Public Interest Advocacy Centre

Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Experiences of people with disability in immigration detention

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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Recommendation 5: *Commonwealth, state and territory governments should implement all of the recommendations contained in the AHRC 'Road Map to OPCAT Compliance'.*

Recommendation 6: *Amend the Migration Regulations by inserting a new provision to require a minimum standard of healthcare as follows:*

> ***Minimum Standard of Healthcare***
>
> *Every held and community detainee has the right to*
>
> *a) access reasonable and culturally appropriate medical care and treatment necessary for the preservation of health at a standard equivalent to that available in the Australian community including:*
>
> *i. if the detainee has a disability, such special care and treatment as a medical officer considers necessary or desirable in the circumstances including, for people in held detention, treatment outside of detention with the Minister's approval;*
>
> *ii. dental treatment necessary for the preservation of oral health;*
>
> *iii. with the approval of a medical officer but at the detainee's own expense, a private registered medical practitioner, dentist, physiotherapist or chiropractor chosen by the detainee;*
>
> *b) as far as practicable, no exposure to risks of infection; and*
>
> *c) conditions in detention that promote the health and wellbeing of the detainee.*
>
> *Any health provider appointed to deliver services to immigration and community detainees must comply with this Minimum Standard of Healthcare.*

Recommendation 7: *The Department of Home Affairs should prioritise and expedite access to medical treatment and/or assessment for people with disability in immigration detention through the public health system.*

Recommendation 8: *The Department of Home Affairs should conduct an audit of existing departmental, operational and training policies to ensure that they fully reflect the Minimum Standard of Healthcare.*

Recommendation 9: *The Department of Home Affairs should conduct a comprehensive review of the mental health care provided in immigration detention led by psychiatrists and specialists experienced in developing plans that reflect the unique and complex needs of the population, including the needs of people with disability.*

Recommendation 10: *The Department of Home Affairs must improve the provision of quality and timely dental care to all immigration detainees.*

Recommendation 11: *The Department of Home Affairs must ensure that people in immigration detention living with Hepatitis C have access to antiviral therapy.*

Recommendation 12: *The Department of Home Affairs should maintain and make publicly available appropriate data on COVID-19 for people in immigration detention.*

Recommendation 13: *The Department of Home Affairs should review its response to COVID-19 in immigration detention, to ensure that risks of transmission are mitigated with the least restriction on other freedoms. Where expert advice recommends the release of people from immigration detention to reduce transmission, this advice should be followed. Solitary confinement must not be used as a tool to prevent transmission.*

Recommendation 14: *APODs should only be used only as a last resort and a short-term measure.*

Recommendation 15*: The Department of Home Affairs should inform the Australian Human Rights Commission and Commonwealth Ombudsman of the location of all APODs and allow those agencies reasonable access to inspect those places.*

Recommendation 16: *The Department of Home Affairs must ensure that restraints in immigration detention, including handcuffing, are only used:*

- *based on an individualised and current risk assessment;*
- *as a last resort to prevent the likelihood of serious harm to the person or others; and*
- *for the shortest necessary period of time.*

1. Introduction

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to make this submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.[1]

PIAC's Asylum Seeker Rights Project seeks to secure humane standards of medical and mental health care for asylum seekers in Australia's onshore immigration detention system. Our clients include people with a range of psycho-social and physical disabilities. Since 2016, we have worked with people in immigration detention and their advocates to address physical and mental health issues facing that population, including the health impacts of the overuse of restraints and excessive use of force.

We are currently running test case litigation challenging the practice of handcuffing people in immigration detention for offsite medical appointments and other transfers within the immigration detention network. We represent clients in litigation and complaints to various government and international oversight bodies. We also engage in work on law reform in these areas. Our work is conducted in close collaboration with refugee and asylum seeker advocacy organisations.

This submission is primarily based on our clients' experiences of onshore immigration detention. It focuses on two areas in Australia's national system of onshore immigration detention which have specific consequences for people with disability: access to healthcare and the overuse of restraints, including handcuffs.

2. Deficiencies in data availability

There is very little public data and information about the experience of people with disability in Australian onshore immigration detention. This concern was flagged in 2015 by the National Ethnic Disability Alliance (**NEDA**) in its report on the experience of people with disability in immigration detention. NEDA noted: 'Data relating to people living with disability, their families and carers, in Australian run immigration detention facilities is practically non-existent.'[2] These concerns have also been raised by the Refugee Council of Australia.[3]

The available data on people with disability in immigration detention has mainly come from responses to parliamentary questions on notice and freedom of information requests.[4] In 2016, the former Department of Immigration and Border Protection responded to a question

[1] PIAC has also lodged the following submissions: 'Institutional economic neglect of people with disability and homelessness' (April 2022); 'Experiences of people with disability accessing air travel and pursuing complaints against airlines and airports' (December 2022); 'Experiences of people with disability enforcing rights under the CRPD' (December 2022).

[2] National Ethnic Disability Alliance (2015), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned*, https://neda.org.au/sites/default/files/2017-06/People%20living%20with%20Disability%20in%20Immigration%20Detention-%20FINAL.pdf, p 16.

[3] See, for example, Refugee Council of Australia, Submission to the Disability Royal Commission, 7 May 2022 https://www.refugeecouncil.org.au/wp-content/uploads/2021/11/People-with-disability-in-detention-RCOA.pdf, p 6; and Refugee Council of Australia, Federation of Ethnic Communities' Council of Australia, National Ethnic Disability Alliance, and Settlement Council of Australia (2019), Barriers and Exclusions: The support needs of newly arrived refugees with disability, https://www.refugeecouncil.org.au/wp-content/uploads/2019/02/Disablity_report_WEB.pdf, 9.

[4] Refugee Council of Australia, Submission to the Disability Royal Commission, 7 May 2022 https://www.refugeecouncil.org.au/wp-content/uploads/2021/11/People-with-disability-in-detention-RCOA.pdf, 7.

on notice stating that it did not hold data in a format sufficient to identify how many people with a disability are being held in immigration detention.[5] However, since that time statistics have been released by the Department of Home Affairs, providing data on the number of people with disability in immigration detention between 2014 and 2018, broken down by broad disability types and the number of people who received certain types of assistive equipment.[6]

According to data obtained through a freedom of Information request, as of June 2021 there were 130 people in immigration detention with an ongoing disability.[7] The exact proportion of humanitarian entrants who have a disability or acquire a disability during the settlement process is unknown.[8] However, a significantly higher proportion of people on humanitarian visas have a disability compared to other migrants and the overall Australian population.[9] NEDA suggests that 'it is probable that the number of asylum seekers living with disabilities currently detained is underreported.'[10]

The absence of detailed data about the numbers of people with a disability in Australian onshore immigration detention is concerning. Without the existence and availability of comprehensive data, it is difficult for civil society to obtain a complete, systematic picture of the experiences of people with disability in onshore immigration detention and advocate for their rights. PIAC recommends that the Department of Home Affairs improve its data collection practises as they relate to people with disability and include specific data about people with disability in onshore immigration detention in monthly published statistics.

Recommendation 1: *The Department of Homes Affairs should provide data on people with disability in its monthly published statistics.*

Recommendation 2: *The Department of Homes Affairs should ensure that adequate disability assessments are conducted so that people with disabilities are appropriately identified in immigration detention.*

3. Background to Australia's onshore system of immigration detention

Australia's migration laws require the mandatory detention of anyone who is not an Australian citizen and does not have a valid visa until they are either granted a visa or

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[5] Senator Rachel Siewert, Answer to Question on Notice SE16/160 (2 December 2016), https://www.aph.gov.au/~/media/Committees/legcon_ctte/estimates/sup_1617/DIBP/QoN_Answers/SE16-160.pdf.

[6] Ibid 6-7.

[7] Department of Home Affairs, Freedom of Information Request: FA 21/06/00239, https://www.homeaffairs.gov.au/foi/files/2021/fa-210600239-document-released.PDF.

[8] National Ethnic Disability Alliance, *Barriers & Exclusions: The support needs of newly arrived refugees with disability* (2019), http://www.neda.org.au/sites/default/files/2019-03/Report%20-%20Barriers%20and%20Exclusions_%20The%20support%20needs%20of%20newly%20arrived%20refugees%20with%20a%20disability%20-%2002%202019.pdf, 6.

[9] National Ethnic Disability Alliance, People with Disability Australia and Federation of Ethnic Communities Councils of Australia, Joint Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2021), http://neda.org.au/sites/default/files/2021-11/NEDA-CALDReport211102%20-%20Low%20Res.pdf, 93.

[10] NEDA, above note 2, 18.

deported.[11] This includes people seeking asylum who arrived in Australia without a visa as well as people already living in Australia who have had their visas cancelled.

PIAC opposes Australia's system of mandatory immigration detention. Australia holds asylum seekers and refugees in immigration detention for excessive and indefinite periods of time, causing harm to physical and mental health. This harm is exacerbated by a failure to ensure people in immigration detention have access to an adequate standard of health and medical care.

3.1 Arbitrary detention

Mandatory immigration detention fails to meet minimum standards for closed environments and invariably leads to arbitrary detention, by permitting detention for unnecessarily lengthy periods. Arbitrary detention of people with disability is prohibited by article 14 of the Convention on the Rights of Persons with Disabilities (**CRPD**).

As a signatory to the CRPD, Australia has an obligation to ensure that if people with disabilities are deprived of their liberty, they are entitled to guarantees in accordance with international human rights law such as the right to equality, protection from cruel, inhuman and degrading treatment, and protection from violence, exploitation and abuse.[12] Furthermore, the United Nations High Commissioner for Refugees (**UNHCR**) Detention Guidelines provides that 'as a general rule, asylum seekers with long-term physical, mental, intellectual and sensory impairments should not be detained.'[13] The Guidelines also require States to make '"reasonable accommodation" or changes to detention policy and practices to match the specific requirements and needs' of people with disabilities.[14] PIAC notes, however, that anything permitted or required by the *Migration Act 1958* (Cth) (the **Migration Act**) or any regulations made under that Act are exempt from the operation of the *Disability Discrimination Act 1992* (Cth).[15]

PIAC recommends that the Department should be required to conduct regular reviews of the detention of people with disability, to actively explore options for

- their release from detention – for example release onto a bridging visa, the exercise of Ministerial discretion; and/or
- the lessening of restrictions, such as the release into community detention

Recommendation 3: *The Department of Home Affairs must conduct regular reviews of the detention of people with disability, to actively explore options for release from detention and/or the lessening of restrictions on a person's liberty.*

3.2 Length of detention

As of 30 September 2022, there are 1333 people detained in Australian onshore immigration detention.[16] The *average* period a person spends in onshore immigration detention in

[11] *Migration Act 1958* (Cth), ss 189, 196 and 198.
[12] Articles 14, 15 and 16 of the CRPD.
[13] UNHCR Detention Guidelines, 2012, 'Guidelines on the Application Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention', http://www.unhcr.org/505b10ee9.html.
[14] Ibid.
[15] *Disability Discrimination Act 1992* (Cth) s 52.
[16] Australian Government Department of Home Affairs, *Immigration Detention Statistics*, 30 September 2022, 4; https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-september-2022.pdf.

Australia is currently 781 days.[17] This can be contrasted with the United States of America, where the average length of stay is 55 days, and in Canada, where it is 15 days.[18]

In Australia there is no limit on the time period for which a person can be detained in immigration detention. For example, in Switzerland, the maximum time a person can be detained in immigration detention is 60 days.[19] In South Africa, the maximum period of immigration detention is 120 days, but any amount of time over 30 days requires a specific court order.[20] The High Court of Australia has previously upheld the legality and constitutionality of indefinite detention.[21]

Medical experts agree that indefinite, arbitrary or prolonged detention causes mental illness and exacerbates existing medical conditions.[22] The Commonwealth Ombudsman has reported that immigration detention in a closed environment for longer than six months had a significant, negative impact on the mental health of immigration detainees.[23] The experience of PIAC's clients is that the impact of indefinite, arbitrary or prolonged detention is particularly acute for people seeking asylum who have developed psychosocial disabilities due to experiences of trauma in their home country.

According to NEDA, People with Disability Australia and the Federation of Ethnic Communities Councils of Australia, there is a very high risk that immigration detention will have an additional negative impact on the health and wellbeing of people with a disability, and 'there is strong evidence that chronic psychosocial disability associated with severe comorbid mental illness may develop.'[24] Immigration detention can also significantly increase the vulnerability of children with pre-existing disabilities.[25] PIAC recommends the introduction of statutory limits on the period of time a person can be detained in immigration detention in Australia.

Recommendation 4: *The* Migration Act *should be amended to prevent indefinite immigration detention, including by imposing maximum time periods for which people can be detained.*

[17] Ibid 12.
[18] American Immigration Council, *Immigration Detention in the United States by Agency* (2 January 2020) https://www.americanimmigrationcouncil.org/research/immigration-detention-united-states-agency; Canada Border Service Agency, *Annual Detention Fiscal Year 2019 to 2020* (2020) https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2019-2020-eng.html.
[19] See, *Federal Act on Foreign Nationals and Integration* (Foreign Nationals and Integration Act, FNIA), 5 December 2005.
[20] See, *Refugees Act* (No. 130) 1998, *Immigration Act* (No. 13), 2002.
[21] *Al-Kateb v Godwin* (2004) 219 CLR 562.
[22] Irina Verhülsdonk, Mona Shahab, and Marc Molendijk, 'Prevalence of psychiatric disorders among refugees and migrants in immigration detention: Systematic review with meta-analysis' (2021) 7 BJPsych Open 6, E204.
[23] Australian Commonwealth Ombudsman, *Suicide and Self-harm in the Immigration Detention Network* (Report No 2, 2013) 59. See also PIAC, *In Poor Health: Health care in Australian immigration detention* (June 2018) 12 and PIAC, *Healthcare denied: Medevac and the long wait for essential medical treatment in Australian immigration detention* (3 December 2021).
[24] NEDA et al, above note 9, 84.
[25] Ibid 87.

3.3 Role of the Optional Protocol to the Convention against Torture (OPCAT)

To fulfil its obligations under OPCAT, the Commonwealth government has nominated the Office of the Commonwealth Ombudsman to be the National Preventative Mechanism (**NPM**) overseeing immigration detention. Disappointingly, there is yet to be sufficient practical progress in implementing a coordinated and effective system of monitoring and prevention. As the Australian Human Rights Commission (**AHRC**) has highlighted, a robust national preventative mechanism has the potential to offer formal safeguards for people with disability who are deprived of their liberty, including in immigration detention.[26]

The importance of adequate oversight of immigration detention conditions is paramount, given the uncertain and arbitrary nature of the length of time people are detained and the harm that can be suffered by people while in immigration detention, particularly people with disability. While any length of time in immigration detention has the potential for harm, extended, indefinite detention has been recognised for decades as extremely damaging to mental and physical health, posing a particular risk to people with disability.

In October 2022, the AHRC published its 'Road Map to OPCAT Compliance'.[27] The Road Map contains a series of concrete recommendations to ensure that the Commonwealth, state and territory governments practically fulfil Australia's OPCAT obligations in a coordinated way. The recommendations include the introduction of primary legislation to 'ensure full effect is given to the key provisions of OPCAT around Australia'.[28] The recommendations also emphasise that NPMs must be appropriately funded to ensure that their design, and operation, occurs in a manner which 'reflects the needs and are inclusive of' people with disabilities.[29]

Recommendation 5: *Commonwealth, state and territory governments should implement all of the recommendations contained in the AHRC 'Road Map to OPCAT Compliance'.*

4. Access to healthcare in onshore immigration detention

Healthcare in Australian onshore immigration detention is inadequate. Healthcare services for people in immigration detention are not comparable to those available to the Australian community. This has particular consequences for people with disabilities, including being arbitrarily refused or delayed needed medical treatment or allied health supports. Our clients' experiences reveal that this has led to the exacerbation and failure to diagnose many serious conditions, including the diagnosis of psychosocial disabilities.

[26] Australian Human Rights Commission, Submission to the Disability Royal Commission re National Preventive Mechanisms: a formal safeguard for people with disability Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 23 September 2022, https://humanrights.gov.au/our-work/legal/submission/national-preventive-mechanisms-formal-safeguard-people-disability.
[27] Australian Human Rights Commission, 'Road Map to OPCAT Compliance', 17 October 2022, https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf.
[28] Ibid, 4.
[29] Ibid.

Onshore detention conditions have resulted in the deterioration of mental health for many people. In 2020-21, there were 195 instances of self-harm in onshore immigration detention centres.[30]

People with disability in immigration detention are also not eligible to receive NDIS funding.[31]

While this section summarises our key concerns, we refer the Royal Commission to our existing reports on the state of healthcare in immigration detention. In 2018, we released *In Poor Health*, a report which analysed the state of healthcare in Australian immigration detention. In 2021, we followed this with a report that focused on the Medevac cohort, *Healthcare Denied*, which demonstrated that healthcare in immigration detention remains in crisis. Copies of those reports are included with this submission.

4.1 The duty of care and 'legislative vacuum'

The Commonwealth Government has a legal duty of care to prevent any reasonably foreseeable harm to people in immigration detention and is responsible for providing a range of services to them, including healthcare.[32] This legal duty includes preventing reasonably foreseeable harm to people with disabilities. The legal duty arises because people in immigration detention (like prisoners) are held against their will and are particularly vulnerable, as they are unable to make arrangements for their own well-being. The obligations owed by the Commonwealth are not in dispute.[33]

The duty of care owed by the Australian government to provide adequate health services to people in immigration detention, including people with disabilities, is not reflected in the current legislative framework. The Migration Act confers power on the Minister to make regulations regarding the day-to-day running of facilities. However, none of the regulations made under the Act[34] provide for the 'operation and regulation of detention centres' with respect to the provision of reasonable medical care.[35]

Australian courts have noted, with concern, the lack of legislative guidance around the 'operation and regulation of detention centres' notwithstanding the Minister's power to enact such provisions in delegated legislation.[36] This 'legislative vacuum' stands in stark contrast to the corrections laws of many Australian states and territories which ensure people in correctional custody have a guaranteed right to reasonable medical care and treatment.[37]

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[30] Australian Government Department of Home Affairs, *2020-2021 Annual Report* (30 June 2021) 120.
[31] NEDA et al, above note 9, 81.
[32] See, for example, *Mastipour v Secretary, Department of Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 93* (*Mastipour*); *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs [2005] FCA 549 (S v Secretary*); *SBEG v Commonwealth of Australia [2012] FCAFC 18; MZYYR v Secretary, Department of Immigration and Citizenship [2012] FCA 694; and AS v Minister for Immigration and Border Protection & Anor [2014] VSC 593.*
[33] Ibid.
[34] This is primarily the *Migration Regulations 1994* (Cth).
[35] Regulation 5.35 of the *Migration Regulations 1994* (Cth) does concern the medical treatment of immigration detainees but in the context of the Secretary's power to take certain steps in instances where 'there will be a serious risk' to the immigration detainee's 'life or health'. However, the regulation does not address the required standard or quality of medical care more generally.
[36] See, for example, *Mastipour*, above note 13, [8] and [2]; and *S v Secretary*, above note 13, [198].
[37] See, for example, s 47 of the *Corrections Act 1986* (Vic), s 53 of *Corrections Management Act 2007* (ACT) and s 82 of the *Correctional Services Act 2014* (NT).

The proper fulfilment of Australia's international human rights obligations includes legislative change to amend the *Migration Regulations 1994* (Cth) (the **Migration Regulations**) by inserting a new provision to require a minimum standard of healthcare. This must be complemented by training, education and robust review. This will help to ensure that if people with disability continue to be held in immigration detention, they receive the healthcare to which they are entitled, commensurate with Australian community standards and in keeping with international law.

Recommendation 6: *Amend the Migration Regulations by inserting a new provision to require a minimum standard of healthcare as follows:*

> **Minimum Standard of Healthcare**
>
> Every held and community detainee has the right to
>
> a) access reasonable and culturally appropriate medical care and treatment necessary for the preservation of health at a standard equivalent to that available in the Australian community including:
>
> i. if the detainee has a disability, such special care and treatment as a medical officer considers necessary or desirable in the circumstances including, for people in held detention, treatment outside of detention with the Minister's approval;
>
> ii. dental treatment necessary for the preservation of oral health;
>
> iii. with the approval of a medical officer but at the detainee's own expense, a private registered medical practitioner, dentist, physiotherapist or chiropractor chosen by the detainee;
>
> b) as far as practicable, no exposure to risks of infection; and
>
> c) conditions in detention that promote the health and wellbeing of the detainee.
>
> Any health provider appointed to deliver services to immigration and community detainees must comply with this Minimum Standard of Healthcare.

4.2 Consequences of the 'legislative vacuum'

The absence of minimum legislative standards of healthcare commensurate with healthcare provided in the community has, in our view, contributed to the failure of healthcare in onshore immigration detention.

Our recent case work confirms that there is chronic non-compliance with the common law duty owed by the Commonwealth to people in immigration detention. These serious problems are ongoing and highlight the need for urgent reform. These concerns have been echoed, over many years, by organisations such as the Australian National Audit Office[38]

[38] Auditor-General, Australian National Audit Office, Delivery of Health Services in Onshore Immigration Detention, Report 13 of 2016-17.

and the AHRC[39] and confirmed by the Parliamentary Joint Committee of Public Accounts and Audit.[40]

The quality of healthcare administered in Christmas Island Immigration Detention Centre has long been the focus of concern. For example, in 2013, a group of doctors working for the International Health and Medical Services (**IHMS**) wrote a 'letter of concern' which stated that Christmas Island Immigration Detention Centre was 'unsuitable for any person living with significant intellectual or physical disability. The detention environment exacerbates their burden of care and the facilities and medical services provided are inadequate to accommodate their needs'.[41]

Through our casework, we have identified several particularly concerning issues affecting people with disability in immigration detention, including:

- arbitrary failure to provide medical treatment to refugees and asylum seekers transferred to Australia from offshore detention for that express purpose (the 'Medevac cohort');
- routine denial of antiviral therapy to detainees living with hepatitis C;
- limited access to dental care;
- delays in people receiving treatment from IHMS;
- relevant agencies failing to implement recommended treatment plans, for example, not providing access to a dental specialist despite referrals being made by a primary physician;
- poor communication and coordination between IHMS and other agencies involved in providing healthcare to people in detention;
- generally poor detention conditions leading to worsening physical and mental health, including the use of 'temporary' hotels for immigration detention for prolonged or indefinite periods, involving lack of access to adequate fresh air, sunlight, activities and visitors; and
- routine use of handcuffs and mechanical restraints on people in immigration detention, particularly for transfers to external medical appointments or between facilities within the immigration detention network.

In response to a freedom of information request lodged by NEDA, the Commonwealth stated that 'any detainee with a disability is referred for further specialist assessment, diagnosis and support, including the provision of assistive devices such as wheelchairs and hearing aids, as appropriate.'[42] However, NEDA's experience suggests that, in practice, this rarely occurs. NEDA notes that 'evidence continues to demonstrate that people with disabilities in

[39] For example, Australian Human Rights Commission, Inspection of Yongah Hill Immigration Detention Centre: Report, 16-18 May 2017, https://www.humanrights.gov.au/our-work/ asylum-seekers-and-refugees/publications/inspection-yongah-hill-immigration-detention; Australian Human Rights Commission, Inspection of Melbourne Immigration Transit Accommodation: Report, 9-10 March 2017, https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-melbourne-immigration-transit; and Australian Human Rights Commission, Inspection of Maribyrnong Immigration Detention Centre: Report, 7-8 March 2017, <https://www.humanrights.gov.au/our-work/asylum-seekers-and refugees/publications/inspection-maribyrnong-immigration-detention>.
[40] Joint Committee of Public Accounts and Audit, Parliament of Australia, Commonwealth Procurement Inquiry based on Auditor-General's reports 1, 13 and 16 (2016-17) (2017).
[41] 'Christmas Island Medical Officer's Letter of Concerns', For Review by International Health and Medical Services Management and Executive, November 2013, https://www.theguardian.com/world/interactive/2014/jan/13/christmas-island-doctors-letter-of-concern-in-full.
[42] NEDA, above note 2, 16.

immigration detention not only face immense challenges, but are not having their basic needs met.'[43]

In the absence of, or in addition to, the introduction of the Minimum Standard of Healthcare set out above, PIAC recommends the following to respond to existing failures in healthcare in immigration detention.

Recommendation 7: *The Department of Home Affairs should prioritise and expedite access to medical treatment and/or assessment for people with disability in immigration detention through the public health system.*

Recommendation 8: *The Department of Home Affairs should conduct an audit of existing departmental, operational and training policies to ensure that they fully reflect the Minimum Standard of Healthcare.*

Recommendation 9: *The Department of Home Affairs should conduct a comprehensive review of the mental health care provided in immigration detention led by psychiatrists and specialists experienced in developing plans that reflect the unique and complex needs of the population, including the needs of people with disability.*

Recommendation 10: *The Department of Home Affairs must improve the provision of quality and timely dental care to all immigration detainees.*

Recommendation 11: *The Department of Home Affairs must ensure that people in immigration detention living with Hepatitis C have access to antiviral therapy.*

4.3 The Medevac cohort

PIAC is particularly concerned that many people who were transferred to Australia to access urgent medical treatment under the Medevac scheme continue to experience significant delays to access healthcare. The Medevac scheme provided for asylum seekers and refugees to be transferred from Nauru and Papua New Guinea to Australia to obtain urgent medical care, in circumstances where medical treatment was not available in those places.

The scheme operated for 8 months, until December 2019.[44] Approximately 192 people were transferred to Australia during that period.[45] Many people in the Medevac cohort have psychosocial disabilities, and in the case of one of our clients, the lack of treatment for physical health conditions has resulted in permanent physical disability. There is no publicly available data identifying the various medical conditions which formed the basis for the transfers of people to Australia and how many people in this cohort have disabilities.

[43] Ibid.
[44] The Medevac law was repealed on 4 December 2019: *Migration Amendment (Repairing Medical Transfers) Act 2019* (Cth). The repeal bill was passed following a 'secret deal' between Senator Jacqui Lambie and the Coalition government. See, Alex Reilly, 'Explainer: the medevac repeal and what it means for asylum seekers on Manus Island and Nauru', *The Conversation*, (Webpage, 4 December 2019), available at https://theconversation.com/explainer-the-medevac-repeal-and-what-it-means-for-asylum-seekers-on-manus-island-and-nauru-128118.
[45] Refugee Council of Australia, *Offshore Processing Statistics* (Report, 4 October 2020); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, AE20-216 - Medical Transferees (Answer to Question on Notice No 216, 2 March 2020).

Every person transferred to Australia under the Medevac scheme was arbitrarily detained in onshore immigration detention facilities upon arrival, including hotels made available for that purpose, where the detention conditions have been widely condemned.[46] This was despite the fact that many were already living in the community in Nauru and Papua New Guinea and had been determined to be refugees.[47] Many in the cohort waited for months or years for the healthcare which was the express purpose of their transfer to Australia. This included excessive delay for treatment for painful and debilitating conditions such as severe gum disease, chest pain and heart palpitations.[48]

While most people transferred under the Medevac scheme were released just prior to the federal election in May 2022, some are still detained.[49] The experience of the Medevac cohort reflects access to healthcare in immigration detention generally: in too many cases the government is failing to provide basic medical care.

4.4 Case study: Sadiq's experience of health care in immigration detention

Sadiq[50] came to Australia on a boat in 2013 and was detained on Manus Island and Nauru for six years. During this period, he developed a serious knee injury that prevented him from walking.

After three years of pain, Sadiq underwent surgery in Port Moresby. The surgery revealed that years without treatment had led to the cartilage in his knee almost completely wearing away. Post-operation, Sadiq suffered from seizures over a period of 8 months. The cause of these seizures was not able to be identified in Port Moresby. The operation on his knee also failed to relieve him of any pain.

Two Australian doctors assessed Sadiq's health issues, finding that he had been prescribed multiple medications with harmful and potentially life-threatening drug interactions. These doctors concluded that Sadiq could not be safely treated in Papua New Guinea. Sadiq was transported to Australia for medical treatment in June 2019 under the Medevac scheme. Shortly after arriving he undertook an electroencephalogram (EEG), which was found to be within normal limits. No further investigation was conducted as to his seizures. Sadiq's knee pain also continued to worsen, and he was placed on the waiting list to see an orthopaedic specialist.

Whilst Sadiq waited over 9 months for a specialist appointment, he developed serious mental health issues, including depression, PTSD symptoms and a severe anxiety surrounding the use of restraints. His anxiety was accompanied by chest pain and heart palpitations. The doctors identified that his mental health symptoms were a result of his prolonged detention.

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[46] Public Interest Advocacy Centre, *Healthcare denied: Medevac and the long wait for essential medical treatment in Australian immigration detention*, (December 2021), https://piac.asn.au/wp-content/uploads/2021/12/PIAC_Medevac-Report_2021_IssueE_03122150-1-1.pdf, 13-14.
[47] Ibid, 5.
[48] See, for example, the case studies in *Healthcare Denied*, above note 39: 17, 29, 31.
[49] See, for example, Eden Gillespie, 'More refugees released from detention in move 'absolutely due' to election' *The Guardian*, (online, 4 April 2022), available at: https://www.theguardian.com/australia-news/2022/apr/04/absolutely-due-to-upcoming-election-australian-government-releases-more-refugees-from-detention.
[50] Not his real name. Sadiq is a PIAC client.

By March 2020, Sadiq refused to be restrained in order to be taken out of detention to his specialist appointments. Sadiq objected to being touched and handcuffed by Serco security guards in public, stating that he 'is not a prisoner'. Sadiq was finally able to see an orthopaedic specialist. That specialist concluded that his knee was inoperable due to the severe damage and prolonged lack of treatment. Sadiq's mental health worsened significantly. By September 2020, he was suffering from advanced PTSD and Anxiety. He developed nightmares, insomnia and started having paranoid delusions.

Sadiq was finally released into community detention in August 2021. Since being released, his mental health has improved significantly. Sadiq's story illustrates how detention can exacerbate both physical and mental health conditions. The failure to treat Sadiq's knee condition whilst offshore led to his permanent disability. This in turn caused a worsening of existing mental health conditions and the development of additional conditions.

5. Impact of COVID-19

The COVID-19 pandemic has had a negative impact on the mental health and wellbeing of people detained in immigration detention, including people with disability. All visits to immigration detention facilities ceased on 24 March 2020 due to COVID-19 and there have been restrictions on external excursions for activities outside detention facilities, such as gym visits and medical appointments. Visits have recommenced in 2022, however it is unclear whether visitation rights will be revoked again if there are further serious 'waves' of COVID-19 in Australia.

When COVID-19 began to rapidly spread in Australia, the Commonwealth refused to follow expert advice to release people into the community to reduce the risk of COVID-19.[51] Instead, the Commonwealth and its contractors chose solitary confinement as a tool to prevent COVID-19 transmission.[52] This led to an underreporting of possible COVID-19 symptoms in immigration detention because people did not want to be locked away without access to fresh air and exercise. Reports also indicate a lack of transparency regarding quarantine rules within detention.[53]

PIAC remains concerned about the heightened risks of contracting COVID-19 in detention environments and overcrowded settings, and the heightened risks of severe or critical illness from COVID-19 because of relevant comorbidities such as hypertension, diabetes, and respiratory disease. Recent data obtained by PIAC through freedom of information requests reveals that at June 2022, there had been 337 cases of COVID-19 in onshore immigration detention. Of these cases, 251 were diagnosed between April and June 2022. This means that during that period, potentially 18 per cent of the population in immigration detention had COVID-19.

The lack of clear data regarding how many people with disability are held in immigration detention is particularly concerning because of the serious risks posed by the pandemic. As

[51] Australian Human Rights Commission, *Management of COVID-19: risks in immigration detention* (2021), https://humanrights.gov.au/sites/default/files/document/publication/ahrc_covid-19_immigration_detention_2021.pdf.
[52] See, for example, Sarah Price, 'Villawood asylum seeker's plea from solitary 'torture' amid virus scare', The Saturday Paper, 18 September 2021, https://www.thesaturdaypaper.com.au/news/politics/2021/09/18/villawood-asylum-seekers-plea- solitary-torture-amid-virus-scare#hrd.
[53] Ibid.

has been widely reported, people with disability are at heightened risk of serious illness and/or death from COVID-19.[54] As has been outlined above, many people in immigration detention have been diagnosed with multiple and complex physical and psychosocial disabilities. The specific vulnerabilities of the detention population means that people in immigration detention face both a greater risk of transmission (due to being detained in a closed environment) and a greater risk of serious illness.

In addition to the direct impact of COVID-19 outbreaks in immigration detention, the increased pressure on Australia's health system has led to further delays in access to medical consultations and treatment. Health issues for people detained in immigration detention further deteriorated in 2020-22 because of COVID-19, and the detrimental impacts of closed environments. Measures to manage the risk of COVID-19 outbreaks in immigration detention have also led to restrictions, including isolation, limits on freedom of movement, socialising, activities, and visits, all of which are critical to health and well-being in detention.

Recommendation 12: *The Department of Home Affairs should maintain and make publicly available appropriate data on COVID-19 for people in immigration detention.*

Recommendation 13: *The Department of Home Affairs should review its response to COVID-19 in immigration detention, to ensure that risks of transmission are mitigated with the least restriction on other freedoms. Where expert advice recommends the release of people from immigration detention to reduce transmission, this advice should be followed. Solitary confinement must not be used as a tool to prevent transmission.*

6. Use of Alternative Places of Detention (APODs)

PIAC is concerned about the increasing use of alternative places of detention (**APODs**) and the specific impacts for people with disability. The Department of Home Affairs can designate almost any location as an alternative place of detention.[55] This includes hotels.[56]

The use of hotels as alternative places of detention has been widely condemned. APODs, including hotels, are generally not fit for purpose. APODs are supposed to be short-term options, however this is not how they are being used.

The conditions of detention in hotels are more restrictive than in immigration detention centres. It is more difficult to access health care because PIAC understands that health services do not visit APODs frequently. APOD detention conditions exacerbate existing health conditions and create new ones. Our clients have reported very limited access to fresh air and sunlight. There are limited opportunities, if any, for activities and programmes.

In June 2019, the AHRC recommended that hotels only be used as places of detention in exceptional circumstances for very short periods of time, not least because of their lack of

[54] See, for example, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Statement of concern - The response to the COVID-19 pandemic for people with disability', 26 March 2020; and 'Statement of ongoing concern - The impact of and responses to the Omicron wave of the COVID-19 pandemic for people with disability', 17 February 2022.
[55] See Migration Act, above note 11, section 5.
[56] 56 APODs were classified as "hotel-type APODs" at 31 January 2021: Senator Nick McKim, Answer to Question on Notice AE21-346 (21 May 2021), https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId10- PortfolioId20-QuestionNumber346.

dedicated facilities and restrictions on access to open space.[57] Despite this recommendation, hotels have continued to be designated as 'alternative places of detention' by the Commonwealth government in preference to options such as the granting of bridging visas or release into community detention.

In October 2021, nearly one third of refugees and asylum seekers detained by the Commonwealth government at Melbourne's Park Hotel tested positive for COVID-19. Reflecting the distress experienced by people being detained there, one detainee labelled it 'a killer hotel, a torture hotel'.[58] Reports included that medical care, food, COVID-19 safety protocols were not provided, or if they were provided, it was done so on an arbitrary basis.[59] Men detained at Park Hotel were subject to a range of mistreatment, including being served maggots and mouldy food, a lack of hygiene and an increased risk of contracting COVID-19.[60] The example of Park Hotel highlights that hotels are generally not fit for purpose as places of immigration detention.

In 2018, the AHRC inspected a number of APODs and reported them to be 'exceptionally restrictive environments with regard to freedom of movement'.[61] This is particularly concerning given the vulnerability of those held in APODs and the contribution of these conditions to the deterioration of mental and physical health.[62]

PIAC remains concerned that hotels are still being used by the Department of Home Affairs. The Department has reported that from 1 January 2018 to 31 January 2021, 170 APODs were used in Australia at any time.[63] It is unknown how many people with a disability are held in APODs.[64]

Recommendation 14: *The Department of Homes Affairs should cease using APODs, except as a last resort and for the shortest practicable time period.*

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[57] AHRC, above note 44; see also Price, above note 45.
[58] Elle Marsh, 'This is a torture hotel': Inside the Park Hotel outbreak', *The Saturday Paper* (online), 27 November 2021, https://www.thesaturdaypaper.com.au/news/politics/2021/11/27/this-torture-hotel-inside-the-park-hotel-outbreak/163793160012962.
[59] Ibid.
[60] Eden Gillespie and Arianna Lucente, 'Asylum seekers in Melbourne detention say they were served 'maggots and mould' for dinner', *SBS News* (online, 29 December 2021), https://www.sbs.com.au/news/article/asylum-seekers-in-melbourne-detention-say-they-were-served-maggots-and-mould-for-dinner/ghide58ou.
[61] Australian Human Rights Commission, *Risk management in immigration detention* (2019), 48.
[62] Australia OPCAT Network, Submission to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD) (January 2020), https://www.refugeecouncil.org.au/wp-content/uploads/2020/02/Implementation_of_OPCAT_in_Australia.pdf, 67; Refugee Council of Australia, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (May 2022), https://www.homeaffairs.gov.au/foi/files/2018/2018-180701332-document-released.pdf, 16.
[63] Senator Nick McKim, Answer to Question on Notice AE21-346 (21 May 2021), https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId10- PortfolioId20-QuestionNumber346.
[64] RCOA, *Immigration Detention in Australia: Main Issues of Concern Since January 2020* (2022), https://www.refugeecouncil.org.au/wp-content/uploads/2022/08/2022-Report-to-the-SPT-Final.pdf, 14; Australia OPCAT Network, Submission to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD) (January 2020), https://www.refugeecouncil.org.au/wp-content/uploads/2020/02/Implementation_of_OPCAT_in_Australia.pdf, 50.

***Recommendation 15**: The Department of Home Affairs should inform the Australian Human Rights Commission and Commonwealth Ombudsman of the location of all APODs and allow those agencies reasonable access to inspect those places.*

7. Arbitrary use of force and the overuse of handcuffs

Handcuffing of people in immigration detention has emerged as routine practice for offsite medical appointments and for transfers between facilities in the onshore immigration detention network. The Migration Act and Migration Regulations are silent on the circumstances in which handcuffs or other restraints can be used in immigration detention.

Our work with people in immigration detention reveals that the overuse of handcuffs is a significant barrier to people receiving medical treatment, particularly for people with psycho-social disabilities.[65] People in immigration detention are routinely handcuffed in transit to medical appointments. These practices discourage attendance at offsite medical appointments and can exacerbate existing mental health conditions or trauma, particularly for many asylum seekers who have experienced trauma or torture. In many instances, the use of force and restraints in immigration detention is arbitrary. The impact on our clients is severe.

The Royal Australian and New Zealand College of Psychiatrists has emphasised that asylum seekers in Australian immigration detention are 'an already traumatised population, many of whom have severe mental health problems and are at increased risk of further depression, anxiety and post-traumatic stress disorder (PTSD).'[66] The use of handcuffing further exacerbates these health problems and puts asylum seekers in immigration detention in an impossible position – they must either accept the harm and distress from being handcuffed or forego access to healthcare where it is made available.

PIAC is concerned by the impact of the excessive use of handcuffing on the wellbeing of immigration detainees, particularly detainees with disabilities. The use of handcuffs and other restraints discourages attendance at offsite medical and mental health appointments, potentially exacerbating existing health conditions and delaying diagnosis of others. It also further harms the mental health of detainees, many of whom are already suffering the adverse effects of prolonged detention. We consider that there is an ongoing failure by the Commonwealth government, and its security contractor Serco, to genuinely consider and balance risks posed by people held in immigration detention with the negative impacts of using handcuffs and other restraints.

The experiences of our clients are consistent with the findings made by the AHRC and the Commonwealth Ombudsman. In 2019, the AHRC published a report that highlighted widespread use of restraints in immigration detention and recommended that practices must be immediately tailored to individual circumstances and risks.[67] In 2020 and 2021, the

[65] Public Interest Advocacy Centre (2018) 4 and 24, https://piac.asn.au/wp-content/uploads/2018/06/18.06.14-Asylum-Seeker-Health-Rights-Report.pdf; and Public Interest Advocacy Centre, *Healthcare denied: Medevac and the long wait for essential medical treatment in Australian immigration detention*, (December 2021), 20 https://piac.asn.au/wp-content/uploads/2021/12/PIAC_Medevac-Report_2021_IssueE_03122150-1-1.pdf.
[66] Royal Australian and New Zealand College of Psychiatrists, 'Immigration detention centres a significant COVID-19 risk', 17 April 2020.
[67] Australian Human Rights Commission, (2019) *Risk Management in Immigration Detention*, 29-30, available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019?_ga=2.195069100.1607295212.1656389767-1412818163.1656389767.

Commonwealth Ombudsman echoed these concerns and raised the growing tendency for force, including the use of handcuffs, to be used as the first, rather than last choice in facilities.[68] The Ombudsman expressed concern that the use of restraints was being exercised in a manner both inconsistent with the Department of Home Affairs' own procedures and possibly without legal basis.[69]

Although there is a lack of direct, publicly available evidence, the Refugee Council of Australia reports that there is frequent and disproportionate use of force against people with psychosocial disability within immigration detention, and that 'often signs of distress are treated as behavioural concerns and responded to with increased force and punitive measures'.[70] The excessive or unjustified use of restraints and other restrictive practises on people with disability is a grave concern in a number of environments, including hospitals and residential care facilities, and we are concerned that this may be the case in immigration detention as well.

Recommendation 16: *The Department of Home Affairs must ensure that restraints in immigration detention, including handcuffing, are only used:*

- *based on an individualised and current risk assessment;*
- *as a last resort to prevent the likelihood of serious harm to the person or others; and*
- *for the shortest necessary period of time.*

7.1 Case study: Yasir's experience of handcuffing in immigration detention

When Yasir was a young child, he was imprisoned for two years with his family as 'enemies of the state'. During this period, he was tortured by prison guards who kept him in handcuffs. Yasir also witnessed his family and other detainees being tortured. Yasir says 'The things that happened in jail changed me forever. I can't even look at handcuffs without feeling like I'm going to have a seizure.'

Yasir and his family were then exiled to another country. They were detained in a 'foreigners detention centre' for over 10 years and suffered extreme poverty and violence there. After being released from the detention centre, Yasir was targeted by police and authorities. He was often taken into custody. As a member of an ethnic minority, Yasir had no formal status. He was not allowed to work, study or marry legally. He couldn't do simple things like get insurance or register a car in his name.

In 2013, Yasir fled to Australia. When Yasir came to Australia he was initially detained on Christmas Island. He became mentally unwell and was finally diagnosed with Post Traumatic Stress Disorder. Yasir also developed physical health issues. In order to attend medical appointments offsite, guards insisted that Yasir be handcuffed. Being handcuffed led to Yasir having seizures. He says, 'I would feel terrible. I would start shaking and

[68] Commonwealth Ombudsman, *Monitoring Immigration Detention*, (July-December 2019), 23, available at https://www.ombudsman.gov.au/__data/assets/pdf_file/0015/111390/Six-monthly-immigration-detention-report-Jul-Dec-2019.pdf.
[69] Ibid.
[70] RCOA, above note 3, 19.

sometimes vomit or have seizures and injure myself'. This led to Yasir missing specialist medical appointments.

Yasir says, 'Even though I have missed important investigations and treatment, I would rather die than agree to handcuffs. The doctors would ask: "Why did you refuse to go to the appointment' and I would say 'I didn't refuse the appointment, I refused the handcuffs"'.

Yasir asked the guards to stop handcuffing him. He says he has never been told why handcuffs are necessary, given sometimes the guards have let him attend appointments without restraints. Further, numerous doctors and counsellors have written reports outlining that Yasir should not be restrained, given his mental health condition. Nonetheless, guards continued to arbitrarily insist that Yasir be handcuffed if he wanted to attend off-site medical appointments.

In November 2020, on behalf of Yasir, PIAC filed landmark test case litigation in the Federal Court to challenge the lawfulness of restraints in immigration detention. The case challenges the lawfulness of handcuffing under both the Migration Act and Disability Discrimination Act. In relation to the disability discrimination claim, Yasir argues that on each of the occasions the Commonwealth and its agents placed him in or proposed to place him in handcuffs and/or other restraints during a transport and/or escort, they:

- could have made adjustments so that handcuffs and/or other restraints were not applied or proposed to be applied to him (direct discrimination claim); and/or
- were requiring him to comply with a condition he was unable to comply with, because of his disability (indirect discrimination claim).

The case is ongoing.

8. Conclusion

Australia's arbitrary and indefinite immigration detention regime inflicts considerable harm which is exacerbated by the failure to provide adequate healthcare to people in detention. PIAC is concerned that Australia's system of onshore immigration detention is causing particular and additional harms to people with disabilities.

Our research and client experience demonstrates that the Commonwealth government continues to breach its duty of care to people with disabilities, including through the denial of access to adequate healthcare and routine arbitrary handcuffing.

PIAC urges the Royal Commission to carefully consider the health implications of immigration detention in Australia for people with disabilities, including the serious consequences of prolonged detention.

The current system is in breach of international law and out of step with Australian community standards.