The Migration Act provides that a strip search of a detainee (other than detainees held in State or Territory prisons or remand centres) may be conducted by an authorised officer, without warrant, to find out whether there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon, or other thing capable of being used to inflict bodily injury or to help the detainee, or any other detainee, to escape from immigration detention.

Section 252A of the Migration Act is to be followed in conjunction with Direction No. 51 – Strip search of immigration detainees made by the then Minister for Immigration and Citizenship under s 499 of the Migration Act.

A strip search procedure can only be conducted by an authorised officer who:

- holds the delegation of an authorised officer for the purposes of the Migration Act
- has received the required training to conduct a strip search and
- holds a current police clearance.

An officer is not made an authorised officer for the purpose of conducting a strip search unless they have received and satisfactorily completed training in the relevant legislative and policy requirements, including:

- civil rights and liberties
- cultural awareness
- the grounds for conducting a strip search
- the pre-conditions for a strip search
- the role of officers involved in conducting a strip search
- the procedures for conducting a strip search
- the procedures relating to items retained during a strip search
- record keeping and
- reporting.

A strip search procedure conducted on a detainee must be carried out in accordance with the rules set out under section 2528 of the Migration Act. In particular, this includes:

- that a detainee must not be subject to greater indignity than is reasonably necessary to conduct the strip search
- must be conducted in a private area
- must be conducted by an authorised officer of the same sex as the detainee, must not be conducted in the presence or view of a person who is of the opposite sex to the detainee
- must not be conducted in the presence or view of a person whose presence is not necessary for the purpose of the strip search and
- must not involve the removal of more items of clothing, or more visual inspection, than the authorised officer conducting the search believes on reasonable grounds to be necessary to determine whether there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon or other thing described in section 252A(l) of the Migration Act.

With regard to Mr FZ, officers were seeking to have him change into alternative clothing, in order to mitigate the possibility that he had a razor blade or other potentially harmful item on his person. The actions of the former Serco manager taking control of that operation were not within the appropriate policies and procedures, and exceeded what was permissible, by directing the removal of items of the detainee's clothing. When asked about the matter, the former manager stated that he did not believe the undertaking to be a strip search. He was counselled in relation to the matter and reminded of the important thresholds which are to be observed. The former manager has since ceased employment with Serco.

Serco's Induction Training Course and subsequent 'refresher training' is clear that personnel are not permitted to forcefully remove items of detainee clothing, as this would be breach of what is permissible in the context of a pat search and would, on technicality, be considered to be a strip search under the Migration Act regardless of the intentions behind the actions.

With regard to the current strip search training, the training refers heavily to the stipulations in the Departments Policy guidance on "Strip Searching of Detainees" including the following distinct and unambiguous directions:

If a detainee refuses to undergo a strip search procedure and it appears that reasonable force may be required, the authorised officer conducting the strip search procedure must comply with the following procedure:

- advise the detainee that force as reasonably necessary to conduct the strip search may be used (noting that section 252B(1)(k) of the Migration Act specifies that the strip search must not be conducted with greater force than is reasonably necessary to conduct the strip search)
- advise the detainee that unless cooperation is forthcoming, the authorised officer intends to use force as reasonably necessary to conduct the strip search
- allow the detainee a reasonable period in which to voluntarily remove any items of clothing that are necessary to conduct the strip search. At this point the authorised officer should provide the detainee with the opportunity to hand over the item they believe them to be concealing
- seek the assistance of another officer prior to conducting the strip search
- if force is used officers must follow the advice provided on the use of reasonable force and record keeping in the use of reasonable force:
 - use of force must be applied only as a last resort, must be justifiable and proportionate to the amount of resistance offered
 - the level of force used must not involve greater force than is reasonably necessary to conduct the strip search procedure. If at any stage the detainee cooperates or complies, the use of reasonable force must cease immediately
 - the use of force must not subject the detainee being searched to greater indignity than is reasonably necessary to conduct the strip search procedure
 - every endeavour must be made to try and preserve the humanity and dignity of the person being searched. For example, ensure privacy from anyone not required to be involved.

Recommendation 8

The Department and Serco review their use of force and search authorisation requirements and practices, to ensure that appropriate authorisation is being obtained in advance in accordance with operational, contractual and other requirements, and that consultation with IHMS in advance is being carried out regarding the appropriateness and manner of deploying force having regard to the physical and mental health of the relevant detainee.

Response

The Department confirms that current policy mandates that the delegated official must approve use of force prior to the application of that to be considered 'planned use of force'. The delegate is the ABF Superintendent at the site, and cannot be delegated.

Where the Superintendent is not available to provide pre-approval, Serco are able to continue to undertake use of force as 'unplanned', with the relevant reporting requirements being triggered to including verbal reporting within an hour, written reports and a post incident review to ensure that the events were appropriate and proportionate to the risks. The physical health of the detainee is taken into account through the use of the trained 'use of force' techniques.

In pre-approving use of force the ABF Superintendent considers available advice from IHMS in their decision. The Superintendent may elect to decline pre-approval and require Serco to report on the matter as an 'unplanned' use of force, such that Serco is required to review the incident to confirm if appropriate steps were followed by Serco personnel. The physical health of the detainee is taken into account through the use of the trained 'use of force' techniques.

In the identified instance, Serco deviated from the policy and obtained 'approval' from the ABF Superintendent's representative, who did not hold the relevant delegation to provide the requested pre-approval. The result is that the incident was therefore 'unplanned'.

Serco has confirmed that relevant personnel have been reminded of the requirement that pre-approval must be sought from the ABF Superintendent only, and if ABF Superintendent approval cannot be obtained the use of force is required to be reported as an 'unplanned' use of force. As 'unplanned' use of force is categorised as a 'major' incident, Serco are contractually obligated to complete a post incident review which:

- determines the causes and contributing factors to the incident;
- analyses and evaluates the actions taken in response to the incident
- identifies any gaps in processes, procedures and training requirements; and
- makes appropriate recommendations to implement any necessary changes to processes, procedures and training.

Recommendation 9

The Department and Serco review their use of force and search incident reporting requirements and practices, to ensure that timely and detailed reporting is being carried out in accordance with operational, contractual and other requirements. These reports should be periodically reviewed to identify and rectify any systemic improvements to the use of force in immigration detention.

Response

The Department reviews Serco incident reporting on an on-going and continuous basis from a compliance perspective, including with regard to quality of the information contained in its reports.


Recommendation 10

The eight recommendations made by the Department's Detention Assurance Team in the Review Report dated 16 May 2017 into use of force against Mr FZ be revisited and checked to ensure implementation.

Response

All eight recommendations of the Detention Assurance Team (DAT) Review, Alleged Assault (FZ) Report No. 21 / 2016 were closed by the Chief Audit Executive, Department of Home Affairs, between 5 February and 26 March 2019, having been assessed as implemented in line with each recommendation's intent.

263. I report accordingly to the Attorney-General.

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

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

November 2019

- 1 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) articles 7 and 10.
- 2 *FZ v Minister for Immigration and Border Protection* [2018] FCA 2027.
- 3 See the definition of 'human rights' in s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth).
- 4 See *Secretary of the Department of Defence v Human Rights and Equal Opportunity Commission, Burgess & Ors* (1997) 78 FCR 208.
- 5 UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (10 April 1992) 1 [3].
- 6 UN Human Rights Committee, *Views: Communication No. 529/1993*, 60th sess, UN Doc CCPR/C/60/D/639/1995 (19 August 1997) (*Walker and Richards v Jamaica*); UN Human Rights Committee, *Views: Communication No 845/1998*, 74th sess, UN Doc CCPR/C/74/D/845/1998 (*Kennedy v Trinidad and Tobago*); UN Human Rights Committee, *Views: Communication No 684/1996*, 57th sess, UN Doc CCPR/C/74/D/684/1996 (*R.S. v Trinidad and Tobago*).
- 7 [2007] NZSC 70.
- 8 [2007] NZSC 70, [79]. This decision considered provisions of the New Zealand Bill of Rights which are worded in identical terms to articles 10(1) and 7(1) of the ICCPR.
- 9 The Standard Minimum Rules were approved by the UN Economic and Social Council by its resolutions ESC Res 663C (XXIV) 24 UN ESCOR Supp 1 UN Doc E/3048 (31 July 1957) and ESC Res 2076 (LXII) 62 UN ESCPR Supp 1 UN Doc E/5988 (13 May 1977). They were adopted by the UN General Assembly in resolutions *Human Rights in the Administration of Justice*, GA Res 2858 (XXVI), UN GAOR, 3rd Comm, 26th sess, 2027th plen mtg, Agenda Item 12, UN Doc A/8588 (20 December 1971) and 3144 of 1983: UN Doc A/CONF/611, Annex 1.
- 10 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.
- 11 UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (10 April 1992) [5].
- 12 UN Human Rights Committee, *Views: Communication No. 458/1991*, 51st sess, UN Doc CCPR/C/51/458/1991 (21 July 1994) 11 [9.3] (*Mukong v Cameroon*); UN Human Rights Committee, *Views: Communication No. 632/1995*, 60th sess, UN Doc CCPR/C/60/D/632/1995 (18 August 1997) 6 [6.3] (*Potter v New Zealand*). See also, UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United States of America*, UN GAOR, 50th sess, Supp No 40, UN Doc A/50/40 (3 October 1995) 55 [285], 57 [299].
- 13 UN Human Rights Committee, *Views: Communication No. 868/1999*, 79th sess, UN Doc CCPR/C/79/D/868/1999 (30 October 2003) 12 [7.3] (*Wilson v Philippines*).
- 14 UN Human Rights Committee, *Views: Communication No. 1020/2001*, 78th sess, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003) at 15 [7.2] (*Cabal and Bertran v Australia*).
- 15 See for example, Australian Human Rights Commission, 'Use of force in immigration detention, *Notice under s 29 of the Australian Human Rights Commission Act 1986* (Cth)' (1 March 2019); Australian Human Rights Commission, 'Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention' (Report No 35, April 2006).
- 16 Australian Human Rights Commission, 'Use of force in immigration detention, *Notice under s 29 of the Australian Human Rights Commission Act 1986* (Cth)' (1 March 2019) 16–18.
- 17 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.
- 18 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.
- 19 Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [4].
- 20 Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [5].
- 21 Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [5].
- 22 Department of Immigration and Border Protection, *Detention Services Manual – Chapter 1 – Legislative and principles overview – Duty of care to detainees* (July 2016) [7].
- 23 Department of Immigration and Border Protection, *Detention Services Manual – Chapter 8 – Safety and security – Use of reasonable force* (September 2015) 3.
- 24 Department of Immigration and Border Protection, *Detention Services Manual – Chapter 8 – Safety and security – Use of reasonable force* (September 2015) 4.
- 25 Department of Immigration and Border Protection, *Detention Services Manual – Chapter 8 – Safety and security – Use of reasonable force* (September 2015) 4.
- 26 Department of Immigration and Border Protection, *Use of Force Detention Standard Operating Procedure* (2 September 2017).
- 27 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.
- 28 Australian Human Rights Commission, 'Use of force in immigration detention, *Notice under s 29 of the Australian Human Rights Commission Act 1986* (Cth)' (1 March 2019) 16–18.
- 29 Department of Immigration and Border Protection, *Detention Services Manual – Chapter 8 – Safety and security – Use of reasonable force* (September 2015) 6.

- 30 Department of Immigration and Border Protection, *Detention Services Manual – Chapter 8 – Safety and security – Use of reasonable force* (September 2015) 6.
- 31 Immigration Detention Facilities and Detainee Services Contract between the Commonwealth and Serco, 10 December 2014, Sch 2 (Statement of Work), Section 4 (Security Services) clause 3.9(a)(i).
- 32 Department of Immigration and Border Protection, *Alleged assault of Mr FZ 21-2017 Report of the Detention Assurance Team* (2017).
- 33 Department of Immigration and Border Protection, *Alleged assault of Mr FZ 21-2017 Report of the Detention Assurance Team* (2017) 13–14.
- 34 Department of Immigration and Border Protection, *Alleged assault of Mr FZ 21-2017 Report of the Detention Assurance Team* (2017) 14.
- 35 Department of Immigration and Border Protection, *Alleged assault of Mr FZ 21-2017 Report of the Detention Assurance Team* (2017) 10.
- 36 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 37 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 38 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
- 39 *Peacock v The Commonwealth* (2000) 104 FCR 464 at 483 (Wilcox J).
- 40 *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 41 For example, see *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth of Australia (DIBP)* [2016] AusHRC 110 at [196]–[205].

Further Information

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