



Australian
Human Rights
Commission

MB v

Commonwealth of

Australia (DIBP)

[2017] AusHRC 117

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ISSN 1837-1183

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Design and layout Dancinggirl Designs

Printing Masterprint Pty Limited

**MB v Commonwealth of
Australia (Department of
Immigration and Border
Protection)**

[2017] AusHRC 117

Report into cruel, degrading and
inhuman treatment in immigration
detention

Australian Human Rights Commission 2017



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**Australian
Human Rights
Commission**

May 2017

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into complaints made on behalf of Mr MB against the Commonwealth of Australia – Department of Immigration and Border Protection (department). It is claimed that various acts of the Commonwealth (including some alleged to have been done on behalf of the Commonwealth by Serco Australia Pty Ltd (Serco)) have breached the human rights of Mr MB.

I have found that the failure of the Commonwealth adequately to consider alternatives to closed detention for Mr MB is inconsistent with or contrary to the rights of Mr MB contained in article 7 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 7 prohibits the torture or cruel, inhuman, or degrading treatment or punishment of an individual.

I have found that other complaints made on Mr MB's behalf to the effect that acts or practices of Serco or the Commonwealth were inconsistent with the human rights of Mr MB have not been substantiated.

In light of my findings, I made one recommendation to the Minister for Immigration and Border Protection and five to the department. These are contained in part 5 of the report.

The department and the Hon. Peter Dutton, Minister for Immigration and Border Protection, provided written responses to my findings and recommendations on 17 March 2017 and 20 March 2017 respectively. I have set out the responses of the department and the Minister in Part 6 of the report.

I enclose a copy of my report.

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into complaints made on behalf of Mr MB against the Commonwealth of Australia – Department of Immigration and Border Protection (department). Complaints were also made against Serco Australia Pty Ltd (Serco), alleging that it performed certain acts on behalf of the Commonwealth. It is claimed that various acts of Serco and the Commonwealth have breached the human rights of Mr MB.
2. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. I consider that the preservation of the anonymity of Mr MB is necessary to protect his privacy. Accordingly, I have given a direction under s 14(2) of the AHRC Act and referred to him by the pseudonym MB in this document.
4. Mr MB remains in immigration detention. As at the date of this document, he has been detained for over seven years. As a result of a previous inquiry I found that the detention of Mr MB has been arbitrary and therefore inconsistent with the human right recognised in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).¹ Those findings are contained in a previous report to the Minister prepared in accordance with s 11(1)(f)(ii) of the AHRC Act.²
5. In the present complaints, it is claimed that during the detention of Mr MB, various acts of the Commonwealth or Serco staff have been inconsistent with his human rights. While not clearly particularised, I consider that the complaints raise for consideration the questions of whether the following acts and practices of the Commonwealth were inconsistent with the rights protected by articles 7 and 10 of the ICCPR:
 - (a) the treatment of Mr MB during particular incidents in immigration detention (these incidents are described in detail below in this document)
 - (b) the failure to ensure the conditions in which Mr MB was detained for a specified period were of a sufficient standard
 - (c) the failure adequately to consider alternatives to closed detention for Mr MB.
6. As a result of this inquiry, I have found that the failure adequately to consider alternatives to closed detention for Mr MB has been inconsistent with or contrary to his human rights.
7. In light of this finding, I have made number of recommendations in section 5.2 below.
8. I initially considered Mr MB's complaints together with complaints made on behalf of another person against Serco and the Commonwealth. My inquiry into those complaints did not find that any act or practice was inconsistent with or contrary to any human right. Those other complaints are not the subject of this report.

2 Background

9. Mr MB is Tamil and a national of Sri Lanka. He travelled to Australia in 2010.
10. He arrived in Australia at Christmas Island by boat and was detained on behalf of the Commonwealth under s 189(3) of the *Migration Act 1958* (Cth) (Migration Act) immediately upon his arrival.
11. The Commonwealth has determined that he is a refugee within the meaning of the *1951 Convention Relating to the Status of Refugees*³ and the *1967 Protocol relating to the Status of Refugees*⁴ (together, the 'Refugees Convention').
12. He received an adverse security assessment from the Australian Security Intelligence Organisation (ASIO). He has been detained in immigration detention facilities since he arrived in Australia.
13. It was not disputed that at all relevant times for the purposes of the present complaints Serco has operated the detention facilities where the complainant has been held, under an agreement with the Commonwealth.
14. Mr MB arrived in Australia March 2010. He was found to be a refugee on 9 July 2010 and received an adverse security assessment on 15 March 2011.
15. I have previously found that Mr MB's indefinite detention in immigration detention facilities, in circumstances where the Commonwealth had failed adequately to consider alternatives to closed detention, is arbitrary, and in breach of Mr MB's rights under article 9(1) of the ICCPR.⁵ Mr MB remains in immigration detention. He has now been detained for over seven years.
16. It is now complained that certain acts or practices of Serco and the Commonwealth relating to the detention of Mr MB are inconsistent with his rights under articles 7 and 10 of the ICCPR. The relevant acts and practices are described in paragraph [49] below.
17. Of particular relevance in this matter is the fact that Mr MB has been diagnosed with a serious psychiatric illness. While it has been diagnosed slightly differently by different psychiatrists, all psychiatric reports before the Commission agree the condition is real and significant, and involves psychotic symptoms. The Commonwealth has not disputed these diagnoses. Further discussion of this illness and the opinions of a number of psychiatrists who have assessed or treated Mr MB are discussed in section 4.5 of this document.

3 Legislative framework

3.1 Functions of the Commission

18. Section 11(1)(f) of the AHRC Act empowers the Commission to inquire into any act or practice done by or on behalf of the Commonwealth that may be inconsistent with or contrary to any human right.
19. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.
20. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

3.2 Relevant human rights

21. The phrase 'human rights' is defined by section 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR, or recognised or declared by any relevant international instrument.
22. The following articles of the ICCPR appear to be relevant to this inquiry.
23. Article 7 of the ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...
24. 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.

(a) Freedom from torture and rights to humane treatment (article 7 of the ICCPR)

25. Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
26. Torture is the most reprehensible of the standards of treatment described in article 7. It involves the intentional infliction by a public official of severe pain and suffering, whether physical or mental, on another person for the purposes of obtaining information or a confession, punishing, intimidating or coercing the person, or for any other reason based on discrimination of any kind.⁶

27. Cruel, inhuman or degrading treatment or punishment can entail unintentional behaviour.⁷ It is a lesser standard than ‘torture’ but is still of a level of severity that could be described as ‘heinous’.⁸ The UN Human Rights Committee has found the following to constitute ‘cruel and inhuman treatment’:
- a. The victim was beaten unconscious, subjected to a mock execution and denied appropriate medical care.⁹
 - b. The victim was beaten repeatedly with clubs, iron pipes and batons and left without medical care for his injuries.¹⁰
28. Degrading treatment arises where the victim has been subjected to particularly humiliating treatment. The UN Human Rights Committee has found the following acts to constitute ‘degrading treatment’:
- a. The victim was ‘assaulted by soldiers and wardens who beat him, pushed him with a bayonet, emptied a urine bucket over his head, threw his food and water on the floor and his mattress out of the cell’.¹¹
 - b. The victim was placed into a cage and then displayed to the media.¹²
29. A number of Mr MB’s complaints include allegations of the inappropriate use of force by Serco officers within immigration detention facilities. When discussing use of force by law enforcement officials, the UN Human Rights Committee has commonly recommended to States that its law enforcement officers adhere to the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.¹³
30. Principle 4 provides that law enforcement officers shall ‘as far as possible, apply non-violent means before resorting to the use of force....’. Principle 5(a) calls for proportionality in the amount of force used when required.
31. These basic standards are echoed in Article 3 of the *UN Code of Conduct for Law Enforcement Officials*,¹⁴ which states:
- Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.
32. While the Principles and Code of Conduct are not binding, they provide useful guidance for interpreting article 7 of the ICCPR as it applies to the use of force by law enforcement officials. I consider that the same principles are applicable to the use of force by officers in immigration detention facilities.
33. Accordingly, the use of force by law enforcement officers in the performance of their duties may be inconsistent with article 7 of the ICCPR where the force exceeds what is objectively reasonable and necessary in the circumstances confronting the officer and the relevant use of force is sufficiently severe.¹⁵

34. The UN Human Rights Committee has also held that indefinite detention under Australia's mandatory immigration detention framework can inflict psychological harm amounting to a violation of article 7.
35. In *C v Australia*,¹⁶ the UN Human Rights Committee found that the continued detention of C when the State party was aware of the deterioration of C's mental health, constituted a breach of article 7 of the ICCPR. The Committee stated:

...the State party was aware, at least from August 1992 when he was prescribed the use of tranquilisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt) it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow.¹⁷

36. Similarly, in *F.K.A.G. v Australia*, the Committee stated:¹⁸

... the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.

37. The relevant question for the purposes of article 7 of the ICCPR is whether a person's detention has caused a level of mental impairment such that it amounts to cruel, inhuman or degrading treatment or punishment.

(b) Inhumane treatment in detention (article 10 of the ICCPR)

38. Article 10(1) of the ICCPR requires States to treat all persons deprived of their liberty 'with humanity and respect for the inherent dignity of the human person'.
39. Article 10(1) applies to anyone deprived of their liberty under the laws and authority of the State who is held in prisons, hospitals – particularly psychiatric hospitals – detention camps or correctional institutions or elsewhere.¹⁹
40. The content of article 10(1) has been developed with the assistance of a number of United Nations 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 (the 'Standard Minimum Rules');²⁰ and
 - b. the Body of Principles for the Protection of all Persons under Any Form of Detention (the 'Body of Principles').²¹

41. For instance, rule 82(1) of the United Nations' *Revised Standard Minimum Rules for the Treatment of Prisoners* (the 'Mandela Rules')²² provides:

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

42. These principles are relevant to the required standards of treatment for all persons deprived of liberty by the State, and not merely those held under the criminal justice system.
43. The UN Human Rights Committee has indicated that compliance with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the obligation imposed by the ICCPR that people in detention are to be treated humanely under article 10(1).²³
44. The assessment of whether the treatment of a person is inconsistent with article 7 or article 10 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.

3.3 What is an 'act' or 'practice'

45. 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.
46. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
47. 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;²⁴ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.
48. The majority of the acts and practices dealt with in this document were performed by employees of Serco. The acts and practices occurred within various compounds within the Villawood Immigration Detention Facility (VIDF). At all relevant times, the day to day operation of that centre was conducted by Serco under an agreement with the Commonwealth. I am therefore satisfied that all the acts and practices of Serco employees described below were undertaken by or on behalf of the Commonwealth for the purposes of s 3(1) of the AHRC Act. That was not disputed by either Serco or the Commonwealth.
49. In this report, I have considered whether the following acts and practices were inconsistent with the rights of Mr MB enshrined in articles 7 and 10 of the ICCPR:
- (a) Alleged physical abuse of Mr MB by Serco staff on 25 and 26 March 2012
 - (b) Alleged unjustified use of force by Serco staff in restraining Mr MB on 31 March 2012

- (c) Alleged verbal abuse of Mr MB by Serco staff in August 2012
- (d) Alleged detention of Mr MB in degrading conditions in August 2012
- (e) Alleged failure of Serco and the Commonwealth to ensure Mr MB received appropriate medical care
- (f) The failure of the Commonwealth adequately to consider whether Mr MB could have been placed in a less restrictive form of detention, or more specifically, the failure of the Commonwealth:
 - i. to ask ASIO to assess Mr MB's individual suitability for community based detention while awaiting his security clearance
 - ii. to assess on an individual basis whether the circumstances of Mr MB indicated that he could be placed in a less restrictive form of detention.²⁵

4 The complaints made on behalf of Mr MB

50. It is alleged that the acts of Serco and/or the department in response to a number of incidents amount to breaches of Mr MB's human rights. It is also complained that the ongoing detention of Mr MB, and the conditions of that detention, are inconsistent with his human rights.

4.1 25 and 26 March 2012 – alleged physical and verbal abuse (incident involving piano and incident involving computer)

(a) Incident of 25 March 2012

51. It is complained on behalf of Mr MB that on 25 March 2012 he was subjected to physical and verbal abuse by a Serco officer in a common area in Sydney Immigration Residential Housing (SIRH), an area within VIDF.

52. It is alleged that at approximately 2.10 pm, Mr MB was playing a piano in the common area. A Serco officer told him to stop. Mr MB did so, and then commenced doing push-ups on a table. At that point, the officer is said to have said 'fuck you' to Mr MB, pulled his arm, shoved his chest so that he nearly fell to the floor, and verbally abused him using words such as 'mental' and 'crazy'. After these events, MB pushed over the piano.

53. Serco and the department give a different account of these events. They agree that at about the specified time, Mr MB pushed over a piano, and then left the relevant building 'of his own accord'. They state that Serco has no evidence of any assault or injury by a Serco employee against Mr MB, and that International Health and Medical Services (IHMS), the organisation which provides medical services to detainees at the detention centre, has no record of Mr MB seeking medical attention on that date or for injuries arising from the incident.

54. In response to this complaint, Serco also stated that Mr MB 'has been a difficult client to manage due to his behavioural issues and repeated outbursts of aggressive behaviour toward Serco staff'.
55. A departmental incident report dated 25 March 2012 records that on that date Mr MB pushed a piano over, and that he was 'challenged about his behaviour' by two 'Client Services Workers', and was 'reminded of his code of conduct'.
56. Despite the claims that there is no evidence of any assault, a departmental 'incident detail report' records that a complaint was made to Serco staff on 26 March 2012, the day after the incident, which complained that while Mr MB was doing push-ups, a 'male staff member shouted at him and pulled him by the arm'. While complaints have been made on behalf of Mr MB relating to incidents on both 25 and 26 March, the reference to push-ups in this complaint supports an inference that it refers to the incident on 25 March 2012. No documents have been provided by Serco or the department about the investigation or resolution of this complaint.

(b) Incident of 26 March 2012

57. It is claimed on behalf of Mr MB that at some time between about 11.30 am and 2.30 pm on 26 March 2012 he was 'manhandled' by a Serco officer. It is claimed that while Mr MB was using a computer in a room adjacent to the visiting area at SIRH, a Serco officer 'pulled him physically from the computer and pulled him out of the room. When this happened, [Mr MB] got upset and broke the computer'.
58. Again, Serco and the department deny this complaint and provide a different version of events. The department claims that on 26 March 2012, Mr MB smashed a computer monitor and keyboard before voluntarily leaving the relevant room. Serco repeats its statements that Mr MB has been a 'difficult client' and states that he assaulted a Serco officer on 26 March 2012. No details of this alleged assault by Mr MB have been provided by Serco.
59. A departmental incident report dated 26 March 2012 supports the department's version of events. It states that at some time on that date, Mr MB was using an 'education computer' in the activities room. He was asked to use a computer in an adjoining room. He 'refused to leave' the computer he was currently using (no details are given about the nature of any request that he do so or the manner in which it was delivered). The report states that there were two 'visits computers' available for Mr MB to use. Mr MB then stood up and smashed the computer keyboard and monitor.

(c) Discussion

60. The precise nature of both these incidents remains unclear. It is clear there were altercations between Mr MB and Serco officers on both 25 and 26 March 2012. I am unable to form a view about the level of physical contact or language involved in these incidents. There may have been some physical contact, although that is disputed by Serco and the Department.

61. It is my view that I am unable to resolve the factual dispute about the precise nature of the events occurring on 25 and 26 March 2012. I am therefore not satisfied that these elements of the complaints have been established.
62. Despite this finding, it is of significant concern to me that repeated incidents involving confrontations appear to have occurred between Mr MB and Serco officers, particularly given Mr MB's psychological condition both generally and at the time in question. Mr MB's mental health is discussed further in section 4.5 of this document.

4.2 31 March 2012 – incident involving shipping container

63. It is complained on behalf of Mr MB that he was assaulted by a number of Serco guards, and restrained by them for an extended period, early in the morning on 31 March 2012. It is claimed that 'about 20' Serco officers were present for the assault. At the conclusion of this incident, Mr MB was taken to Liverpool Hospital and admitted to a mental health ward. It is claimed that after the assault Mr MB had lost control of his bladder and vomited in a bathroom, but was not given a change of clothes or allowed to clean himself before he was taken to hospital. It is also complained that Serco officers accompanied Mr MB at all times he was in hospital, observing him.

(a) The incident

64. It is not denied that there was an incident on the night of 30-31 March 2012, which involved Mr MB being restrained by a number of Serco officers, though both Serco and the department have denied that any 'assault' took place.
65. I have considered the information in the complaint, written responses and documents supplied by Serco and the department. These materials include CCTV footage from a number of cameras in the grounds of SIRH, some hand-held video footage taken by Serco officers of part of the incident, and 'incident reports' completed by a number of officials who were involved or witnessed relevant events.
66. All parties agree that late on 30 March 2012 Mr MB climbed onto a shipping or storage container situated in the grounds of SIRH. The CCTV footage shows a figure climbing onto a container at approximately 11.44 pm. The figure cannot be recognised as Mr MB but I am satisfied that it is him, as the events depicted in the footage match both the allegations in the complaint and the written reports of a number of Serco officers.
67. The CCTV footage shows a number of people assembling around the base of the container. At approximately 12.51 am, Mr MB can be seen standing up and climbing down from the container. He walks towards some buildings with SIRH, accompanied by a number of people who, I am satisfied from the Serco Incident Reports that have been provided to me, were Serco staff.

68. At approximately 1.32 am, it appears that there was a physical altercation. A number of people grappled with Mr MB. A number others can be seen in the CCTV footage running towards the altercation. Very little detail can be made out in the footage, as the relevant camera was situated at some distance from the altercation and incidents occurred at night. However, it is entirely consistent with both the complaint and Serco and the department's response to the complaint to conclude that at 1.32 am, a number of Serco staff physically restrained Mr MB. The CCTV footage is not of sufficient quality to give any indication of why that occurred.
69. Incident reports completed by Serco staff give slightly varying accounts of what sparked the altercation and led to the restraint of Mr MB.
70. One incident report states that:
- [Mr MB] became agitated and was displaying an aggressive hostile stance and with clenched fists. Client [MB] stood up and was trying to escape from officers. Client [MB] was given lawful instructions to get back and not to resist with staff. Client [name redacted] then assaulted CSM [name redacted] at approximately 01:35am by placing him in a headlock. This was because he wasn't happy with the way Serco officers were trying to relocate [MB] using minimal hands on force.
71. Another simply states:
- at approximately 0130, client [MB] was restrained by officers due to aggressive behaviour.
72. Yet another records that Mr MB was informed by a Serco officer that he was required to go to 'unit 7' within SIRH, and that force would be 'applied' if he did not. At that point, the report states that Mr MB 'began to run away', and then 'began to thrash his arms around in the air'. At that time the decision was made to restrain Mr MB.
73. The incident reports indicate that Mr MB was then forcibly moved into a unit and restrained by a number of Serco officers on a couch.
74. The department has supplied hand-held video camera footage of Mr MB being restrained on this couch. That footage shows that he was restrained for approximately 30 minutes before he appears to have become calm and was released. It is unfortunate that the video footage does not commence earlier and did not capture the events leading to the initial restraint of Mr MB. I note that a Serco incident report records that while a request was made at 'approximately 0105' for a video camera to be obtained, it did not arrive until 'approximately 0135'. That is almost exactly the time at which the altercation broke out.
75. The decision to send for a video camera was made in anticipation that force might be used. This is consistent with Serco's 'Immigration Detention Centre Use of Force Policy and Procedures' Document (a copy of which has been supplied to me). While it is of concern in those circumstances that it appears to have taken half an hour for a video camera to be procured, in all the circumstances, I am unable to conclude that there was a significant departure from Serco's procedures in relation to obtaining video footage of the initial restraint of Mr MB.

76. As I have said, at the time the hand-held footage commences, Mr MB can be seen being restrained by a number of Serco staff on a couch in a unit at SIRH. Having reviewed the footage, it is evident that a significant amount of force was at times applied by Serco staff. It is of concern to me that a number of Serco staff in their incident reports state that 'minimal' force was used. Having viewed the footage, I am unable to agree with that assessment. However, it is also evident that Mr MB was periodically struggling strenuously with those restraining him. It appears that at several points he attempts to bite one of them. It appears to me that the amount of force used to restrain Mr MB was not more than was necessary to effect that restraint. However, that leaves open the question of whether the initial decision to restrain Mr MB was itself justified.
77. In my view, there is insufficient material before me to enable me to determine the answer to that question. It is not addressed in the complaint made on Mr MB's behalf, nor was it subsequently addressed by him or his representatives. While I do not uncritically accept all aspects of the accounts contained in the Serco incident reports, they all agree that force was applied in response to Mr MB refusing to comply with directions given by Serco officers and attempting to evade them. Mr MB's mental condition at this time appears to have been disturbed to some degree; that is evidenced by his subsequent admission to a psychiatric unit at Liverpool Hospital. I am unable to conclude that the decision to restrain Mr MB was not justified. For that reason, I find that it has not been established that this restraint was inconsistent with articles 7 or 10 of the ICCPR.
78. With respect to the complaint that Mr MB was not allowed to change his soiled clothing before being taken to hospital, I note that it is denied by Serco and the Commonwealth. Mr MB is apparently shown in the hand-held video footage entering the bathroom of the unit on his own after his release by Serco staff. There is otherwise no evidence that supports either party. In those circumstances I cannot be satisfied that Mr MB was taken to hospital in soiled clothes in circumstances where he was denied an opportunity to change his clothes.
79. I find that there is insufficient material to substantiate the complaint that the presence of Serco guards with Mr MB while he was in hospital following these events was sufficiently intrusive as to amount to inhuman or degrading treatment for the purposes of articles 7 or 10 or the ICCPR.
80. While I am not satisfied that the actions of Serco personnel on 31 March 2012 amounted to a breach of articles 7 and 10, the events forming the subject matter of this complaint are concerning. That is especially so in light of the fact that it appears that Serco was, or should have been, aware that Mr MB's mental state had been particularly troubled in the days before 31 March 2012. In addition to the events on 25 and 26 March, records of the IHMS show that Mr MB had ceased taking his antipsychotic medication some time before that date. Further, an email from Dr Neil Phillips, psychiatrist, recorded in an IHMS note dated 29 March 2012 stated: 'I am concerned that [Mr MB's] distress is building up.... I think it's hazardous to add any additional stress to [Mr MB] as he has plenty to make him despair already'.

81. I find that, as at 31 March 2012, Serco had, or ought to have had, knowledge of Mr MB's mental state. This finding has not led me to form a view that his restraint on that date was inconsistent with articles 7 or 10 of the ICCPR. However, I consider that these events support my view that immigration detention is an environment that has had negative consequences for Mr MB's mental health. This view is discussed further in section 4.5 below.

4.3 August 2012 – verbal abuse and conditions of detention

82. It is complained on behalf of Mr MB that on 3 August 2012, Mr MB was verbally abused by a Serco officer. At that time, Mr MB was detained in the 'Annexe' at VIDF. The Annexe is an area where vulnerable individuals are held so that they may be closely monitored. It is alleged that on 3 August, Mr MB inadvertently left food in a microwave for too long, creating smoke in the Annexe. As a result of this, a Serco officer 'threatened him', pulled his shirt, 'used abusive language (fuck you etc)', and told Mr MB he was obliged to follow the rules while in the Annexe.
83. The complaint refers to Serco staff harassing Mr MB on other occasions, and that 'words such as "mental" etc were being used in front of him' at other times. No further particulars of this alleged conduct have been provided to me.
84. The department and Serco deny the complaint. The department states that there is no record that any complaints about these incidents have been made to Serco officials. Serco repeats its claim that its staff 'have always treated Mr MB with compassion and understanding given his poor state of mental health'. The department has made a statement in similar terms.
85. I do not place significant weight on the fact that there is no documentary record of a complaint being made to Serco staff. There are many possible explanations for the lack of any such record. However, the complaint is expressed in vague terms and contains few particulars. While it is clear that there has been friction between Serco staff and Mr MB, and it is possible both that bad language was used against Mr MB and that his shirt was pulled by a Serco officer in the Annexe, the materials before me are insufficient to satisfy me that incidents occurred in August 2012 that were of sufficient intensity to constitute breaches of articles 7 or 10 of the ICCPR.

4.4 Conditions of detention

86. It is also complained on behalf of Mr MB that at the beginning of August 2012, he was moved to the Annexe at VIDF. It is alleged that he was held in conditions that amounted to a breach of his human rights, in that he did not bathe for a period of five days and was incontinent. Photographs of Mr MB's room in the Annexe have been provided to me, which show that room to be in some disarray.

87. I find that Mr MB was living in poor conditions at the relevant time. This is confirmed by a report of Dr Neil Phillips, psychiatrist, dated 13 August 2012, which records his direct observation that Mr MB 'had been deliberately defecating in his room'. He went on to say that in his view, the events of 31 March 2012 'appear... to have precipitated a rapid decline in [Mr MB's] mental health and general behaviour'.
88. After reviewing the materials before me, it is my view that the poor conditions Mr MB lived in while in the Annexe in August 2012 was a further result, and indication, of the effect immigration detention was having on his mental health, rather than the result of a particular failure by Serco staff to place him in sanitary conditions. I am unable to conclude that the conditions of Mr MB's detention were, on their own, sufficient to amount to a breach of articles 7 or 10 of the ICCPR. The effect of immigration detention on Mr MB's mental health is discussed further in the next section.

4.5 Failure to provide appropriate medical treatment, and failure adequately to consider alternatives to closed detention

(a) The complaint

89. It is complained on behalf of Mr MB that the Commonwealth failed to provide necessary medical care to treat Mr MB's psychiatric condition. It is further complained that Mr MB's detention in an immigration detention facility, in the context of his medical condition, inflicted significant psychological harm on him. It is complained that this amounted to a breach of his human rights.

(b) A relevant act or practice

90. In my report relating to a previous inquiry, I found that Mr MB's detention in immigration detention facilities was arbitrary, because the Commonwealth had failed adequately to consider alternatives to holding Mr MB in closed detention. My reasons for reaching this conclusion were complex and I do not reproduce them in full here. In summary, I found that the Commonwealth claimed that Mr MB was legally required to be held in closed detention by operation of the Migration Act, because he was an 'irregular Maritime arrival' who had been assessed to be a risk to security by ASIO. I found that the Minister at all times had discretionary powers which would have allowed Mr MB to be granted a visa or placed in a less restrictive form of detention. However, the Commonwealth did not fully consider whether those powers could be exercised in Mr MB's case because it had:

- (a) failed to ask ASIO to assess Mr MB's individual suitability for community based detention while awaiting his security clearance
- (b) failed to assess on an individual basis whether the circumstances of Mr MB indicated that he could be placed in a less restrictive form of detention.²⁶

91. The relevance of these findings is that the Commonwealth did not adequately consider whether Mr MB could have been placed in a less restrictive form of detention, that this was the result of failures that constitute acts or practices for the purposes of the AHRC Act, and that these failures had the result that the detention of Mr MB was arbitrary for the purposes of article 9 of the ICCPR.

(c) Mr MB's medical condition

92. It is not disputed that Mr MB has a significant psychiatric condition. There is some disagreement about his precise diagnosis. He has been diagnosed with schizophrenia by a number of psychiatrists. He has alternatively been diagnosed with some other mental illness with psychotic symptoms. He has, in addition, been diagnosed with post-traumatic stress disorder.

(d) Discussion

93. While it is complained that Mr MB did not receive adequate medical care while detained in immigration detention (or as a result of that detention), having reviewed the available evidentiary materials I am not satisfied that this complaint is made out.

94. Extensive medical records have been provided by representatives of Mr MB, Serco, and the department. These records show that Mr MB received significant medical attention. He was medicated for his psychiatric condition and was seen by a number of specialists. He was admitted on several occasions to Liverpool Hospital and subsequently discharged, to be returned to immigration detention at Villawood. Some of the records produced by the department indicate that there were at times difficulties in obtaining appropriate medical treatment for Mr MB, but indicate that this was rather a result of some medical practitioners expressing reluctance to treat Mr MB while he remained in immigration detention than a failure of Serco or the department to take necessary steps to obtain appropriate medical treatment. In light of the evidence before me, I am not satisfied that Mr MB was not provided with appropriate medical treatment as a result of any act or practice (including any omission) on the part of Serco or the Commonwealth.

95. On the other hand, there is a very significant amount of evidence that Mr MB's detention in immigration detention had a highly deleterious impact on his health, and particularly his mental health. That evidence includes:

- (a) A psychological assessment report prepared by Sejla Tukelija, a psychologist at the Service for the Treatment And Rehabilitation of Torture and Trauma Survivors (STARTTS), dated 27 May 2011, which suggests a diagnosis of anxiety and depression for Mr MB, and states:

In terms of future prospects for recovery, it is my view that the stressors associated to the Detention environment will continue to negatively impact on Mr [MB's] mental health. A much more appropriate alternative would be to allow Mr [MB] to live in the community where he could have some sense [of] normalcy and devote his time to his mental and physical health issues.

(b) An occupational therapy report dated 3 August 2011 by NSW Health, which notes a functional deterioration on the part of Mr MB while he was placed in the Blaxland compound at VIDF.

(c) A letter from IHMS, dated, 5 October 2012, stating that:

IHMS believes that that [sic] the current mental health care provisions are the optimal that can be provided **given the limitations of the detention environment** [emphasis added].

(d) A report of Assoc. Professor Suresh Sundram, consultant psychiatrist, dated 14 March 2012, stating that:

[Mr MB's] prognosis is grim if he remains in SIRH. I am not confident that antipsychotic medication will alone be sufficient and I believe the detention environment in SIRH will perpetuate his persecutory delusions as well as provide constant triggers of his past experiences.

(e) A report of Neil Phillips, psychiatrist, dated 18 December 2011, stating that:

...the present situation of indefinite detention without knowing why exactly he is being held, is extremely stressful and is exacerbating his mental ill health.

While the use of a modest dose of antipsychotic medication will probably ease [Mr MB's] psychotic experiences and possibly stabilise his mood, adequate treatment will require much more than this. Even if regular counselling is added to his treatment it will remain mainly ineffective while he remains in indefinite detention. The ongoing detention and the uncertainty of his fate and the fate of his brother will undermine all treatment efforts.

(f) A report of Dr Nagesh B. Pai, psychiatrist, dated 13 August 2012, stating that:

[Mr MB's] indefinite detention will remain a major challenge to the success of any such treatment.

Release into the community would immediately solve many problems. It would bring hope and build his self-esteem. Treatment adherences would likely improve. It would immediately allow normal Community Mental Health resources to be used and access to Mental Health Rehabilitation and recovery programs.

Recovery from serious mental illness involves building genuine autonomy and increasing living skills. Eventually, returning to engaging in community based activities is, if not gainful employment should be the goal of management of [Mr MB]. None of these things can be achieved while [Mr MB] remains an immigration detainee.

- (g) A further report of Neil Phillips, psychiatrist, dated 13 August 2012, stating that:

[Mr MB's] mental health is clearly very disturbed at the moment.

...

If [Mr MB] remains in indefinite detention his prognosis is very poor. In the eight months I have known him his mental state has seriously deteriorated, particularly, since an alleged assault by SERCO guards on the night of 30/3/12. He suffered physical injuries and this incident appears to have precipitated a rapid decline in [Mr MB's] mental health and general behaviour.

...

Mr MB's continued detention, particularly the fact that it is indefinite detention without trial, is the main factor causing the serious deterioration in his mental state.

...

[In reference to Mr MB being held in the higher security Blaxland compound at VIDF]: I believe the isolation he is experiencing in Blaxland is likely to worsen his condition.

- (h) A report of Dr Derrick Silove, Professor of psychiatry at the University of New South Wales, dated 7 July 2012, expressing the opinion that the conflict and stress of Mr MB's environment in immigration detention will worsen his psychosis, and stating that:

Overall, I find it disturbing that a man with such a severe mental disorder is being held under the current conditions when he deserves specialist care. I would recommend that all those involved in his care review existing guidelines for the management of schizophrenia to remind themselves of the extent to which the current conditions of his care fall short of those recommendations.

96. This medical evidence is not contradicted by any materials provided by Serco or the department.
97. In light of the medical evidence discussed above, I find that Mr MB's detention has had a very significant and negative effect on his mental health. While it is agreed by the experts that Mr MB had a psychiatric condition that predated his detention, it is also agreed that his detention has significantly exacerbated that condition. Further, I find that the psychiatric assessments referred to above support an inference that the incidents leading to the complaints of physical and verbal abuse discussed earlier in this document can largely be seen to be manifestations of the psychiatric consequences of Mr MB's ongoing detention.

98. For the reasons referred to above in paragraphs [90] to [91], I have previously found that Mr MB's detention was arbitrary. As I have discussed in paragraphs [34] to [37] above, arbitrary detention may amount to a breach of article 7 of the ICCPR where it leads to sufficiently serious psychological consequences. In light of the medical evidence above, I find that the Commonwealth's failure adequately to consider alternatives to closed detention (by reason of the failures described in paragraph [90] above) amounts to treatment contrary to article 7 of the ICCPR.

5 Conclusions and Recommendations

5.1 Conclusions

99. For the reasons given above, I find that the Commonwealth's failure adequately to consider alternatives to closed detention was inconsistent with the rights of Mr MB contained in article 7 of the ICCPR.
100. I find that the other complaints to the effect that acts or practices of Serco or the Commonwealth were inconsistent with the human rights of Mr MB have not been substantiated.

5.2 Recommendations

101. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.²⁷ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²⁸
102. I have found that Mr MB's prolonged and ongoing detention in closed immigration detention facilities has had a serious negative impact on his mental health.
103. As a result of a previous inquiry, I found that Mr MB's ongoing detention (together with that of nine other persons) was arbitrary, and inconsistent with article 9 of the ICCPR. As a result of my findings in that inquiry, I made one recommendation to the Minister and six recommendations to the department which were intended to ensure that Mr MB and persons in his position are not held in closed immigration detention facilities unless any risk they would pose in a less restrictive environment has been properly assessed, and proper consideration has been given as to whether any such risk could be mitigated in other ways. My reasons for making those recommendations are given in my previous report. The Minister and the department did not accept the first five of my recommendations. Their responses are included in my previous report.²⁹

104. In Mr MB's case, his prolonged detention has had particularly severe consequences. He has now been detained for over 7 years. It has been two and a half years since I made the recommendations referred to in the paragraph above. I therefore repeat the recommendations I made in the report resulting from my earlier inquiry into Mr MB's detention, for the reasons given in that report (and in the previous Commission reports referred to therein).³⁰

(a) Recommendation to the Minister

Recommendation 1

The Minister for Immigration and Border Protection indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention because the department has received an adverse security assessment in relation to that person from ASIO, unless the department has taken appropriate steps to determine whether any risks the individual might pose could be mitigated (for instance, through the imposition of appropriate conditions).

(b) Recommendations to the department

Recommendation 2

The department refer Mr MB to ASIO and request that ASIO provide a security assessment pursuant to s 37(1) of the ASIO Act relevant to the following prescribed administrative actions:

- (a) granting the complainant a temporary visa and imposing additional conditions necessary to deal with any identified risk to security, for example, a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or sureties;*
- (b) making a residence determination under s 197AB of the Migration Act in favour of the complainant;*
- (c) making a residence determination in favour of the complainant, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.*

Recommendation 3

To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, the department ask ASIO to advise it of any measures that could be taken to allow Mr MB to be placed in a less restrictive form of detention consistently with the requirements of national security.

Recommendation 4

The department seek advice from ASIO of the kind identified in Recommendations 2 and 3 in respect of each person held in immigration detention who has received an adverse security assessment from ASIO.

Recommendation 5

As the department receives advice sought from ASIO in relation to Recommendations 2, 3 and 4, the department refer the cases of each relevant person to the Minister for consideration of the exercise of appropriate public interest powers. The submissions accompanying the referrals should include details of how any potential risk identified by ASIO can be mitigated.

Recommendation 6

The Commonwealth continue actively to pursue alternatives to detention, including the prospect of third country resettlement, for the complainant and for other people in immigration detention who are facing the prospect of indefinite detention. The Commonwealth inform each of these individuals on a regular basis of the steps taken to secure alternatives to detention and the Commonwealth's assessment of the prospects of success of these steps.

6 The Minister's and the department's responses

105. By letter dated 20 March 2017 the Minister for Immigration and Border Protection responded to my findings and recommendations. The Minister's response was in the following terms:

Recommendation 1

I do not accept this recommendation.

It is Government policy that individuals who have been assessed to be directly or indirectly a risk to Australia's security will remain in immigration detention until such time that a durable solution for individuals with adverse security assessments is found that is consistent with Australia's international obligations.

Given the serious nature of the Assessment by ASIO, and in light of Government policy, I am not minded to exercise my Ministerial intervention powers in respect of individuals with adverse security assessments.

106. By letter dated 17 March 2017, the department responded to my findings and recommendations. The department's response was in the following terms:

Current Immigration Status of Mr [MB]

The Department notes that on 21 December 2016, Mr [MB] was issued with a qualified security assessment by the Australian Security Intelligence Organisation (ASIO). The new assessment has the legal effect of superseding the previous adverse security assessment. As a result of the issuance of a new assessment, the Department has commenced investigation of alternative placement options for Mr [MB].

Given Mr [MB]'s physical health, mental health and serious behavioural concerns, appropriate support arrangements and risk mitigation strategies are being investigated by the Department prior to the potential referral of a submission to the Minister for Immigration and Border Protection for consideration of his Ministerial intervention powers.

Response to Recommendation 2

As noted, ASIO has issued a qualified security assessment for Mr [MB] which has the legal effect of superseding the previous adverse security assessments. Due to ongoing physical health, mental health and behavioural concerns, the Department is investigating appropriate support arrangements and risk mitigation strategies for Mr [MB] prior to the potential referral of a submission to the Minister for Immigration and Border Protection for consideration of his Ministerial intervention powers.

Response to Recommendation 3

While qualified security assessments contain information that could be prejudicial to the interests of the applicants, they do not contain a recommendation with regards to any prescribed administrative action. This includes placement recommendations. As noted in the response to recommendation 2, the Department is currently making an assessment of an appropriate placement for Mr [MB].

Response to Recommendation 4, 5 and 6

In responding to recommendations 4, 5 and 6, the Department notes the advice of the President of the Australian Human Rights Commission that these recommendations are the same made in an earlier inquiry concerning the detention of Mr [MB].

The Department notes the recommendations of the Australian Human Rights Commission in immigration detention cases where the person is subject to an adverse security assessment.

The Department confirms that it is Government policy that individuals who have been assessed to be directly or indirectly a risk to Australia's security will remain in held immigration detention until such time that a durable solution for persons with adverse security assessments is found that is consistent with Australia's international obligations.

The Department is aware that the same threshold is applied to a security assessment whether it is requested for the purpose of Public Interest Criterion 4002 (and, consequently, satisfying a legislative criterion for the grant of a visa) or for the purpose of making a residence determination. This means that recipients of an adverse security assessment for permanent visa purposes would receive a further adverse response to any subsequent requests for security advice. As such, the Department does not consider there to be any utility in making a further request for information in circumstances where the outcome is already known.

The Department notes that ASIO and the Independent Reviewer of Adverse Security Assessments continue to review adverse security assessments to ensure that they remain appropriate. The Department undertakes regular communication with ASIO on the adverse security assessment cohort and whether any changes in ASA status have taken place or are being considered.

Departmental case managers have regular discussions with people in detention to advise them of the outcome of detention placement decisions and other steps that are being pursued to resolve their case.

107. I report accordingly to the Attorney-General.

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the end.

Gillian Triggs
President
Australian Human Rights Commission

May 2017

Endnotes

- 1 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Australian Human Rights Commission Act 1986* (Cth) Sch 2.
- 2 The department and the Minister for Immigration and Border Protection have been advised of the previous relevant report. The reasoning in that report was the same as that contained in Commission report [2013] AusHRC 64.
- 3 Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954, entered into force for Australia 22 April 1954).
- 4 Opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967, entered into force for Australia 13 December 1973).
- 5 See above n 2.
- 6 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 1, is widely accepted as setting out the definition of torture.
- 7 The Human Rights Committee has said that the various treatments are distinguishable on the basis of the ‘purpose’ of such treatment. See: UN Human Rights Committee, *General Comment No 20*, 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 March 1992) [4].
- 8 Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004) [9.01].
- 9 *Linton v Jamaica*, UN Human Rights Committee, Communication No. 255 of 1987, UN Doc. CCPR/C/46/D/255/1987.
- 10 *Bailey v Jamaica*, UN Human Rights Committee, Communication No. 334 of 1988, UN Doc. CCPR/C/47/D/334/1988.
- 11 *Francis v Jamaica*, UN Human Rights Committee, Communication No. 320 of 1988, UN Doc. CCPR/C/47/D/320/1988.
- 12 *Polay v Campos v Peru*, UN Human Rights Committee, Communication No. 577 of 1994, UN Doc. CCPR/C/61/D/577/1994.
- 13 UN Doc. A.CONF.144/28/Rev.1 (1990). See e.g., Concluding Observations on Israel, (1998) UN Doc. CCPR/C/79/Add.93 [15]; Concluding Observations on the US, (1995) UN Doc. CCPR/A/50/40 [297]; Concluding Observations on Cyprus, (1995) UN Doc CCPR/C/79/Add.39 [6]; Concluding Observations on Portugal, (2003) UN Doc. CCPR/CO/78/PRT [9]; Concluding Observations on Paraguay, (2006) UN Doc. CCPR/C/PRY/CO/2 [11]. The UN Committee against Torture has also commonly referred to these principles in its Concluding Observations.
- 14 UN General Assembly Resolution 34/169, passed on 17 December 1979.
- 15 Sarah Joseph, Katie Mitchell, Linda Gyorki and Carin Benninger-Budel, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (World Organisation Against Torture (OMCT), 2006), 163-165 <<http://www.omct.org/monitoring-protection-mechanisms/reports-and-publications/2006/11/d18503/>>.
- 16 Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999.
- 17 Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999 [8.4].
- 18 *F.K.A.G. et al. v Australia* Communication No 2094 of 2011, UN Doc CCPR/C/108/D/2094/2011 at [9.8]; see also *M.M.M et al v Australia* Communication No 2136 of 2012, UN Doc CCPR/C/108/D/2136/2012 at [10.7].
- 19 UN Human Rights Committee, *General Comment No 21*, 44th sess, UN Doc HRI/GEN.1.Rev.1 (10 April 1992) [2]. See also: Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004) [9.134].
- 20 The Standard Minimum Rules were approved by the UN Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. They were adopted by the UN General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1.
- 21 The Body of Principles were adopted by the UN General Assembly in resolution 43/173 of 9 December 1988 Annex: UN Doc A/43/49 (1988).
- 22 (2015) UN Doc. E/CN.15/2015/L.6/Rev.1.
- 23 UN Human Rights Committee, *General Comment No 21*, 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 April 1992) (Replaces general comment 9 concerning humane treatment of persons deprived of liberty) [5]. See also *Mukong v Cameroon* [1994] UNHRC 38, UN Doc CCPR/C/51/458/1991 [9.3].
- 24 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 25 These acts and practices are discussed in my report resulting from Mr MB’s previous complaint. See n 2 above.
- 26 See above n 2.
- 27 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 28 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 29 See above n 2.
- 30 Ibid.

Further Information

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