



Australian
Human Rights
Commission

JA v Commonwealth (Department of Defence)

[2014] AusHRC 72

© Australian Human Rights Commission 2014.



ISSN 1837-1183

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication. All material presented in this publication is licenced under a Creative Commons Attribution 3.0 Australia licence, with the exception of the Australian Human Rights Commission Logo.

To view a copy of this licence, visit <http://creativecommons.org/licences/by/3.0/au>.

In essence, you are free to copy, communicate and adapt the work, as long as you attribute the work to the Australian Human Rights Commission and abide by the other licence terms.

Design and layout Dancinggirl Designs

Printing Masterprint Pty Limited

Electronic format

This publication can be found in electronic format on the website of the Australian Human Rights Commission:
www.humanrights.gov.au/publications/index.html.

Contact details

For further information about the Australian Human Rights Commission, please visit www.humanrights.gov.au or email communications@humanrights.gov.au. You can also write to:

Communications Team
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

JA v Commonwealth (Department of Defence)

Report into arrest, detention, treatment
in detention, interference with privacy
and attacks on reputation

[2014] AusHRC 72

Australian Human Rights Commission 2014



**Australian
Human Rights
Commission**

Contents

1	Introduction	3
2	Summary of findings and recommendations	3
2.1	Summary of findings	3
3	Summary of recommendations	4
4	The complaint by Mr JA	4
4.1	Background	4
4.2	Findings of fact	5
5	The Commission's human rights inquiry and complaints function	5
5.1	Human rights relevant to this complaint	6
6	Detention	6
6.1	Was the detention lawful?	6
6.2	Was the detention arbitrary?	7
7	Right to be informed of reason for arrest	8
8	Treatment in detention	8
8.1	Solitary confinement	8
8.2	Light in cell	9
8.3	Adequacy of clothing, bedding, and heating	9
8.4	Contact with the outside world	10
9	Interference with privacy and attack on reputation and honour	12
10	Findings and recommendations	12
10.1	Power to make recommendations	12
10.2	Consideration of compensation	13
10.3	Recommendation that compensation be paid	14
11	Apology	15
12	Defence's responses to my conclusions and recommendations	15



**Australian
Human Rights
Commission**

May 2014

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

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into a complaint made by Mr JA against the Commonwealth of Australia – Department of Defence (Defence).

The complaint raised issues under articles 9(1), 9(2), 7, 10(1) and 17(1) of the International Covenant on Civil and Political Rights (ICCPR).

Following my inquiry, I found that Mr JA's detention was not lawful in that he was not detained in accordance with the procedure established by the *Defence Force Discipline Act 1982* (Cth) (DFDA). I also found that Mr JA's detention was arbitrary because it was not necessary and not proportionate to Defence's legitimate aim of applying military discipline in accordance with the DFDA. As a result, I found that his detention was in breach of article 9(1) of the ICCPR.

In relation to each of the other complaints raised by Mr JA, I have either found that there was not an act or practice of the Commonwealth that was inconsistent with or contrary to the articles of the ICCPR that he complains about, or I decided not to inquire into the complaints on the basis that they were misconceived, lacking in substance, or could be more effectively or conveniently dealt with by another statutory authority.

By letter dated 6 January 2014 the legal representative for Defence provided a response to my findings and recommendations. As part of this response Defence has confirmed that it has amended its procedures to ensure that members of the Defence Forces who are charged in accordance with s 95(2) of the DFDA are charged by a proper officer authorised in writing. I have set out the response in its entirety in part 12 of my report.

Please find enclosed a copy of my report.

Yours sincerely

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

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission and the reasons for those findings following an inquiry by the Commission into a complaint lodged by Mr JA that his treatment by the Commonwealth of Australia – Department of Defence (Defence) involved acts or practices inconsistent with or contrary to human rights within the meaning of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr JA has asked that he not be referred to by name in this report. I consider that the preservation of the anonymity of Mr JA is necessary to protect his privacy. Accordingly, I have given a direction pursuant to section 14(2) of the AHRC Act and have referred to him throughout the report as Mr JA.

2 Summary of findings and recommendations

2.1 Summary of findings

(a) Arrest

3. I do not find that Mr JA was not informed of the reasons for his arrest or the charges against him as required by article 9(2) of the *International Covenant on Civil and Political Rights* (ICCPR).

(b) Detention

4. I find that Mr JA was not detained in accordance with the procedure established by the *Defence Force Discipline Act 1982* (Cth) (DFDA) in breach of article 9(1) of the ICCPR.
5. I find that Mr JA's detention was arbitrary within the meaning of article 9(1) of the ICCPR. Mr JA's detention was not necessary and not proportionate to Defence's legitimate aim of applying military discipline in accordance with the DFDA.

(c) Treatment in detention

6. I do not find that Defence's treatment of Mr JA whilst he was detained breached his right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment within the meaning of article 7 of the ICCPR.

7. I do not find that Defence's treatment of Mr JA whilst he was detained breached his right to be treated with humanity and with respect for the inherent dignity of the human person within the meaning of article 10(1) of the ICCPR.

(d) Interference with privacy, attacks on reputation

8. I have decided not to inquire into Mr JA's allegations of breach of article 17(1) of the ICCPR pursuant to sections 20(2)(c)(ii) and (vi) of the AHRC Act.
9. I am of the opinion that Mr JA's allegation that Defence arbitrarily interfered with his privacy could be more effectively or conveniently dealt with by the Office of the Australian Information Commissioner (OAIC). I am of the opinion that Mr JA's allegation that Defence has committed an unlawful attack on his honour and reputation is lacking in substance.

3 Summary of recommendations

10. In light of my findings regarding the acts and practices of Defence that were inconsistent with Mr JA's rights, I make the following recommendations:
- that Defence pay financial compensation to Mr JA in the amount of \$15 000 to compensate him for being arbitrarily detained;
 - that Defence provide a formal written apology to Mr JA for the breach of his human rights identified in this report.

4 The complaint by Mr JA

4.1 Background

11. On or about 3 December 2008 Mr JA lodged a complaint with the Commission.
12. Mr JA and Defence have both had the opportunity to provide submissions in this matter, including the opportunity to respond to the preliminary view outlined in former President Branson's letter of 28 October 2011 which set out the acts or practices raised by the complaint which appeared to be inconsistent with or contrary to human rights. I note that there have been several attempts to resolve the matter by conciliation.
13. My function in investigating complaints of breaches of human rights is not to determine whether Defence has acted consistently with Australian law, but whether Defence has acted consistently with the human rights defined and protected by the ICCPR.
14. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of the international instruments and by international jurisprudence about their interpretation.

4.2 Findings of fact

15. I consider that the complaint arose from the following factual circumstances.
16. Mr JA joined the Royal Australian Navy on 2 April 2007. He was based at HMAS Cerberus and at the time of the events forming the basis of the complaint he was 18 years old.
17. On or about 14 April 2008 Mr JA was absent without leave. On 21 April 2008 Captain Sheldon Williams, Commanding Officer of HMAS Cerberus, issued a warrant for Mr JA's arrest.
18. At about 11.00 pm on 1 May 2008 Mr JA was arrested by Victoria Police and delivered into the custody of Captain Williams. Mr JA was admitted to the Cerberus Unit Detention Centre (CUDC) at about 11.18 pm.
19. By instrument dated 2 May 2008 Captain Williams ordered that Mr JA be held in custody awaiting a hearing or trial by a service tribunal. Defence provided a log to the Commission that indicates that Mr JA was charged on 2 May 2008 by naval Police Officer (PO) Robinson and/or Warrant Officer (WO) Atkinson with one count under section 24 of the DFDA (Absence Without Leave).
20. At about 2.30 am on 3 May 2008 Mr JA was taken to Frankston Hospital.
21. After approximately one hour at the hospital, Mr JA was discharged and was then detained at the Health Centre Cerberus (HCC). Mr JA was detained at the HCC from 3 May until the afternoon of 7 May 2008.
22. At approximately 3.20 pm on 7 May 2008 Mr JA was returned to the CUDC.
23. By instrument dated 7 May 2008 Mr JA was suspended from duty. At about 12.30 pm on 8 May 2008 Mr JA was released from the CUDC.

5 The Commission's human rights inquiry and complaints function

24. Section 11(1)(f) of the AHRC Act provides that the Commission has a function to inquire into any act or practice that may be inconsistent with or contrary to any human right.¹
25. Section 3(1) of the AHRC Act defines 'act' to include an act done by or on behalf of the Commonwealth. Section 3(3) provides that the reference to, or the doing of, an act includes the reference to the refusal or failure to do an act.
26. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where an act complained of is not one required by law to be taken.²
27. By instrument dated 2 May 2008 Captain Williams ordered that Mr JA be held in custody pending hearing of charges by Summary Authority. I am satisfied that Captain Williams' decision to detain Mr JA was an act of the Commonwealth within the meaning of the AHRC Act.

5.1 Human rights relevant to this complaint

28. The expression 'human rights' is defined in section 3 of the AHRC Act and includes the rights and freedoms recognised in the ICCPR, which is set out in Schedule 2 to the AHRC Act.
29. The articles of the ICCPR that are of relevance to this complaint are:
- Article 7 (prohibition on torture and cruel, inhuman or degrading treatment or punishment);
 - Article 9(1) (prohibition on unlawful or arbitrary detention);
 - Article 9(2) (right to be informed of reasons for arrest);
 - Article 10(1) (humane treatment of people deprived of their liberty); and
 - Article 17(1) (prohibition on unlawful or arbitrary interference with privacy and unlawful attacks on honour and reputation).

6 Detention

6.1 Was the detention lawful?

30. Mr JA claims that his detention from the evening of 1 May 2008 until 8 May 2008 was unlawful.
31. The power to detain Mr JA arose from section 95 of the DFDA. Section 95 of the DFDA relevantly states:
- (2) Where a person has been delivered into the custody of a commanding officer, the commanding officer or an officer authorized, in writing, by the commanding officer shall, unless the person has been arrested in execution of a warrant under section 88, before the expiration of the period of 24 hours after the person has been delivered into the custody of the commanding officer, either charge the person with a service offence or release the person from custody.
32. On 1 May 2008 Mr JA was arrested by members of Victoria Police pursuant to a warrant issued under section 90 of the DFDA and was delivered into the custody of Captain Williams, the commanding officer of HMAS Cerberus.
33. On 2 May 2008 Mr JA was purportedly charged with the service offence of Absence Without Leave under section 24 of the DFDA by either WO Atkinson or PO Robinson. Neither WO Atkinson or PO Robinson was the commanding officer or an officer authorized in writing by the commanding officer within the meaning of section 95(2) of the DFDA. Neither WO Atkinson nor PO Robinson were 'officers' within the meaning of the DFDA.
34. Defence notes that WO Atkinson and PO Robinson were members authorised to charge defence members with service offences under section 87 of the DFDA. However, Mr JA was not charged under section 87 of the DFDA.
35. I find that Mr JA was not properly charged with a service offence because he was not charged by the commanding officer or an officer authorized in writing by the commanding officer in accordance with section 95(2) of the DFDA. Accordingly, I find Mr JA's detention from 1 May 2008 until 8 May 2008 was not in accordance with the procedures established by law, namely the DFDA, within the meaning of section 9(1) of the ICCPR.

6.2 Was the detention arbitrary?

36. Mr JA also claims that his detention was arbitrary. Defence denies that Mr JA's detention was arbitrary. Defence states that Mr JA was detained because he had absconded from base on a number of occasions in the past and Defence was concerned that Mr JA would not remain on base whilst it prepared for hearing the charge brought against him and investigated other absence related potential charges. Defence notes that the DFDA provides that in most circumstances, a hearing before a service tribunal shall be held in the presence of the accused person.³
37. Defence claims that Mr JA's detention in the HCC from 3 May 2008 until 7 May 2008 was reasonable and not arbitrary because medical practitioners had recommended that Mr JA remain under clinical observation during this time.
38. Defence claims that Mr JA's detention from the afternoon of 7 May 2008 until the afternoon of 8 May 2008 was not arbitrary for a number of reasons. It claims Mr JA was reasonably considered a flight risk if released from custody, that three charges against him had been fully prepared and were ready to be heard and that Victoria Police had informed Defence that it intended to arrest Mr JA on 8 May 2008 in relation to certain civilian charges. Defence also claims that Mr JA's detention in this period was not arbitrary because Mr JA was returned to the CUDC from the HCC late in the afternoon of 7 May 2008 and it was therefore unlikely that the military charges against Mr JA would be able to be heard on that day.
39. Under international law, to avoid being arbitrary, detention must be necessary and proportionate to a legitimate aim of the Commonwealth.⁴
40. I accept that, in some circumstances, pre-trial detention may be necessary to ensure the presence of an accused at trial. However, Defence states that it took no action to progress the military charges against Mr JA from the time he was taken to Frankston hospital in the early hours of 3 May 2008.
41. Defence states that Mr JA was detained in Frankston Hospital from 3 May 2008 until 7 May 2008 because medical practitioners had recommended that he remain under clinical observation. However, Mr JA could have remained under clinical observation but have been released from detention.
42. Further, Defence advises that on 5 May 2008 Senior Constable Fox informed Warrant Officer Atkinson that Victoria Police intended to arrest Mr JA in relation to certain civilian charges. The information before me suggests that Defence suspended any action to progress the military charges against Mr JA when it was advised that Mr JA would be charged with civilian offences.
43. There is some information before me to suggest that Defence intended to hold Mr JA in custody for a period of eight days from the time that he was first detained.
44. Notes taken by Senior Constable Andrew Fox of Victoria Police on 1 May 2008 state:

S/T Gary Atkinson (warrant officer) [JA] arrested re AWOL Friday not good for navy. [JA] will be in custody for 7 days.
45. Notes taken by Senior Constable Fox on 6 May state that Mr JA was:

Due for release from navy jail Fri 9th (or Thurs 8th)
46. I note that under section 95(5) of the DFDA, eight days is the maximum period of time that a person may be held in custody before the commanding officer is required to report in writing to a superior officer and the Director of Military Prosecutions, his or her reasons for the delay in dealing with the charge.

47. For the reasons outlined above, I am satisfied that Mr JA's detention was arbitrary within the meaning of section 9(1) of the ICCPR from the morning of 3 May 2008 when he was taken to Frankston hospital. I am satisfied that Defence took no action to progress the hearing of the charge brought against him from this date.

7 Right to be informed of reason for arrest

48. Mr JA claims that he was not informed of the reason that he was arrested or detained.
49. Defence states that to the best of its knowledge, Mr JA was informed by Victoria Police upon his arrest that he was being arrested for the military offence of Absence Without Leave. Defence further states that on 2 May 2008 Mr JA was charged with Absence Without Leave and was served the relevant paperwork. Defence's claim is supported by the detention log which indicates that at 8.34 on 2 May 2008 Mr JA was charged with 's 24 AWOL'. Further, in his complaint Mr JA states 'I was arrested on the grounds of an alleged warrant for my arrest for AWOL'.
50. Based on the information before me, I cannot be satisfied that Mr JA was not told what offence he had been charged with and why he was being detained. Accordingly, I find that the existence of the act or practice that is alleged to be contrary to Mr JA's human rights has not been established within the meaning of section 29(3)(b)(i) of the AHRC Act.

8 Treatment in detention

51. Mr JA makes a number of allegations of breach of articles 7 and 10 of the ICCPR in relation to his detention in the CUDC. Each of these allegations is considered below.
52. The United Nations Human Rights Committee has indicated that the threshold for establishing a breach of article 7 is higher than the threshold for establishing a breach of article 10.⁵
53. Inhuman treatment must attain a minimum level of severity to come within the scope of article 10(1) of the ICCPR. Whether treatment breaches article 7 or article 10 depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age, state of health or other status of the victim.⁶

8.1 Solitary confinement

54. Mr JA claims that he was detained in solitary confinement in a very small cell in the CUDC.
55. Defence denies that Mr JA was detained in solitary confinement. Defence states that as Mr JA was the only detainee in the CUDC at the relevant time, his cell door would have been left open at all times, allowing him access to the courtyard area. In support of its claim, Defence refers to the detention log which indicates that when Mr JA was first assessed as threatening self-harm late on the evening of 2 May 2008, he was found outside his cell in the courtyard.
56. Solitary confinement must continue for a considerable period of time before it will meet the threshold for a breach of article 10 and for a longer period before it will amount to a breach of article 7.⁷ It appears that Mr JA was detained in CUDC from 11.18 pm on 1 May 2008 until 2.35 am on 3 May 2008 (approximately 27 hours) and from 3.20 pm on 7 May 2008 until 12.30 pm on 8 May 2008 (approximately 21 hours).

57. There is insufficient information before me to support Mr JA's claim that he was held in solitary confinement. In any event, even if I were satisfied that Mr JA had been detained in solitary confinement, I am not satisfied that detention for two non-continuous periods of 27 and 21 hours meets the level of severity necessary for a breach of articles 7 or 10. For these reasons, I find that the existence of the act that is alleged to be contrary to Mr JA's human rights has not been established within the meaning of section 29(3)(b)(i) of the AHRC Act.

8.2 Light in cell

58. Mr JA claims that the cell in CUDC in which he was detained had no natural light and the artificial light in the cell was constantly on.
59. Defence denies Mr JA's claim. Defence alleges that natural light enters the cells via a small skylight in the ceiling of the cell. In support of its claims Defence refers to the ADF Detention Centre Inspection Report dated 13 November 2008 completed by the Defence Police Training Centre which states that the CUDC cells 'have good natural and artificial lighting and ventilation'. Defence has also provided a copy of the ADF Minimum Individual Cell requirements which states that cells are to have 'natural lighting (sky tube, skylight or similar)'. Defence claims that the artificial lighting in the cells is turned on during the day and turned off at night.
60. The United Nations Human Rights Committee has invited States Parties to indicate in their reports the extent to which they are applying the Standard Minimum Rules.⁸ 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.⁹ Rule 11 relates to the provision of lighting to prisoners in areas where detained persons are required to live or work.
61. Mr JA was not required to live or work in the CUDC cell in which he was detained. As noted above, he was detained there for approximately 27 hours on 1 May until 3 May 2008 and then approximately 21 hours on 7 and 8 May 2008.
62. There is no information before the Commission, aside from Mr JA's assertion, to support his claim that the CUDC cell in which he was detained did not have natural light. Conversely, there is material before the Commission which suggests that the CUDC cells have adequate natural and artificial light.
63. In relation to Mr JA's claim that the light in his cell was left on constantly, it is unclear based upon the material before the Commission whether this in fact occurred. I note that Defence denies this allegation and claims that the light was turned off at night. For the reasons outlined above, I find that the act or practice that is alleged to have breached Mr JA's human rights has not been established within the meaning of section 29(3)(b)(i) of the AHRC Act.

8.3 Adequacy of clothing, bedding, and heating

64. Mr JA alleges that when he was taken into detention, his civilian clothes were taken away from him and he was not given adequate replacement clothing. Mr JA also claims that on 1 or 2 May 2008 he asked for an additional blanket and was not given one. Mr JA also claims that the cell he was held in did not have heating and that he was required to sleep on a concrete block.

65. Defence agrees that Mr JA was required to change out of his civilian clothes. Defence states that Mr JA was given standard issue overalls and boots. Defence agrees that Mr JA was not given any socks but states that this is because socks can be used for self-harm and are not a Navy issue requirement. Defence agrees that Mr JA was not given thermal underwear and advises that thermal underwear is not a Navy issue item.
66. In relation to Mr JA's allegation about inadequate bedding, Defence claims that detainees are provided with sheets, pillows and two blankets as standard issue. The detention log indicates that Mr JA requested an extra blanket at 11.29 on 2 May 2008 and that he received this extra blanket.
67. In relation to Mr JA's allegation about a lack of heating in the CUDC cell, Defence claims that there was a heater in the cell and it was operational at the time that Mr JA was in the cell.
68. In relation to Mr JA's claims about being required to sleep on a concrete block, Defence states that Mr JA slept on a mattress that was placed on a concrete moulding. The photographs provided by Defence of the cell in which Mr JA was detained supports that such beds exist in the CUDC cells as does the ADF Centre Inspection Reports dated 7 December 2007 and 13 November 2008.
69. The SMRs require that persons in detention are provided with appropriate clothing and bedding.¹⁰
70. I note that Mr JA states that he was cold whilst detained at CUDC. Based on the material before the Commission, it is unclear whether the heating was turned on in the cell in which Mr JA was detained while he was detained there.
71. The material before the Commission indicates that Defence provided Mr JA with standard navy issue overalls, bedding and that he was given an extra blanket when he asked for one. Based on the information before me, I find that an act or practice that is contrary to Mr JA's human rights has not been established within the meaning of section 29(3)(b)(i) of the AHRC Act.

8.4 Contact with the outside world

72. Mr JA claims that:
- he was not advised that he could seek legal representation
 - he was not allowed to make phone calls
 - he was not allowed to receive visitors
 - his parents weren't told where he was.
73. Defence denies that Mr JA was not advised that he was entitled to seek legal representation. Defence states that advice about the right to legal representation is a standard part of the police caution provided to individuals who are arrested and Victoria Police would have advised Mr JA that he was entitled to seek legal representation.
74. Defence also claims that WO Atkinson provided this advice to Mr JA as part of the caution given to Mr JA when he was charged with Absence Without Leave on 2 May 2008. The detention log indicates that Mr JA was cautioned and charged on 2 May 2008 and that he understood the caution and charge. Warrant Officer Atkinson states that if Mr JA had asked to see a lawyer, this request would have been noted in the detention log.
75. Based on the information before me, I am not satisfied that Mr JA was not informed of his right to seek legal representation. Accordingly, I find that the existence of an act or practice has not been established within the meaning of section 29(3)(b)(i) of the AHRC Act.

76. Mr JA claims that he was not allowed to contact his family whilst he was detained by Defence. Defence agrees that on 6 May 2008 Mr JA was refused permission to call his sister and that his mobile phone was confiscated at this time. Defence states that Mr JA made no other requests to contact his family.
77. Defence notes that the CUDC Standing Orders state:
- Telephone calls are a privilege and are granted to a detainee as a reward for their effort. The OIC [officer in charge] has approved that all SUA [service-member under arrest] ... may have a free local or STD phone call on admission to inform a relative or close friend of their location and postal address of HMAS Cerberus. It is considered to be in the interests of detainees and beneficial to relatives and friends to be aware of the location of detainees, to eliminate anxiety on their part.
78. Defence also states that the routine for admitting a detainee includes making a detainee aware of his or her custodial privileges, which include making telephone calls to family and friends. Defence claims that as the standard procedures were followed in relation to Mr JA, he would have been advised that he was allowed to make a phone call.
79. The detention log indicates that on 5 May 2008 Mr JA was found using an unauthorised mobile phone. Defence claims that inpatient records from the HCC show that on 7 May 2008 Mr JA had a telephone conversation with his mother and that also on 7 May 2008 his brother called whilst he was at a psychiatrist appointment and a message was left on Mr JA's bed asking him to return his brother's call. On 8 May Mr JA received a call from his father.
80. In relation to visits, the detention log indicates that on 2 May 2008 Mr JA was visited by Chaplain Sykes in the CUDC and on 4 May 2008 Mr JA received two separate visits from four unauthorised visitors.
81. I accept that Defence placed some limitations on Mr JA's ability to contact the outside world during the eight days that he was detained by confiscating his mobile phone and refusing him permission to telephone his sister. However, the information before me suggests that Mr JA could have made a telephone call to advise his family of his whereabouts if he wished to. Further, Mr JA had contact with his family towards the end of his period of detention.
82. I am not satisfied that the refusal to allow Mr JA to use his mobile phone reached the minimum level of severity necessary to establish a breach of article 7 or 10 of the ICCPR. I find that the act or practice is not inconsistent with or contrary to a human right within the meaning of section 29(3)(b)(ii) of the AHRC Act.
83. Defence agrees that it did not inform Mr JA's family that he had been admitted to Frankston hospital and transferred to the HCC. Defence submits that it was under no obligation to inform Mr JA's family of his admission to hospital and the HCC. Defence states that the hospital and the HCC are not 'institutions for the treatment of mental affections' and that Mr JA was not suffering from a 'mental affection'. Defence also claimed that it would have breached the *Privacy Act 1988* (Cth) (Privacy Act) had it disclosed Mr JA's personal information to his family without his consent.
84. The SMRs provide guidance on the contact that individuals should be allowed to have with their family. Particularly, SMR 44(1) provides that a detained person's family should be informed if he is transferred to 'an institution for the treatment of mental affections'.
85. I accept that neither Frankston Hospital nor the HCC are 'institutions for the treatment of mental affections'. Further, it appears that Mr JA was not incapacitated such that he could not have informed his family of his transfer to Frankston hospital and to the HCC.

86. From the information before me, I am not satisfied that Defence's failure to inform his family that he had been transferred to Frankston hospital and the HCC reached the minimum level of severity necessary to a breach of article 7 or 10 of the ICCPR. I find that the act or practice is not inconsistent with or contrary to a human right within the meaning of section 29(3)(b)(ii) of the AHRC Act.

9 Interference with privacy and attack on reputation and honour

87. By letter of 12 April 2013 Mr JA indicated that he wished to amend his complaint.
88. Mr JA claims that Defence has arbitrarily interfered with his privacy and unlawfully attacked his honour in its letter dated 18 April 2012 in response to former President Branson's preliminary view of the alleged breaches of human rights raised by Mr JA.
89. I have accepted this allegation as an amendment to Mr JA's complaint.
90. Mr JA claimed that Defence arbitrarily interfered with his privacy by providing medical information about Mr JA to the Commission.
91. I have decided not to inquire into Mr JA's allegation that Defence arbitrarily interfered with Mr JA's privacy pursuant to section 20(2)(c)(vi) of the AHRC Act as I am of the opinion that the subject matter of this allegation could be more effectively or conveniently dealt with by the OAIC. Mr JA alleges a breach of the Privacy Act. The OAIC is responsible for administering the Privacy Act.
92. I note that the ICCPR provides protection against unlawful attacks to honour and reputation. Defence's response to former President Branson's preliminary view sets out the circumstances in which Defence claims that Mr JA came to be taken to Frankston hospital and to the HCC. Defence has committed no unlawful act in doing so. Given this, I am satisfied that this allegation is lacking in substance and I have decided not to inquire into it pursuant to section 20(2)(c)(ii) of the AHRC Act.

10 Findings and recommendations

10.1 Power to make recommendations

93. 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.¹¹ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹²
94. 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.¹³

10.2 Consideration of compensation

95. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
96. However, in considering the assessment of a recommendation for compensation under section 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.
97. 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.
98. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for a breach of art 9(1). This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.
99. The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).¹⁴
100. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,¹⁵ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:¹⁶
- ... the *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognized by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.¹⁷
101. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).¹⁸ In that case at first instance,¹⁹ the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116 000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.
102. Mr Taylor was detained for two separate periods. The first was for 161 days and the second was for 155 days. In that case, because Mr Taylor's convictions were in relation to sexual offences against children, Mr Taylor was detained in a state prison under a 'strict protection' regime and not in an immigration detention centre. The detention regime to which Mr Taylor was subjected was described as a 'particularly harsh one'.
103. The Court also took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.²⁰

104. On appeal, in the New South Wales Court of Appeal, Spigelman CJ considered the adequacy of the damages awarded to Mr Taylor and observed that the quantum of damages was low, but not so low as to amount to appellable error.²¹ Spigelman CJ also observed that:

Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as “the initial shock of being arrested”. (*Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 at 515.) As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.²²

105. Although in *Fernando v Commonwealth of Australia (No 5)*, Siopis J ultimately accepted the Commonwealth’s argument that Mr Fernando was only entitled to nominal damages,²³ His Honour considered the sum of general damages he would have awarded in respect of Mr Fernando’s claim if his findings in respect of the Commonwealth’s argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre.

106. Siopis J accepted Mr Fernando’s evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages.

107. His Honour also noted that Mr Fernando’s evidence did not suggest that in immigration detention he was subjected to the harsh ‘strict protection’ regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of inmates in the same way that Mr Nye did whilst he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando in respect of his 1,203 days in detention the sum of \$265 000.²⁴

10.3 Recommendation that compensation be paid

108. I have found that Mr JA’s detention was not in accordance with the requirements of section 95(2) of the DFDA and was arbitrary.

109. I consider that Mr JA’s detention was arbitrary from the time that he was placed in the HCC in the early hours of 3 May 2008 until his release on 8 May 2008 because I am of the view that Defence did not progress the preparation of the charge and potential charges against Mr JA from this time.

110. Mr JA alleges that Defence has committed a range of criminal offences and civil wrongs. I have confined my consideration of compensation to determining the amount appropriate to compensate Mr JA for Defence’s breach of article 9(1) of the ICCPR only.

111. Mr JA alleges that the amount of compensation awarded to him should take into account an amount representing aggravated and exemplary damages.

112. I have not found that Defence has engaged in conduct that could ground an award of aggravated or exemplary damages and my recommendation does not reflect an allowance for such conduct.

113. Mr JA claims that he has sustained a psychiatric injury as a result of being detained by Defence from 1 May 2008 to 8 May 2008. However, there are no medical reports before me that evidence such an injury. Notwithstanding this, I accept that Mr JA would have experienced some distress as a result of his detention.

114. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above I consider that payment of compensation in the amount of \$15 000 is appropriate.

11 Apology

115. In addition to compensation, I consider that it is appropriate that Defence provide a formal written apology to Mr JA for the breach of his human rights identified in this report. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.²⁵

12 Defence's responses to my conclusions and recommendations

116. On 12 December 2013, I provided a notice to Defence under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaints dealt with in this report.
117. By letter dated 6 January 2014, the legal representatives for Defence provided the following response to my recommendations. Parts of this response have been redacted at the request of Defence because they relate to settlement discussions between the parties.

You have invited the Department of Defence (Defence) to provide you with information concerning the action it has taken, or is taking, as a result of the findings and recommendations outlined in the President's notice and the nature of any such action.

Changes to procedures

We confirm that, during the course of this matter, Defence has amended its procedures to ensure that members of the Defence Forces who are charged in accordance with s95(2) of the *Defence Force Discipline Act 1982 (DFD Act)* are charged by a proper officer authorised in writing. A revised form has been developed for this purpose.

We also confirm that the Director of Military Discipline Law has reviewed the existing guidance on *Dealing with an arrested person* in the Australian Defence Forces *Discipline Law Manual*.

The guidance has been amended to provide additional information and to make the requirements of sub-section 95(2) of the DFD Act clearer.

The revised guidance and form have been published electronically. The Director of Military Discipline Law has notified Service Headquarters lawyers, Service Command lawyers and the Military Law Centre of the amendments through the Director General Australian Defence Force Legal Service Update.

As provided for under s95 of the DFD Act, it is the responsibility of Commanding Officers, the Director of Military Prosecutions and any relevant 'superior authority' to monitor the circumstances by which a member of the Defence Forces is detained, and to ensure that the member is dealt with without delay having regard to the circumstances of an individual case.

Compensation

Defence has sought to resolve this matter with the assistance of the Australian Human Rights Commission (AHRC) by way of an agreed settlement. ...

Mr [JA] did not accept Defence's settlement offer.

Having regard to the findings and recommendations outlined in the President's notice, Defence would also like to restate its offer of settlement to Mr [JA]. ...

We note the Commonwealth's obligations concerning the handling of monetary claims under the *Legal Services Directions 2005* (LSDs), and in particular the following items of Appendix C:

- (a) Item 2, which requires a settlement to be made on the basis that there is at least a meaningful prospect of liability being established; and
- (b) Item 6, which requires that the terms of a settlement involving a monetary sum should ordinarily require the claimant to sign a release.

In order to satisfy these requirements, Defence requires Mr [JA] to execute a deed of release on terms consistent with those provided to Mr [JA] previously.

118. I report accordingly to the Attorney-General.



Professor Gillian Triggs
President
Australian Human Rights Commission

May 2014

-
- 1 Section 3(1) of the AHRC Act defines human rights to include the rights recognised by the ICCPR.
 - 2 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 3 Section 139 *Defence Force Discipline Act 1982* (Cth).
 - 4 *Van Alphen v Netherlands* Communication No 305/1988 UN Doc CCPR/C/39/D/305/1988, *A v Australia* Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993, *C v Australia* Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999.
 - 5 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) [247]-[248].
 - 6 *Brough v Australia* Communication No 1184/2003 UN Doc CCPR/C/86/D/1184/2003, *Vuolanne v Finland* Communication No 265/1987 UN Doc CCPR/C/35/D/265/1987.
 - 7 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) [245].
 - 8 UN Human Rights Committee, General Comment 21 (Replaces general comment 9 concerning humane treatment of persons deprived of liberty) (10 April 1992) at [5].
 - 9 UN Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 (1994) at [9.3]; *Potter v New Zealand*, Communication No. 632/1995, UN Doc CCPR/C/60/D/632/1995 (1997) at [6.3]. See also, UN Human Rights Committee, Concluding Observations on the United States, UN Doc A/50/40 (3 October 1995) at [285] and [299].
 - 10 See for example SMRs 17 and 19.
 - 11 AHRC Act s 29(2)(a).
 - 12 AHRC Act s 29(2)(b).
 - 13 AHRC Act s 29(2)(c).
 - 14 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].
 - 15 [2013] FCA 901.
 - 16 [2003] NSWSC 1212.
 - 17 [2013] FCA 901 at [121].
 - 18 *Ruddock v Taylor* (2003) 58 NSWLR 269.
 - 19 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
 - 20 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
 - 21 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
 - 22 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
 - 23 The court awarded nominal damages of one dollar for the unlawful detention of Mr Fernando because as a non-citizen, once he committed a serious crime, he was always liable to have his visa cancelled: *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [98]-[99].
 - 24 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [139].
 - 25 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

For detailed and up to date information about the
Australian Human Rights Commission visit our website at:
www.humanrights.gov.au

To order more publications from the Australian Human
Rights Commission download a Publication Order Form at:
www.humanrights.gov.au/publications/index.html
or call: (02) 9284 9600 fax: (02) 9284 9611
or email: publications@humanrights.gov.au

