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

Submission on laws, policies and practice affecting migrants, refugees and citizens from culturally and linguistically diverse backgrounds

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

INTRODUCTION

This submission examines the intersection in Australian law, policy and practice between immigration, cultural and linguistic diversity (CALD) and disability. The topic is one of panoramic proportions. The Australian Bureau of Statistics (ABS) reports that in the 2016 census, over 28 percent of Australians were born overseas. In that year it was estimated that as much as 11 percent of the Australian workforce were temporary migrant workers. Migrants who transition to become Australian citizens meld into the general populations of the concern to the Disability Royal Commission.

Whether or not they become citizens, however, we will argue that there has been a tendency in Australia for migrants with disabilities to be forgotten, invisible or actively excluded. And that this has rendered migrants and persons from CALD backgrounds susceptible to violence, abuse, exploitation and neglect. In many instances, Australia is and has been in breach of obligations it has assumed under international law.

We will argue that the invisibility of migrants with disabilities is partly a function of a legal and social rhetoric that migration laws deliver border control and 'quality control' such that Australia admits only healthy, job-ready migrants. In fact, when it is understood that 'migrants' include all non-citizens in Australia – from tourists, students and temporary migrant workers to long term permanent residents – it will be seen that persons with disabilities are well and truly represented.

Where individuals enter the country without authorisation in search of protection (asylum), there has been an assumption in Australia as in many other countries that persons with disabilities 'do not survive disaster and that they do not travel'. Again, neither of these assumptions is correct.

The World Health Organisation (WHO) estimates that in any population one can expect 2.9 per cent to comprise persons with severe disabilities, and a further 12.4 per cent to have moderate long-term disabilities. While the United Nations (UN) agency responsible for the protection of refugees was slow to acknowledge this, recent research suggests that populations of refugees and asylum seekers probably include even higher numbers of persons with disabilities.

One of the first points of criticism of Australia's treatment of migrants with disabilities is that accurate statistics are not available of the number of persons with disabilities across the various categories of migrants. This is a matter of concern because in the absence of reliable data it is inherently difficult to assess the extent to which Australia is complying with its international legal obligations with respect of these people.

Methodology

This submission is based on a detailed analysis of Australia's obligations under international law as they apply to different categories of migrants in various

situations. The work examines law, policy and practice in Australia, focusing as much as possible on current situations. Where helpful, we have included brief summaries of past events, practices and laws. We have used publicly available sources. No interviews with migrants or their advisors were conducted for the submission, although source material was provided by both migrants and their advisers.

Structure of the Submission

This submission is divided into ten parts, of which three parts have been submitted and given the Designations SUB.100.00888 – the COVID-19 submission; SUB.001.00638 – the parts 1-3 submission. This submission includes the earlier work already submitted.

We begin in **Part I** with an overview of Australia's legal obligations with respect of migrants and refugees with disabilities. The criticisms that have been made of Australia by UN Human Rights treaty bodies will be summarised in the body of the submissions as we address each of the areas that we submit should be of concern to the Royal Commission.

The main body of the submission is organised to deal in sequence with general migrants, unlawful non-citizens and persons seeking protection on humanitarian grounds (asylum seekers). The discussion addresses in turn issues relating to improper discrimination; instances of (actual and systemic) abuse of migrants with disability; instances of actual and systemic violence perpetrated on migrants with disability; and the systemic failure to accommodate disabilities, with abusive outcomes.

Part I - International legal obligations relevant to migrants with disabilities

The first part provides an overview of Australia's legal obligations with respect of migrants and refugees with disabilities. The criticisms that have been made of Australia by UN Human Rights treaty bodies are summarised in the body of the submissions as we address each of the areas that we submit should be of concern to the Royal Commission.

Criticisms made by various United Nations treaty bodies of Australia's treatment of migrants showcase many instances where migrants with disabilities have been and are being abused, neglected or exploited. While aspects of Australia's legislative framework are identified as areas of concern, most of the commentary relates to

(i) the operation of discriminatory legislation and
(ii) the operation of offshore and mandatory immigration detention.

In relation to Australia's **discriminatory laws**, at least four UN treaty bodies have commented recently on the lack of equal treatment and robust anti-discrimination legislation. In relation to legislation that openly discriminates against migrants with disabilities, treaty bodies have expressed concern about:

- Targeted exceptions being made to general prohibitions on non-discrimination against persons with disabilities;
- The ability of government officials to use disability as a basis for adverse migration assessments; and
- The exclusion of migrants on temporary visas from accessing forms of social supports.

Australia's legislative framework relevant to migration and disability creates and facilitates institutional processes that neglect migrants with disabilities. At least six UN treaty bodies have expressed concern about Australia's policy of mandatory, indefinite detention and offshore detention and the effect on the health of migrants. The following aspects of these policies have been highlighted:

- Limited access to basic health care (especially in relation to mental health services);
- Instances of assault, sexual abuse and rape by immigration facility employees; and
- Acts of intimidation and the use of force and physical constraints by immigration facility employees against migrants.

These features of Australia's migratory legislation framework are concerning as they demonstrate abuse, neglect and exploitation of migrants with disabilities. In January 2020 Australia appeared before the UN Human Rights Council to submit to it Universal Periodic Review. We urge the Commission to examine the findings by the Council when they are made public.

Part II - Disability and the immigration health rules

This part examines laws, policies and practice relating first to the admission of general migrants with disabilities.

The main concerns identified relate to the migration health rules' failure to distinguish between disease and disability; the arbitrary mechanisms used to determine cost and the failure to allow for consideration of positive contributions by persons with disabilities. Potential for abuse and neglect of persons with disabilities is identified in the potential for the 'one fails, all fail' rule in a family application to encourage families to hide or abandon members with disabilities.

Part III - Accommodating disability in CALD communities in Australia

Part III deals with issues for general migrants *after entry* in their access to social security support. We examine the '10 year' rule limiting access to disability benefits and who does and does not have access to the National Disability Insurance Scheme (NDIS). A special study is made here of New Zealand citizens and other long-term temporary migrants. This section concludes with a discussion of the extent to which community support is and is not available during the COVID19 pandemic.

Part IV - 'Crimmigration' law and disability

Australian law, policy and practice has become increasingly uncompromising in recent years in the treatment of non-citizens deemed to be of bad character because of their criminal behaviour or other conduct deemed unbecoming. We question the propriety of expelling non-citizens who have spent most or all of their lives in Australia, most particularly where the non-citizens in question have disabilities and/or come from countries where return would cause disproportionate harm or constitute *refoulement* under international law.

Using three case studies as examples, we argue that the scheme for removal of 'character concern' non-citizens who have applied for protection visas is woefully unfit for purpose. When a visa is cancelled by the Minister under s 501 of the *Migration Act 1958* (Cth) ('Act'), the visa holder is barred from applying for any other visa except a protection visa. However, character considerations also condition protection visa processes, with no concession made for disabilities. In the result 'character concern' non-citizens who are also persons with disabilities are being detained sometimes in excess of 10 years.

The failure to accommodate persons with disabilities includes situations where a person's refugee background and/or treatment by Australia lead to psycho-social illness which can manifest in disruptive behaviours. While some individuals have won release from detention following judicial review of their cases, the case studies suggest that little or no regard is given to findings by UN Human Rights mechanisms that Australia is in breach of its human rights obligations.

Part V – Disability and Wrongful Immigration Enforcement

The arrest, detention and removal of 'unlawful non-citizens' ceased to be subject to judicial oversight in 1994. The wrongful arrest, detention and removal of over 240 Australian citizens and lawful permanent residents (many with disabilities) between 2000-2004 became a matter of great controversy. In response, the Liberal-National government introduced a raft of oversight measures, including the creation of an Immigration Ombudsman; the creation of National Identity Verification and Advice Unit and the Immigration Health Advisory Group (IHAG).

Since the re-election of the Liberal-National government in 2013, a number of these measures have been quietly abandoned. While the Ombudsman maintains a role in reviewing long-term detainees, IHAG no longer exists and the standards for Health care have been downgraded. Our research suggests that the incidence of wrongful arrest and detention is rising again. We identify four cases that have been the subject of internal inquiries between 2017 and 2019.

Part VI – Disability and Immigration Detention

Part 6 of the submission explores the relationship between immigration detention and disability. Australian law mandates the detention (and removal) of all non-citizens in

Australia without a visa. Although mechanisms exist for the grant of visas to allow for release, policy settings mean that thousands of non-citizens who either have had their visa cancelled or who have entered the country without a visa are held in both closed and other forms of community detention. Persons seeking protection in Australia as refugees (asylum seekers) are included in this group.

In late September 2020, the average time that non-citizens were being held in 'closed' immigration detention was 545 days. This is up from an average of 454 days in 2016 when the UN Special Rapporteur expressed concern that a majority of detainees had spent more than 730 days in custody.

This Part begins with a brief overview of the history of immigration detention in Australia, noting that while exceptions can be made for children, there is no statutory or policy constraint on the detention of non-citizens with disabilities.

Part 6.2 examines the incidence of disability in immigration detention. We note the persistent criticisms that Australia's detention laws, policies and practices have attracted from international and domestic human rights bodies. We note also the trend in recent years to ignore international calls to remedy human rights abuses that are occurring.

Our research suggests that the available data on the incidence and nature of disability in immigration detention in Australia is poor. In 2019, the poor data on disabilities generally was a matter of concern to the CRPD Committee in its review of Australia. The Committee noted the lack of:

> national disaggregated data on students with disabilities, including on the use of restrictive practices and cases of bullying, [and the]… absence of national data disaggregated by disability at all the stages of the criminal justice system, including data on the number of persons unfit to plead who are committed to custody in prison and other facilities.

'Other facilities' include closed immigration detention environments.

Part 6.3 examines shortcoming in mechanisms used for the identification of disabilities in immigration detention.

Part 6.4 examines shortcoming in the accommodations made for persons with disabilities in immigration detention. Limited data on the incidence of impairments complicates the process of accommodating disability. Without clear identification of disability or possible disability, there is an increased risk of mistreatment. The AHRC provides three examples of apparent bad practice. The first involved the routine use of handcuffs in moving detainees, even where injuries to wrists through incidents of self-harm. The second concerned the inappropriate isolation of a new mother suffering post-partum depression. The third involved the inappropriate management of a man suffering from schizophrenia and auditory hallucinations who was placed

in mechanical constraints in a police watch house when released after 5 weeks in a mental health facility.

This sub-part notes particular issues for persons with mobility disabilities and for persons with sensory impairments.

Part 6.5 provides a brief overview of the extensive research that has been done showing that prolonged immigration detention causes or exacerbates all manner of disabilities in detainees. This is most particularly the case for persons who enter detention environments with pre-existing injuries, vulnerabilities or disabilities. The injuries caused to children by immigration detention are considered in Part 7.

Part VII – Children, Disability and Immigration Detention

Part VII of the submission considers the situation of children with disabilities in immigration detention. Although there were only two children in closed detention at time of writing (the 'Biloela' children on Christmas Island), we have included this submission because no change has been made to law and policy in Australia to prevent abuses of the past re-occurring. If only for this reason it is important to document the harms done.

More importantly, children continue to suffer as a result of detention and offshore processing policies which prioritise deterrence of putative irregular migrants over the rights of actual (embodied) child migrants.

A significant issue is that data on the incidence and nature of disabilities in children in immigration detention of any kind is poor and sometimes non-existent. This is particularly the case for children being held in community detention.

We outline concerns that Australia's immigration detention policies contribute to causing disabilities in children and fail to provide children with pre-existing disabilities with access to the life and standard of health care to which they are entitled under international law. Australia is obliged to make the 'best interests' of children in immigration detention a 'primary consideration', regardless of children's immigration status. The mandatory detention policy, which often results in the detention of children for prolonged periods, has drawn repeated criticisms from domestic and international human rights oversight mechanisms. The practice of transferring children for processing in foreign countries has been nothing short of cruel and inhumane.

We note that detention centres both in Australia and in Nauru and Papua New Guinea (PNG) suffer from a chronic lack of specialist paediatric health care services. For children with disabilities the situation breaches their 'right to special care' under international law, frustrating their right to achieve their full potential.

Long periods of detention and inadequate health care and support can lead to deterioration of pre-existing conditions. Case studies reveal that children in both on-

shore and offshore detention facilities without pre-existing disabilities have developed 'Resignation Syndrome'. This is a life-threatening psychiatric condition, in which children mentally and physically withdraw from life to the point they can enter an unconscious state and require hospitalisation.

Arbitrary and prolonged periods of detention, including exposure to adults suffering from severe mental illnesses, frequently cause children to develop a range of psycho-social disabilities. While the incidence of pre-existing psychiatric disorders in children arriving in detention facilities is low, research has revealed that after two years all children involved in the study suffered from at least one psychiatric disorder. Many detained as children experience ongoing symptoms of PTSD into their adulthood.

The case studies make it clear that Australia has failed to uphold its duties towards children with disabilities in immigration detention under international law.

Part VIII – Disability and the 'Legacy Caseload' Refugees

The 'Legacy Caseload' are unauthorised maritime arrivals (UMAs) detained between 13 August 2012 and 1 August 2014 making up a cohort of around 30,000 asylum seekers and refugees. In this part we explain who is included in this group and their relationship with the so-called 'offshore processing regime'. We explain the impact of prolonged processing delays followed by a precipitous policy change to 'Fast Track' processing and the corrosive uncertainty and anxiety attending the temporary visas issued to those accepted as refugees.

Although a very substantial cohort of refugees and asylum seekers, the Legacy Cohort seems to be the group about which least is known in terms of incidence and nature of disabilities. There is virtually no data that we can find on this subject. We were unable to find any organization (including the Australian Human Rights Commission) who had uncovered this information.

This part identifies mechanisms that provide an impression of how Australian law, policy and practice is causing disabilities. The most obvious impact has been on the mental health of these refugees and asylum seekers. We show that at least eleven members of the legacy caseload have taken their own lives since 2014. Some researchers have described the situation of these people as one of 'lethal hopelessness'. Another marker of mental illness is reports of self-harm. Here some detailed research has been conducted on incident reports over a one year period. This shows that rates of self-harm in asylum seeker populations is up to 200 times the rates reported in the general community.

We identify one other proxy for the identification of disabilities in this cohort in the Primary Application and Information Service (PAIS) which is an assistance scheme offered to asylum seekers deemed to be 'particularly vulnerable'. By mid-2017 3,224 (of around 30,000) had received PAIS assistance. Unfortunately, we were unable to find any form of disaggregated data on the make-up of the PAIS recipients.

Part IX - Disability, Offshore Processing and the 'Medevac' Refugees

Part 9 of the submission addresses the harms caused by the 'offshore processing' system. As we explain in Part 9.1, this involves the interdiction and transfer of unauthorised maritime asylum seekers to Regional Processing Centres (RPC) in Nauru and Papua New Guinea (PNG)'s Manus Island. The Centres have operated as detention facilities where protection claims are determined and refugees have waited long years in the hope of securing resettlement in yet another country.

An obvious aim in establishing offshore processing was to deny asylum seekers access to the protections of Australian law. The Australian Government asserts that the scheme shifts responsibility for actions taken by authorities in Nauru and on Manus Island to Nauru and PNG. In Part 9.2 we show that the Australian Government carries legal responsibility for asylum seekers and refugees transferred offshore under both international and domestic law. That responsibility is beyond dispute when individuals are returned to Australia for medical treatment or other purposes.

In Part 9.3 we explain that deliberate decisions have been made to include persons with obvious disabilities in a scheme that has been opaque in its operation. Vulnerable asylum seekers were sent into situations where it was plain that appropriate disability supports did not exist and could not be provided. It is a scheme that has resulted in the creation and exacerbation of physical and mental disabilities.

Since 2000, 18 refugees and asylum seekers have died in or en route to offshore immigration detention centres with six deaths due to suicide or possible suicide. Many more have expressed suicidal ideation, engaged in self-harm or attempted suicidal acts. In 2016, the UN High Commissioner for Refugees (UNHCR) described the prevalence and severity of mental disorders within the RPCs in PNG's Manus Island as 'extreme'.

Yet, accurate data on the incidence and nature of disabilities amongst refugees detained at RPCs or transferred back to Australia does not appear to exist. There is no transparency in the mechanisms used to identify disabilities or in the measures taken to accommodate disabilities.

We will argue that Australia's offshore processing policy and practice amounts to torturing people in ways that cause disabilities. Although processing facilities on Nauru and in PNG are being moth-balled, current laws and policies would allow the resumption of the program. The scheme is a clear and cruel breach of Australia's international obligations and has been the subject of repeated criticisms from international human rights mechanism, including the Universal Periodic Review undertaken of Australia in January 2021.1

[1] The Report of the Human Rights Council was not available at time of writing. However, questions submitted in advance included issues relating to offshore processing. See generally https://www.ohchr.org/EN/HRBodies/UPR/Pages/AUindex.aspx.

We urge the Commission to include consideration of offshore processing in its deliberations for two reasons.

First, although the majority of asylum seekers sent offshore have been brought to Australia, approximately 300 individuals remained on Nauru and Manus Island in early February 2021. Moreover, 'transitory persons' in Australia remain liable to return offshore without notice. There is no legislative or policy impediment to Australia resuming its offshore processing activities.

Second, the offshore processing regime is having an on-going effect on persons with disabilities caught up in the scheme - both overseas and in Australia. Many of those brought back to Australia have been placed in hotel detention, with the result that some have been in closed detention for eight years or more. In January 2021 transferees from Nauru and PNG were released from hotel detention, but on visas that envision the return of the holders overseas.

Of the over 2000 persons who are no longer in offshore detention, 33 have died after being transferred from a RPC. Those returned to Australia continue to live in marginal conditions, without work rights or social security support. The Australian Human Rights Commission has found that transferees to Australia (who include persons with disabilities) have been denied access to timely and appropriate medical treatment and to other social security supports. In spite of transferees being brought to Australia because of their need for medical treatment, many have faced long delays even after their arrival in obtaining the attention they need.

As we explore in Part 7, refugee children caught by the system continue to be in situations of heightened risk. As we explore in Part 8, the temporary protection regime means that those irregular maritime arrivals who escaped transfer to a RPC continue to be at risk of developing disabilities and/or having existing disabilities exacerbated. This group is known as the 'Legacy caseload'.

Part X- Australia's Response to Migrants with Disabilities in the COVID-19 Pandemic

This submission addresses a critical area of concern in Australia's immigration and border control system: the regime for the detention of non-citizens subject to control measures. Given that we now understand that up to 15 percent of the world's population live with disabilities, it is unsurprising that persons with disabilities are represented in Australia's immigration detention system. In a separate submission we will examine shortcomings in systems for screening and identifying persons with disabilities in immigration detention contexts. We will also address elsewhere the adverse health consequences of detention and the extent to which Australian law and practices have created disabilities in detainees.

In this submission the immediate focus is on how specific types of immigration detention affect persons with disabilities in the immediate context of **COVID-19**

pandemic lockdown measures. The experiences of people with disabilities are not at all homogenous. In this document, we outline the experiences of detainees in closed Immigration Detention Centres and various Alternative Places of Detention (as defined). Our aim is to address the Commission's Terms of Reference as they relate to 'the extent of violence, abuse, neglect and exploitation experienced by people with disability **in all settings and contexts**.'

For immigration detainees with physical disabilities, detention settings have fallen short because of barriers to accessibility and mobility that have resulted in neglect and loss of dignity. The use of elevated, demountable buildings accessible only by stairs in regional processing centres are examples in point. Across Australia, detention sites are characterised by poor ventilation and cramped corridors. Prolonged, indefinite detention continues to cause and/or exacerbate psycho-social disabilities. As of 31 May 2020, the average period of time for people held in detention facilities was **553 days.** Self-harm and suicides are ongoing.

The stigma of disability has been exploited by a system which has continued to discourage disclosure of disabilities and often directly discriminates against detainees with disabilities. Requests for accommodation of disabilities have been met with lacklustre and unsatisfactory responses. In the result, detainees with disability have been unable to live with dignity, independence and autonomy. An asylum seeker of short stature was deliberately selected for processing in Papua New Guinea where he was not even afforded the dignity of an accessible toilet despite multiple requests. There are accounts of persons with a neuro-developmental disorders denied access to specialist psychiatric services. Children with physical disabilities have fallen by the wayside.

This submission examines specific risks to immigration detainees with disabilities as a result of the COVID-19 pandemic and what is required to guard against **violence, abuse, neglect and exploitation** of these people

RECOMMENDATIONS

Part 1: International obligations

1.1 The Federal government should respect and respond to criticisms of its laws, policies and practices by UN Human Rights mechanisms.

1.2 When responding to criticisms, the Federal government must understand migrant's experiences through the lens of 'intersectionality', meaning it must address the cumulative, overlapping grounds of discrimination facing migrants, taking into account their disability, age, gender and other circumstances.

Part II: Admission and the health rules

2.1 Separate threshold rules should be devised for disability, instead of disability being conflated with disease and risk to public health. As they stand both PIC

4005 and 4007 evince a medical approach to disability which is greatly at odds with the social approach mandated by the CRPD.

2.2 All health rules should allow for waiver in situations of 'undue cost' rather than the blunt 'significant cost'.

2.3 Decision makers at every level should be empowered to weigh the applicant's compelling and compassionate circumstances that favour a health waiver against any costs that might be incurred. Specifically, decision makers should be empowered to weigh the benefits brought by an applicant against any costs that might be incurred.

2.4 Decision makers at every level should be directed to consider and respond in a way that is consistent with Australia's obligations under international human rights law, including the right to life and the right to the highest possible standard of health. This is particularly important in the case of migrant children with disabilities born in Australia.

2.5 Decision makers at the delegate level should receive training on the operation of the Convention on the Rights of Persons with Disabilities.

2.6 'Notes for Guidance for Medical Officers of the Commonwealth of Australia' should be publicly accessible.

Part III: Post migration entitlements

3.1 The ten-year waiting period for the Disability Support Pension should be abolished or at least substantially reduced.

3.2 Temporary visa holders with disabilities, especially children, should have access to minimum essential support services.

3.3 The Federal government should prioritise outreach to people with disabilities from CALD backgrounds to improve availability and accessibility of disability services

3.4 Efforts should be made to improve NDIS plans in catering for the holistic needs of persons with disabilities from CALD backgrounds.

Part IV: Crimmigration Law and Disability

4.1 Policy guidelines in criminal deportation cases *involving persons with disabilities* should be amended to make consideration of the particular harms faced by these people because of their disabilities a **mandatory relevant consideration** at the point of either visa cancellation or revocation of a mandatory cancellation order.

4.2 Policy guidelines in criminal deportation cases should be amended to make the consideration of Australia's obligations under the CRPD – in particular the

rights to life and to freedom from torture, degrading treatment, violence and abuse - mandatory relevant considerations in all cases at the point of either visa cancellation or revocation of a mandatory cancellation order.

4.3 'Character concern' non-citizens with disabilities who cannot be removed from Australia within a reasonable period of time should be exempted from mandatory indefinite detention. This should involve prioritizing the release of such individuals from closed detention environments in accordance with Australia's international legal obligations, especially where United Nations Human Rights mechanisms make findings against Australia.

Part V: Disability and Wrongful Immigration Enforcement

5.1 Arrest and detention of persons with disabilities in immigration contexts should be subject to independent oversight so that the question of what constitutes a 'reasonable suspicion' of unlawful status is not solely the preserve of unaccountable immigration officials.

5.2 The recommendations of the Palmer Report continue to be apposite and sensible. The measures taken previously in response to that report should be reinstated. In particular, a designated detention oversight body such as the former IHAG should be reinstated and given sufficient powers to regulate the provision of health care to persons with disabilities in immigration detention.

5.3 We draw the Commission's attention to Recommendation 39 of the Australian Human Rights Commission in its 2019 Report. We agree that the Department of Home Affairs should ensure that all people in immigration detention have an opportunity for regular, face to face contact with status resolution officers and it should provide adequate resourcing for this.

Part VI: Disability and Immigration Detention

6.1 The Minister for Home Affairs or other responsible Minister should release all persons with disabilities into community-based alternatives to closed immigration detention. In particular, persons with disabilities should not be sent to the detention centre on Christmas Island where the conditions are inherently harsh, with poor health care facilities and poor communication with the mainland. We call on the Commission to recommend amendments to the *Migration Act* 1958 to extend the operation of s 4AA to include persons with disabilities.

6.2 The Department for Home Affairs should collect and publish data on the incidence of disabilities in all forms of immigration detention, disaggregated by age and type of disability. Statistics should include data on the length of time persons with disability are kept in detention

6.3 The Department for Home Affairs should make public the mechanisms it uses to identify disability in non-citizens in all forms of immigration detention.

6.4 The Federal Government should establish an independent disability advisory group to monitor and review the effect of immigration detention on persons with disabilities. The group should include persons with disabilities.

6.5 We agree with the AHRC recommendation 8ff in its 2019 Report that the Department of Home Affairs should commission a comprehensive review of the mental health care provided in immigration detention. The review should include review of the inclusiveness training given to all staff (including private contractors) interacting with detainees with disability.

6.6 We agree with the AHRC recommendation 12 in its 2019 Report that the Department of Home Affairs should revise transfer and placement policy to ensure that people are not selected for involuntary transfer to another immigration detention facility where this would interfere with timely access to health care.

6.7 We agree with the ALRC recommendations 17-20 in its 2019 Report concerning the use of constraints in escort operations (transfers from or between detention environments). Policy and procedures should make it clear that restraints should not be used on persons with a physical disability or other frailty.

Part VII – Children, Disability and Immigration Detention

7.1 The Minister for Home Affairs or other responsible Minister should ensure that all children are released from closed detention with their parents or guardians into community-based alternatives. Policy settings should be changed to ensure that detention practice complies with s 4AA of the *Migration Act*, most particularly in situations where children present with disabilities.

7.2 The Minister for Home Affairs or other responsible Minister should publish regular data on the incidence and nature of disabilities in children held in community detention.

7.3 The Minister for Home Affairs or other responsible Minister should ensure that no children are transferred to offshore processing centres, most particularly in situations where children present with disabilities.

7.4 If the Australian Government does revert to detaining children in immigration detention facilities, it should:

- Ensure adequate medical treatment is available and facilitate prompt transfer to specialist facilities where this is in the best interest of the child.
- Provide all resources necessary to ensure children with disability in immigration detention have equal access to medical treatment and advocacy.

7.5 The Australian Government should initiate prevention education programs for responsible adults on mental health causes, symptoms and how to seek help children develop coping strategies and improve distress tolerance.

Part VIII- Disability and the 'Legacy Caseload' Refugees

8.1 The Commission should issue a notice to the Department of Home Affairs to see what information they have on the incidence and nature of disabilities amongst the Legacy Caseload refugees and asylum seekers.

8.2 The Department of Home Affairs should collect and publish data on the incidence and nature of disabilities in all populations of asylum seekers and persons from refugee backgrounds in its care or under its control including Legacy Caseload refugees and asylum seekers.

8.3 The Department of Home Affairs improve the collection and publication of data on the incidence of self-harm in all populations of asylum seekers and persons from refugee backgrounds in its care or under its control including Legacy Caseload refugees and asylum seekers so as to comply with WHO reporting guidelines.

8.4 The Commission should urge the government to provide more certainty for refugees and asylum seeker in the Legacy Caseload by increasing the avenues available to permanent residence in Australia as a mechanism for improving mental health and reducing the incidence of debilitating mental illness.

Part IX Disability, Offshore Processing and the 'Medevac' Refugees

9.1 Offshore processing is inherently abusive of the human rights of participants. It should be abandoned by the Federal government because it has caused so much death, disability, abuse and neglect.

9.2 Persons with disabilities should never be included in offshore processing schemes because there is no way that the needs of people with disabilities can be met. There is no way that such schemes can comply with Australia's international human rights obligations.

9.3 The Department of Home Affairs should publish data on the incidence of disabilities in offshore processing, including disabilities in the cohort of 'transferees' from RPCs. The Department of Home Affairs should make public the mechanisms used to identify disabilities in RPC populations and the measures taken to accommodate the disabilities identified.

9.4 For transferees brought to Australia for medical treatment, the Department of Home Affairs should ensure immediate access to medical treatment and care through the public health system or, if required, through the private health system. Funding should be provided to ensure that this occurs, as required by

Art 12 of the International Covenant on Economic, Cultural and Social Rights and Arts 25 and 26 of the CRPD.

9.5 The Department of Home Affairs should allocate additional resources to increase mental health services and support for persons with disabilities who are transferred to Australia from RPCs. As a gesture of compassion, the government should allow persons with disabilities who are transferred to Australia from RPCs to access permanent visas that resolve their immigration status.

Part X Australia's Response to Migrants with Disabilities in the COVID 19 Pandemic

10.1 The Australian Government should fall in line with other comparable countries, accept the advice of medical experts and the recommendation of the Ombudsman and reduce the current population of immigration detention facilities insofar as necessary to ensure effective and dignified compliance with public health requirements;

10.2 The Minister for Home Affairs should prioritise release of low-risk detainees with disabilities from immigration detention into community settings;

10.3 Urge that better measures be taken to ensure social distancing inside detention facilities, including staggered mealtimes, providing sufficient and effective hand sanitiser, ensuring staff wear personal protective equipment and avoiding contact with detainees wherever possible; and

10.4 The Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 be amended to exclude mobile phones from the ambit of any search and seizure powers.

PART I: INTERNATIONAL LEGAL FRAMEWORKS

A INTRODUCTION

1.1 Overview of Australia's Human Rights Obligations

Australia is party to most of the key international human rights treaties relevant to the rights of persons with disabilities, including:

- *Convention on the Rights of Persons with Disabilities;*[2]
- *International Covenant on Civil and Political Rights;*[3]
- *International Covenant on Economic, Social and Cultural Rights;*[4]
- *Convention on the Status of Refugees;*[5]
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*[6]
- *Convention on the Rights of the Child*;[7] and
- *Convention on the Elimination of All Forms of Discrimination against Women*.[8]

These instruments oblige Australia to treat both citizens and non-citizens who have disabilities in a manner that recognises their basic human right to be treated with dignity and respect.[9] Some instruments recognise specific obligations to recognise the human rights of persons with disabilities (notably the *Convention on the Rights of Persons with Disabilities*, 'CRPD'). Other instruments are more general in their application (for example, the *International Covenant on Civil and Political Rights*, 'ICCPR'). State-compliance with these obligations is monitored by United Nations committees that monitor observance of the obligations conferred by specific treaties.[10]

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2 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

3 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

4 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976) ('ICESCR').

5 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as modified by 1967 Protocol) ('Refugee Convention').

6 *Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('Committee Against Torture').

7 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

8 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').

9 Various treaty bodies have determined that human rights obligations are owed regardless of whether an individual is a citizen of a state. See for example, Human Rights Committee, 'General Comment No 31', UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10; and Committee against Torture, 'General Comment No 2', UN doc CAT/C/GC/2, 24 Jan 2008, para 7. See Mary Crock, Christine Ernst and Ron McCallum, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2013) 24 *IJRL* 735, 738-42.

10 For example, the Committee on the Rights of Persons with Disabilities monitors compliance with the CRPD.

Australia has attracted criticism from all of the major UN human rights monitoring bodies for aspects of its law, policy and practice relating to migrants (including long term permanent residents), asylum seekers and refugees. Specific criticisms have been made about the impact of Australian law and practice on migrants and refugees with disabilities. Australia's lack of compliance with its human rights obligations has often manifested in instances of abuse, exploitation and neglect of migrants and refugees with disabilities. In this part we examine the nature of the obligations assumed by Australia as relevant to the varied contexts of the migration experience.

1.2. Summary of key criticisms of Australia by United Nations Treaty Bodies[11]

Criticisms made by various United Nations treaty bodies of Australia's treatment of migrants showcase many instances where migrants with disabilities have been and are being abused, neglected or exploited. While aspects of Australia's legislative framework are identified as areas of concern, most of the commentary relates to

(iii) the operation of discriminatory legislation and
(iv) the operation of offshore and mandatory immigration detention.

In relation to Australia's **discriminatory laws**, at least four UN treaty bodies have commented recently on the lack of equal treatment and robust anti-discrimination legislation.[12] In relation to legislation that openly discriminates against migrants with disabilities, Treaty bodies have expressed concern about:

- Targeted exceptions being made to general prohibitions on non-discrimination against persons with disabilities;[13]
- The ability of government officials to use disability as a basis for adverse migration assessments;[14] and
- The exclusion of migrants on temporary visas from accessing forms of social supports.[15]

Australia's legislative framework relevant to migration and disability create and facilitate institutional processes that neglect migrants with disabilities. At least six UN treaty bodies have expressed concern about Australia's policy of mandatory,

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11 The bodies we consider here include: the Human Rights Council and its reports on the *International Convention on Civil and Political Rights* (2009 and 2017) and the *International Convention on Economic, Social and Cultural Rights* (2009 and 2017); the Committee on the Convention on the Rights of Children (2012 and 2019); the Committee on the Rights of Persons with Disabilities (2019); the Committee on the Convention Against Torture (2008 and 2014); the Committee on the Convention on the Elimination of Discrimination Against Women (2010 and 2018).

12 These comments are made either at a high level of generality, or specifically in relation to persons from migratory backgrounds. See ICCPR 2009 [12]; ICCPR 2017 [17-18], [31b]; CRC 2019 [19a]; CRPD 2019 [9], [35]; ICESCR 2009 [16].

13 CRPD Committee [9], [35].

14 CRPD Committee [35]; ICESCR 2009 [16]; UPR 2010 [47].

15 CRPD Committee [35]; ICESCR 2017 [31b].

indefinite detention and offshore detention and the effect on the health of migrants.16 The following aspects of these policies have been highlighted:

- Limited access to basic health care (especially in relation to mental health services);[17]
- Instances of assault, sexual abuse and rape by immigration facility employees;[18] and
- Acts of intimidation and the use of force and physical constraints by immigration facility employees against migrants.[19]

These features of Australia's migratory legislation framework are concerning as they demonstrate the presence of abuse, neglect and exploitation directed towards migrants with disabilities. Such a point is highlighted when consideration is given to cases involving migrants with disabilities who have been subject to offshore and mandatory immigration detention (expressing also the attendant physical and mental effects identified above).20 While the UN bodies have not restricted their criticisms of Australia's treatment of migrants with disabilities to these topics, they are nevertheless focal points of criticism.

1.3. Overview of the Convention on the Rights of Persons with Disabilities

Of those international legal instruments relevant to migrants with disabilities, the CRPD is particularly important. Australia has signed and ratified the CPRD as well as its Optional Protocol which facilitates complaints by private individuals alleging breaches of the Convention.21 The purpose of the CRPD is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.[22] Several of the rights and obligations under the CRPD particularise to persons with disabilities general human rights standards, such as the rights to non-discrimination and equal treatment.[23] The CRPD's most radical innovation, however, is that it

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16 ICCPR 2009 [23]; ICCPR 2017 [35-38]; CRC 2019 [44-45]; CRPD 2019 [13-14]; ICESCR 2009 [25], [30]; CAT 2009 [25]; CAT 2014 [16-17]; UPR 2010 [37], [48]; UPR 2015 [63], [67]; CEDAW 2018 [53-54].

17 ICCPR 2017 [35-38]; ICESCR 2009 [16], [25], [30]; ICESCR 2017 [17-18]; CAT 2008 [25]; CAT 2014 [17].

18 ICCPR 2017 [35-38]; CRC 2019 [4]; ICESCR 2017 [17-18]; CAT 2014 [17]; CEDAW 2018 [53-54].

19 ICESCR 2017 [17-18], [35-38].

20 See discussions in Parts IV, V and VI of this submission.

21 CRPD; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plen mtg, Agenda Item 67(b), Supp No 49, UN Doc A/RES/61/106 (24 January 2007, adopted 13 December 2006) annex II; Department of Social Services (Cth), 'International Participation in Disability Issues', UN Convention on the Rights of Persons with Disabilities (Web Page, 9 October 2017) <https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/government-international/international-participation-in-disability-issues>.

22 CRPD, Art 1.

23 See, for example, ICCPR, Arts 14, 26.

demands state parties acknowledge disability as a societal construct and not just a question of impairment. Thus, Art 1 provides that 'disability' includes 'long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (emphasis added).'[24]

Australian domestic law most relevant to the CRPD,25 the Disability Discrimination Act 1992 (Cth) does not obviously make the leap from a 'medical' model of disability to the social model.[26] It defines disability as:

(a) total or partial loss of the person's bodily or mental functions; or
(b) total or partial loss of a part of the body; or
(c) the presence in the body of organisms causing disease or illness; or
(d) the presence in the body of organisms capable of causing disease or illness; or
(e) the malfunction, malformation or disfigurement of a part of the person's body; or
(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour. Furthermore, a reference to disability includes that which:
(h) presently exists; or
(i) previously existed but no longer exists; or
(j) may exist in the future (including because of a genetic predisposition to that disability); or
(k) is imputed to a person.[27]

In what follows it will be seen that the treatment of disability within a migration context is very much mired in a **medical approach** to disability and as such has been

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24 The Attorney-General's Department has also recognised that the CRPD lacks an express definition of disability, leading to the adoption of a broad definition in relevant anti-discrimination and disability legislation. See, Attorney-General's Department, 'Rights of people with disability: public sector guidance sheet' (Web Page) <https://www.ag.gov.au/rights-and-protections/publications/rights-people-disability-guidance-sheet>; CRPD, Art 2; *Disability Discrimination Act 1992* (Cth) s 4; *Disability Services Act 1986* (Cth) s 18(b)(i).

25 Ibid.

26 See Oddný Mjöll and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009); Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1; and Arlene S Kanter, 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse Journal of International Law & Commerce* 287.

27 See, *Disability Discrimination Act*, s 4.

criticised as inconsistent with the CRPD.[28] It will be seen that migrants with disabilities are uniquely vulnerable to being abused, exploited and neglected, facing the risk of 'double discrimination' due to their concurrent status as a non-national and a person with a disability.[29] We will argue that Australia's laws relating to the admission of migrants, the entitlements afforded to migrants after entry and immigration detention infringe specific provisions of the CRPD, and other human rights instruments more generally.

B ADMISSION OF MIGRANTS

1.4 Obligations Relating to Discrimination and Article 18 of the CRPD

A fundamental concern relating to Australia's compliance with the CRPD and its protection of migrants with disabilities relates to an interpretive declaration it made in relation to Article 18 requiring the recognition of the liberty of movement (i.e. for persons with disabilities to not be deprived of their liberty of movement due to their disability).30 The interpretive declaration states:

> Australia recognises the rights of persons with disability to liberty of movement, to freedom to choose their residence and to nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.[31]

The declaration has been criticised the CRPD Committee for facilitating inequitable migration and asylum legislation which can discriminate against persons with disabilities in migration and asylum processes.[32] The declaration caveats Australia's

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28 For example, the Committee on the Rights of Persons with Disabilities ('CRPD Committee') identified many policies and actions of the Australian Government that were contrary to the CRPD. See generally, CRPD Committe, *Concluding Observations: UN Report on Australia's Review of the Convention on the Rights of Persons with Disability*, UN Doc CRPD/C/AUS/2-3 (Report, 24 September 2019) para 5(e).

29 See Ben Saul, 'Migrating to Australia with disabilities: non-discrimination and the Convention of Persons with Disabilities' (2010) 16(1) *Australian Journal of Human Rights* 63, 64, 67.

30 This is also relevant to the non-discrimination Articles of the CRPD, such as Article 5. CRPD, Art's 5, 18.

31 For the text of all reservations and interpretative declarations made in relation to the *CRPD* see, United Nations, 'United Nations Treaty Collection: Chapter IV Human Rights', *15. Convention on the Rights of Persons with Disabilities* (Website, 16 April 2014) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en>.

32 CRPD Committee, *Concluding observations on the combined second and third periodic reports of Australia*, UN CRPD 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para's 9–10; *Migration Act 1958* (Cth); *Migration Regulations 1994* (Cth).

understanding of its responsibilities under the CRPD.[33] The CRPD Committee has **twice requested** Australia to remove its declaration, stating that it was 'concerned' about how it would effect compliance with Article 18.[34] The committee voiced concern on the operation of Australia's migration health rules as they affect migrants with disabilities, as well as other laws, policies and practices that both create disabilities in migrants and result in abuse and exploitation of migrants with disabilities.[35]

1.5. The 'Health rules' as prohibited discrimination

Article 18 of the CRPD requires Australia to ensure that persons with disabilities are not deprived of their ability to 'utilise relevant processes such as immigration proceedings … to facilitate [the] exercise of the right to liberty of movement'.[36] This provision has to be read in conjunction with the obligation enshrined in Article 5 of the CRPD that Australia does not use disability as a ground for discriminating against persons with disabilities. The non-discrimination principle is reflected in all of the core human rights treaties, a matter reflected in the criticisms levelled at Australia.[37] A notable aspect of the CRC is that this Convention establishes normative rules that all apply to children, *regardless of citizenship or immigration status.* Article 2(1) requires states parties to 'respect and ensure the rights set forth in the present Convention to *each child* within their jurisdiction' and prohibits discrimination 'irrespective of the child's or his or her parent's or legal guardian's…birth or other status'.[38] The

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33 Alexandra Stratigos et al., *Review and Recommendations for Reform of Australian Laws and Policies Relating to Entry, Stay and Residence for People Living with HIV* (Report, July 2014) 2, 7.

34 Also related to Articles 12 and 17 of the CRPD. Similar requests have been made by the Committee on the Rights of the Child ('CRC Committee') in relation to Australia's reservation pertaining to Art 37(c) of the CRC. See, CRPD Committee, *Concluding observations on the combined second and third periodic reports of Australia*, UN CRPD 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para's 5, 6, 63; CRPD Committee, *Concluding observations on the initial report of Australia*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) para 15; CRC Committee, *Concluding Observations: Australia*, CRC, 60th session, 28 August 2012, UN Doc CRC/C/AUS/CO/4, paras 8–9.

35 See CRPD Committee, *Concluding observations on the combined second and third periodic reports of Australia*, UN CRPD 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 35.

36 CRPD, Art 18(1)(b).

37 For example, the CRC, Art 2(1); ICCPR, Art 24; CRC Committee, *Concluding observations on the combined fifth and sixth periodic reports of Australia,* UN CRPD 82nd sess UN Doc CRC/C/AUS/CO/5-6 (1 November 2019), para 19; Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN CRPD 121st sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) para 48. See the discussion in Mary Crock and Hannah Martin, 'International Law and the protection of migrant children' in Mary Crock and Lenni Benson *Protecting Migrant Children: In search of Best Practice,* (London: Elgar Publishing, 2018), 82 ff.

38 Emphasis added. See UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (United Nations Children's Fund, 3rd ed, 2007) 23; Office of the High Commissioner for Human Rights (OHCHR), *Study of the OHCHR on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration,* Human Rights Council, 15th sess, UN Doc A/HRC/15/29 (5 July 2010) 3 [3]; and UNCRC, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 39th sess, UN Doc CRC/GC/2005/6 (1 September 2005) [18] ('GC6').

Committee on the Rights of the Child has criticised Australia's immigration admission policies as violating non-discrimination principles because they 'still allow disability to be the basis for rejecting an immigration request.'[39]

We describe the operation of Australia's health rules in Part II. Put simply, the *Migration Regulations* 1994 (Cth) enable the exclusion of a non-citizen on the basis of a 'disease of condition' that would impose costs or burdens on the Australian health system.[40] The rules are justified by the Australian government as necessary to protect public health, and contain public health expenditure.[41] They are discriminatory because exclusion occurs whenever a disability is identified, with no consideration given to any covalent benefit that a person with disabilities might bring to Australia.

The discriminatory effect of the health test is rendered immune from review or objection under the *Disability Discrimination Act* 1992 (Cth) as section 52 does not 'affect the discriminatory provisions in' the *Migration Act* or instruments made under that Act (i.e. the *Migration Regulations*).[42] These provisions have been identified as being contrary to Article 18 of the *CRPD* as it limits the 'liberty of movement' of those migrants and asylum seekers with disabilities through the exclusion of them on the basis of particular forms of disability. [43]

In Part II we will argue that the operation of the health rules can mandate the exclusion of persons with disabilities and prevent migrants with disabilities in Australia from remaining in the country. This can have the effect of undermining the rights to life, health and family unity, most particularly where the person in Australia has sought protection as a refugee and/or where return is effected to a country without needed life sustaining equipment. The policy can also operate to deny a person with disabilities access to care and accommodation measures: it can encourage families not to reveal that a family member has a disability.

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39 See CRC, Art 2. CRC Committee, *Concluding observations on the combined fifth and sixth periodic reports of Australia,* UN CRPD 82nd sess UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) para 44(g).

40 The relevant provisions depend on the subclass of the particular visa, but Sch 4, items 4005 and 4007 are relevant to this discussion. See *Migration Regulations* Sch 4. See Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press 2011), Ch 6.

41 Joint Standing Committee on Migration, Parliament of Australia, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (Report, 21 June 2010) 44–45.

42 Ben Saul, 'Migrating to Australia with disabilities: non-discrimination and the Convention of Persons with Disabilities' (2010) 16(1) *Australian Journal of Human Rights* 63, 67.

43 Though it should be noted that Australia has made developments in relation to the 'health test' in its application to refugees, as the relevant provisions can be waived for a person seeking refugee settlement. This reform did not extend to migrants more generally, however, meaning it is a persisting discriminatory feature of Australia's migration framework. For more discussion on this point, see Refugee Council of Australia, *Barriers and Exclusions: The support needs of newly arrived refugees with a* disability (Report, February 2019) 8; CRPD Committee, *Concluding observations on the combined second and third periodic reports of Australia*, UN CRPD 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para's 35–36. See further Part II below.

C ENTITLEMENTS AFTER ENTRY

Many of the entitlements most relevant to migrants with disabilities following entry into Australia relate to social security and disability support. This section will begin by considering the human rights to life and health as expressed by instruments such as the ICESCR – and the more particular rights afforded to migrants with disabilities.[44]

1.6. Rights to Health, Social Security, Disability Support and Articles 9 and 12 of the ICESCR

The right to health is enshrined in Article 12(1) of the ICESCR as 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'.[45] The right is without qualification insofar as it applies regardless of a person's immigration status or nationality. However, it is not absolute in its proscriptions where state parties are constrained by resource limitations or challenging security conditions.[46] Other human rights instruments acknowledge the right to health as a critical entitlement.[47] Article 9 of the ICESCR establishes the right to social security (to be distributed without discrimination) in order to address (a) a lack of income caused by disability and (b) unaffordable access to health care.[48] The ICESCR Committee has emphasised the obligation to provide social security for people with disabilities, and that this should 'reflect the special needs for assistance and other expenses often associated with disability'.[49] Relevantly, these comments apply to migrants with disabilities who are often excluded from social security and disability support, concurrently impeding their right to health. Consequently, the ICESCR Committee has criticised Australia's policies of limiting access to social security for certain classes of migrants (such asylum seekers on bridging visas).[50] The lack of access and protection to this support demonstrates Australia's neglect of migrants are – or may be – disabled.

It should be noted in this context that the Article 11 of the CRPD goes further than any other human rights convention in stipulating that States Parties:

> Take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with

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44 ICESCR, Arts 9, 12; CRPD, Arts 5, 23(1)(c), 25.

45 ICESCR, Art 12(1).

46 Ben Saul, David Kenley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, 2014), 1068–1069.

47 For example, CEDAW, Arts 10(h), 11(f), 12, 14(2)(b) and 16(1)(e); CRC, Arts 24 and 25; and CRPD Arts 23(1)(c) and 25.

48 ICESCR, Art 9.

49 Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security,* 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [20].

50 Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth period report of Australia,* UN Doc E/C.12/AUS/CO/5 (11 July 2017) [31(b)].

disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

This was the first time that a convention stipulated that human rights should apply to all persons in all situations, including disasters and other emergencies.[51] These provisions are of particular relevance to Australia's treatment of asylum seekers where distinctions are made according to the manner in which a person travelled to Australia and the date of their arrival.

51 See generally Crock, M.; Smith-Khan, L.; McCallum, R.; Saul, B. *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible* (Edward Elgar: Cheltenham, UK; Northampton, MA, USA, 2017), Ch 2 and Naomi Hart et al, 'Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts' (2014) 40 *Monash University Law Review* 148.

1.7. The 'Ten-Year Rule', Article 9 of the ICESCR and Article 18 of the CRPD

Australia is obligated under Article 9 of the ICESCR to distribute social security in a manner which is non-discriminatory. Australia has been criticised by both the ICESCR and CRPD Committee for restricting social security payments to migrants with disabilities.[52] The *Social Security Act 1991* (Cth) regulates social security payments in a manner which restricts the ability of non-citizens to access payments.[53] This restriction means that temporary visa holders are unlikely to be able to access social security payments, with the Age and Disability Support Pension being of particular note. There is a 10-year qualifying residence requirement for this pension, and it has been stated by the Department of Social Services that this qualification is designed to 'ensure that only people who have established a long-term connection with Australia are able to access these payments'.[54] This qualifying period for migrants have been criticised by the Committee on the basis of violating Article 18 through the neglect it directs towards migrants with disabilities, and has recommended that it be removed from social security legislation.[55] We examine the impact of these provisions in Part III of the Submission.

1.8. The National Disability Insurance Scheme and Articles 16 and 19 of the CRPD

Under Article 16(2) of the CRPD, State parties are required to take all appropriate measures in 'support for persons with disabilities and their families and caregivers, and under Article 16(4), State parties are to take similar measures to 'promote the physical, cognitive and psychological recovery'.[56] Furthermore, Article 19 requires that State parties take appropriate measures to facilitate persons with disabilities 'living independently and being included in the community'.[57] Australia has been criticised by the CRPD committee, on the basis of these Articles, through the operation of the National Disability Insurance Scheme ('NDIS'). NDIS is a statutory program that supports those who have a disability. The Committee listed the National Disability Insurance Scheme Act 2013 (Cth) as one of the 'positive aspects' of Australia's compliance with the CPRD, and has been described as a major

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52 Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) para 20; CRPD Committee, *Concluding observations on the combined second and third periodic reports of Australia*, UN CRPD 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) para 35(c), 36(b).

53 Department of Social Services, Parliament of Australia, *Pathways to Participation for Migrants: Commission Inquiry Migrant Intake into Australia* (Report, June 2015) 19; *Social Security Act 1991* (Cth).

54 Ibid.

55 CRPD Committee, *Concluding observations on the combined second and third periodic reports of Australia*, UN CRPD 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) para 35(c), 36(b)

56 CRPD, Arts 16(2), 16(4).

57 *Convention on the Rights of Persons with Disabilities*, Art 19.

development in Australia's treatment of those with disabilities.[58] However, the Committee identified several features of the NDIS that are incompatible with the CRPD.[59] The comments most relevant to migrants with disabilities are that the scheme does not provide 'persons with disabilities from culturally and linguistically diverse' backgrounds (i.e. migrants) with an equal opportunity to access the scheme.[60] This is a commonly criticised feature of NDIS: it is unavailable to asylum seekers, some classes of refugees and others on 'permanent temporary' visas such as New Zealand Nationals. While refugees with permanent humanitarian visas are now covered by the NDIS, those seeking asylum (i.e. persons with bridging visas) and those holding Temporary Protection Visas and Safe Haven Enterprise Visas are unable to access the NDIS.[61] It is said that not enough is done to reach out to persons from culturally and linguistically diverse backgrounds even where they are nominally eligible to access the scheme. The CRPD Committee has recommended that the NDIS is reformed to be more accessible to persons from culturally and linguistically diverse backgrounds.[62] These matters are explored in Part III and Part IV of this submission.

D IMMIGRATION DETENTION AND ASYLUM SEEKERS

1.9. Immigration Detention, Article 31 of the Refugee Convention and Article 9 of the ICCPR and Article 14 of the CRPD

A number of human rights instruments come into play when migrants – including asylum seekers and refugees – are placed in immigration detention. Australia is party to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.[63] First, under Article 31 of this Convention, Australia is obliged not to impose penalties on

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58 The Australian Federation of Disability Organisations has continued support for the implementation of NDIS and the Federation of Ethnic Communities has described the insurance scheme as 'one of the most important social reforms in relation to welfare of people with a disability in recent history. See, Federation of Ethnic Communities, *Access and Equity in the Context of the National Disability Insurance Scheme* (Report, June 2015) 1; Australian Federation of Disability Organisations, 'Media releases', *Watershed moment for people with disability as Federal/State NDIS Agreements get signed in Victoria and New South Wales* (webpage, 8 May 2018) < https://www.afdo.org.au/turnbull-government-delivers-on-the-ndis/>; Australian Federation of Disability Organisations, 'Media Releases', *Watershed moment for people with disability as Federal/State NDIS Agreements get signed in Victoria and New South Wales* (webpage, 16 September 2015) <https://www.afdo.org.au/?s=NDIS+watershed>; *National Disability Insurance Scheme Act 2013* (Cth).

59 These criticisms extended from NDIS relying too heavily on the 'medical model' of disability, being prohibitively complex, demonstrating a low percentage of access from women with disabilities, and not providing the elderly, those from Indigenous backgrounds and those from culturally or linguistically diverse backgrounds with equal opportunities (relating to Articles 1–4, 6 and 16). See, Committee on the Rights of Persons with Disabilities (n 7) 3–4, 9, 11.

60 Ibid 3.

61 Refugee Council of Australia, *Barriers and Exclusions: The support needs of newly arrived refugees with a* disability (Report, February 2019) 20–21.

62 Committee on the Rights of Persons with Disabilities (n 7) 3.

63 Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). (Refugee Convention)

refugees who enter its territory without authorisation.[64] Second, as a party to the ICCPR, Australia is obliged not to arrest or detain persons 'arbitrarily'; to give persons timely access to judicial proceedings; and to compensate persons who have been wrongfully imprisoned.[65] Third, Article 14 of the CRPD requires that persons with disabilities enjoy the right to liberty equally to others, and that they are not arbitrarily deprived of their liberty.

Australia's laws mandating detention have attracted sustained criticisms from a range of UN bodies, in the context of individual complaints brought to the Human Rights treaty bodies, reviews by those bodies and its Universal Periodic Review by the Human Rights Council.[66]

1.10 Immigration Detention and the Convention Against Torture

Australia is signatory to, and has ratified, the Convention Against Torture and its Optional Protocol.[67] Under Article 16 of the *CAT*, Australia is obliged to prevent 'acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture' as defined by Article 1 of the Convention.[68] Australia's policies relating to the indefinite detention of refugees, asylum seekers (regardless of age or other attributes) and criminal permanent residents have drawn multiple criticisms from the UN Committee Against Torture and Special Rapporteurs for violating Article 16. These polices have been described by the Human Rights Council as amounting to 'cruel, inhuman and degrading treatment' in direct violation of the *CAT*.[69] The CAT

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64 Convention on the Status of Refugees, Art 31. See generally Guy Goodwin-Gill 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection' in Feller et al (eds), Refugee Protection in International Law (CUP Cambridge 2003) 220-34.

65 ICCPR, Art 9(1)-(5).

66 In conjunction with those UN body reports already cited, consider *F.K.A.G. et al. v Australia*, UN HRC 108th session, UN Doc CCPR/C/108/D/2094/2011 (26 July 2013); *M.M.M. et al. v Australia*, UN HRC 108th session, UN Doc CCPR/C/108/D/2136/2012 (25 July 2013); Human Rights Council Working Group on Arbitrary Detention, *Opinion No. 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia)*, UN Doc A/HRC/WGAD/2019/2 (6 June 2019); Human Rights Council, *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1*, UN HRC 10th session, UN Doc A/HRC/WG.6/10/AUS/2 (15 November 2010) paras 37, 48, 58; Human Rights Council, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21*, UN HRC 23rd sess, UN Doc A/HRC/WG.6/23/AUS/2 (31 August 2015) paras 8, 65 – 67.

67 CAT. *See also* Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 18 March 2002, (entered into force 22 June 2006).

68 The relevant treatment is defined as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person' under a public authority.

69 *Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru,* UN Doc A/HRC/35/25/Add.3 (24 April 2017) [57].

Committee's recommendations are that the mandatory detention policies should be repealed, and that 'detention should only be applied as a last resort'.[70]

1.11. Immigration Detention and Article 25 of the CRPD and Article 12 of the ICESCR

Recalling the obligations conferred by Article 12 of the ICESCR, Australia has an obligation to recognise the right of persons to enjoy the 'highest attainable standard of physical and mental health'.[71] A similar obligation is derived from Article 25 of the *CRP,* which requires States to provide for the highest attainable standard of health – with the added stipulation that States should ensure non-discrimination on the basis of disability.[72] Criticisms have been made of Australia by both the Human Rights Committee and CRPD committee in relation to these Articles due to a lack of access to adequate health care for migrants with disabilities. Indeed, in relation to immigration detention facilities, persons with physical and mental disabilities have been denied appropriate assistance – with some fatalities as a result of this neglect being recorded.[73] The CRPD Committee has recommended that Australia develop their health care services to be more sensitive to a 'human rights model of disability' and 'establish a minimum standard of healthcare and adequate support for persons with disabilities held in immigration detention'.[74] These matters are explored further in Part V of this submission.

1.12. Immigration Detention and Article 37 of the CRC

Article 37(b) of the *CRC* prohibits arbitrary detention of children, and provides that the detention of children should only 'be used only as a measure of last resort and for the shortest appropriate period of time'.[75] It prohibits subjecting children to 'torture or other cruel, inhuman or degrading treatment or punishment',[76] and states that children who are deprived of liberty – as they are when in immigration detention – are to be treated 'treated with humanity and respect for the inherent dignity of the human person', taking into account their age-specific needs.[77] Australia has been criticised in its Universal Periodic Review for the detention of migrant children

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70 Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*,* UN Doc CAT/C/AUS/CO/4-5 (23 December 2014) 6 [16].

71 ICESCR, Art 12.

72 CRPD, Art 25.

73 Dainius Puras, Saeed Mokbil, Felipe González Morales and Nils Melzer, Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, AL AUS 4/2019 (2 April 2019), 1.

74 CRPD 2019 Report, p.11 [36c]; CRPD Report, p.13 [49].

75 CRC art 37(b).

76 CRC art 37(a).

77 CRC art 37(c).

(including migrant children with disabilities), for violating these obligations due to children.[78] In a global study, the UN General Assembly explained that immigration detention has harmful impacts on children as it 'aggravates existing health conditions and causes new ones to arise, including anxiety, depression, suicide ideation and post-traumatic stress disorder'.[79] Furthermore, the CRPD committee has identified that Australia's policies of immigration detention processing are contrary to Article 7 on 'children with disabilities', and recommended the urgent removal of all refugee and asylum seeking children, particularly children with disabilities and their families from detention facilities.[80] These matters are explored further in Part V of the submission

E OFFSHORE PROCESSING OF ASYLUM CLAIMS

Australia has been criticised by various UN committees for its policy of 'offshore processing' of certain asylum seekers who sought to enter Australia by boat without authorisation. Section 198AD of the Migration Act states that unauthorised maritime arrivals are to be taken to a 'regional processing country'.81 Actual transfers have occurred as a matter of policy that seems to have been quite arbitrary in its operation. This policy has required refugees and asylum seekers who have arrived in Australia by boat without a valid visa between specified dates to be transferred to Nauru or Papua New Guinea.82 The policy has resulted in well documented deaths and extensive instances of physical and psycho-social harms to detainees. Consequently, the Human Rights Council has called for the 'end of offshore transfer arrangements and [to] cease any further transfers of refugees or asylum seekers to Nauru, Papua New Guinea or any other country'.83 These recommendations were echoed by the CRPD committee which stated in 2019 that (i) laws that enabled the deprivation of liberty through detention should be repealed and (ii) end the commitment of persons with disabilities to indefinite detention.84 These matters are explored further in Part VI of this submission.

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78 *Human Rights Council Working group on the Universal Periodic Review, Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21,* UN Doc A/HRC/WG.6/23/AUS/2 (31 August 2015) 13 [67].

79 *Report of the Independent Expert leading the United Nations global study on children deprived of liberty,* UN Doc A/74/136 (11 July 2019) 12.

80 CRPD Committee, *Concluding observations on the combined second and third periodic reports of Australia*, UN CRPD 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 14(e)

81 *Migration Act* 1958 (Cth), s 198AD.

82 Andrew & Renata Kaldor Centre for International Refugee Law, *Who is Legally Responsible for Offshore Processing on Manus and Nauru?* (website, 1 October 2018) <https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-australia%E2%80%99s-responsibility-asylum-seekers-and-refugees-nauru-and>. See also Madeline Gleeson *Offshore: Behind the Wire on Manus and Nauru* (Sydney: New South Publishing, 2016).

83 Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN HRC 121st sess, CCPR/C/AUS/CO/6 (1 December 2017) 36.

84 CRPD Committee, *Concluding observations on the combined second and third periodic reports of Australia*, UN CRPD 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) para 28.

Recommendations:

1.1 The Federal government should respect and respond to criticisms of its laws, policies and practices by UN Human Rights mechanisms.

1.2 When responding to criticisms, the Federal government must understand migrant's experiences through the lens of 'intersectionality', meaning it must address the cumulative, overlapping grounds of discrimination facing migrants, taking into account their disability, age, gender and other circumstances.

PART II: MIGRANTS, DISABILITY AND THE HEALTH RULES

We ask the Royal Commission to include in its deliberations the operation of Australia's migration health rules. We will show that in the past these rules have led to instances of abuse of human rights, including death. While some improvements have been made in response to persistent campaigns, we will show that the improvements have not eliminated the risks that current laws can result in the abuse and neglect of persons with disabilities who come within the ambit of Australia's responsibilities.

This Part begins with a brief explanation of how the health rules in migration law operate and why they raise concerns relative to Australia's international human rights obligations. There follows a more detailed exploration of the consequence of the relevant rules treating disability as being synonymous with disease. This Part concludes by outlining examples of how the rules have operated to cause abuse and neglect of migrants with disabilities.

A THE HEALTH CRITERIA

2.1. Overview

Australia is far from unique in reserving to itself the right to exclude or expel non-citizens who pose a threat to public health. However, it has taken an unusually stringent and uncompromising approach to ensuring the purity of its constituent members.[85] Importantly, concerns about risks to public health have always been paired with policies designed to exclude persons with disabilities. At Federation in 1901, the *Immigration Restriction Act* (Cth)[86] provided for the arrest, detention and exclusion of 'prohibited immigrants' as defined in s 3 of that Act. After the famous 'dictation' test which facilitated the exclusion of virtually anyone deemed undesirable,[87] section 3 was dominated by references to what we might term today as 'health concern non-citizens'.[88] What is striking in the long list is the conflation of

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85 See Alison Bashford 'At the Border: Contagion, Immigration, Nation' (2002) 33(120) *Australian National Historical Studies* 244.

86 Act No 17 of 1901. This Act was one of the very first enactments passed by the new Federal Parliament in 1901.

87 On this history, see Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (The Federation Press, 2011) Ch 2. ("Crock and Berg").

88 See further, Commonwealth, *Parliamentary Debates,* House of Representatives, 20 August 1919, 6 (Patrick Glynn, MP). 'Prohibited immigrants' as defined in s 3 included:

> (b) any person not possessed of the prescribed certificate of health;
> (c) any idiot, imbecile, feeble-minded person, epileptic, person suffering from dementia., insane person, person who has been insane within five years previously, or person who has had two or more attacks of insanity ;
> (d) any person suffering from a. serious transmissible disease or defect;
> (e) any person suffering from pulmonary tuberculosis, trachoma., or with any loathsome or dangerous communicable disease, either general or local;
> (f) any person who, in the opinion of an officer, is likely, if he enters the Commonwealth, to become a charge upon the public by reason of infirmity of

genuine public health issues (such as whether an immigrant suffered from tuberculosis or a communicable disease) with disabilities, including mental disabilities.

Following Australia's signature and ratification of the Convention on the Rights of Persons with Disabilities ("CRPD"), it is disappointing to see that modern migration laws in this country continue to conflate issues of illness with disability. The identification of either disease or disability remain grounds for exclusion or expulsion.

As a general rule,[89] most visas are subject to a requirement that the Minister be 'satisfied' that the visa applicant meets applicable health criteria.[90] The *Migration Regulations 1994* (Cth) ("the Regulations") set out the criteria for each visa subclass (in Schedule 2). The Sch 2 criteria include four-digit codes which link to other schedules. The public interest criteria ("PIC") 4005 and 4007 (commonly referred to as the "health criteria") are contained in Schedule 4: see Appendix 2-A.

The 'health' requirements in PIC 4005 and PIC 4007 are the same. To pass the health test, the applicant must be:

(a) free from tuberculosis; and
(b) free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
(c) free from a disease or condition to which a person who has it would be likely to require health care or community services or would meet the medical criteria for the provision of a community service, and the provision of the health care or community services would be likely to result in a **significant cost** to the Australian community in the areas of health care and community services or would be likely to prejudice the access of an Australian citizen or permanent resident to health care or community services, regardless of whether the health care or community services will actually be used in connection with the applicant.[91]

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mind or body, inefficiency of means to support himself, or any other cause;

(g) any person suffering from any other disease, disability, or disqualification which is prescribed;

89 Note that provisions such as *Migration Act 1958* (Cth) ('*Migration* Act') ss 351, 195A and 417 give the Minister an overriding power to grant visas. Visas that do not attract PIC 4005 or 4007 are generally visas that are tied to other visas or visa applications, such as Bridging Visas or Resident Return Visas; or, certain humanitarian visas; or, discrete visas, such as the Medical Treatment Visa (subclass 602) under the medical treatment sub-category. Although PIC 4005 or 4007 may not apply, the applicant may still be asked questions regarding their health status and requested to provide related health evidence or undertake health examinations. See Appendix 2-B for an overview of the health criteria applicable to current visa subclasses.

90 *Migration Act* s 65.

91 See Appendix 2-A for extracts of PIC 4005 and 4007.

2.2. The health waiver

The only element that distinguishes PIC 4007 from PIC 4005 is the availability of a waiver for PIC 4007. The Minister may waive the health requirements if:

(a) the applicant satisfies all other criteria for the grant of the visa applied for; and
(b) the Minister is satisfied that the granting of the visa would be unlikely to result in:
    (i) undue cost to the Australian community; or
    (ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.[92]

Unlike PIC 4005, the waivable rule allows decision makers to weigh the impact upon the Australian community of admitting an applicant against compelling and compassionate factors that are applicable to the applicant.[93] PIC 4007 is not limited to simple calculus of costs. The visas subject to health waiver are set out in Attachment 2-A.

Until 2009, PIC 4007 only applied to certain family formation visas' and onshore protection visa applicants.[94] No waiver was available for skilled migrants who failed the health test unless they were seeking to reside in a regional area.[95] Although the rules were relaxed somewhat in 2009-10, with the re-election of a conservative coalition in 2013 waiver of the health rules has been confined to skilled visa applicants who have been nominated for and apply under the Temporary Residents Transition Stream of the Employer Nomination Scheme (visa subclass 186) and Regional Sponsored Migration Scheme (visa subclass 187). There is no waiver provision for any temporary visa apart from the Temporary Skill Shortage (visa subclass 482, formerly the subclass 457 visa[96]).

3. What amounts to 'significant cost'

The biggest hurdle for applicants is the requirement that their disease or condition not pose the risk of 'significant cost' to the Australian community. The phrase is triggered by a set amount, determined over a set period of time.

In determining whether an applicant satisfies the health criteria, the Minister must seek the opinion of a Medical Officer of the Commonwealth ("MOC").[97] It is the MOC

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92 *Migration Regulations 1994* (Cth) ('*Migration Regulations*') Sch 4, PIC 4007(2). The visa subclasses subject to waivable and non-waivable criteria are set out at Appendix 2-B to this part.

93 *Bui v Minister for Immigration and Multicultural Affairs* (1999) 85 FCR 134

94 'Family formation visas' included partner, child, adoption, New Zealand Relative and offshore sponsored Humanitarian visas - remaining relative, orphan relative and parent visas are not included – this is highlighted in *Schedule 2* of the Regulations.

95 Visa subclass 856/857 allowed applicants residing in 'participating States' and Territories access to a health waiver.

96 Note PIC4006A was the health criteria that applied to subclass 457 visa and continues to apply to those 457 visa applications in the pipeline.

97 *Migration Regulations*, reg 2.25A.

who decides whether an applicant for a visa is likely to represent costs to Australia. MOC decisions are opaque because costing methods are based on statistical and actuarial data that is not readily available to the public.[98] Assessments turn on matters such as the nature of a disease or disability; the expected life span of the applicant; the extent to which an applicant may be eligible for social security assistance such as disability or other social services; and the likely cost of medications and other assistive devices.

The nominal cost to engage the exclusionary operation of the rules was $40,000 over an applicant's expected lifetime. In response to a Parliamentary Joint Standing Committee inquiry into the Health rules,[99] and persistent public campaigning, the rules were relaxed on 1 July 2019 so that the 'significant cost' threshold increased from $40,000 to $49,000 and the time frame was reduced from life to a maximum period of 10 years.[100] Whilst these relaxations are welcomed, the basis on which exact figures are arrived at continue to be opaque.[101] Further changes were made in April 2020 to specify that the putative costs of accessing the National Disability Insurance Scheme ('NDIS') should not be counted in any assessment.[102] This is significant for applicants for temporary visas who have been rejected historically on the basis of putative costs despite being ineligible for such social services.[103] At present, it is less clear what the ramifications will be for permanent visa applicants who are eligible for the NDIS.

Significant costs for *temporary visas* will usually be based upon the proposed period of a person's stay.[104] Significant costs for permanent visas differ depending upon the

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98 MOC are guided significantly in their assessments by the Department of Home Affairs' 'Notes for Guidance', which are contained within policy. These notes deal with the financial costs and prejudice of access to services of various medical conditions (both disease and disability related). The notes are only accessible to those who pay a subscription fee for LEGENDcom (namely migration agents and legal practitioners). The notes are neither widely known by nor accessible to the public. See further, Policy – Migration Regulations – Schedules, '[Sch4/4005-4007NFG] Sch4/4005-4007 - Notes for Guidance for Medical Officers of the Commonwealth of Australia'.

99 Joint Standing Committee on Migration, Parliament of Australia, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (Canberra: 21 June 2020).

100 For an account of the changes to the costings over time, see Appendix 2-C.

101 For a discussion on the lack of data relating to, and visibility of, disabled migrants see further: Karen Soldatic et al, ''Nowhere to be found': disabled refugees and asylum seekers within the Australian resettlement landscape',(2015) 2(1) *Disability and the Global South* 50.

102 Maani Truu, 'Exclusive: Visa rule changes open door to temporary visa applicants with a disability or health condition' *SBSNews* (Online Journal, 27 April 2020) <https://www.sbs.com.au/news/exclusive-visa-rule-changes-open-door-to-temporary-visa-applicants-with-a-disability-or-health-condition>.

103 The Department of Home Affairs formerly took into account the putative costs of State disability services in the assessment. The State services have now largely been absorbed by the NDIS. The Government has recognised the anomaly as temporary migrants are ineligible for the NDIS (as they were for State disability services).

104 Exemptions to this rule are listed in Legislative Instrument F2016L01126, *Migration Regulations 1994 - Specification of Visa Subclasses for the Purposes of the Health Requirement - IMMI 16/067*. The temporary visas listed in the Gazette are those that likely lead to the grant of a permanent visa and therefore the assessment is on a permanent basis.

medical condition but are generally calculated over a five-year period. Exceptions are made where the applicant is:

- Is aged 75 or older. In this circumstance the applicant will be assessed for a three year period or
- Has a condition that is permanent, and the course of the disease is reasonably predictable beyond the five-year period. In these circumstances, the applicant will be assessed for a maximum of 10 years. Prior to 2019, the applicant would be assessed for 'lifelong' costs, being the estimated costs over the applicant's estimated remaining life expectancy.
- Has an inevitable or reasonably predictable (>65% likelihood) reduced life expectancy due to their health condition or disease. In this case, the applicant will be assessed for a maximum of 10 years, if their life expectancy is greater than five years. Prior to 2019, the assessment would be made against their reduced life expectancy.[105]

In the case of applicants for temporary visas, there is a list of exclusions as to what will be 'costed' for the purpose of determining 'significant cost'. These exclusions are contained in Gazette Notice *IMMI 11/073*.[106] The cost of needed medications will always be included in the 'costing'. Prima facie, cost is calculated on the assumption that the person will use public services, regardless of whether or not they are entitled to or will actually access those services. The Department has considered this inconsistency in the decision not to count putative NDIS costs towards any assessment.

HIV is considered to be a permanent condition and the course of the disease is deemed reasonably predictable. Accordingly, the significant cost assessment for HIV-positive applicants for *permanent visas* will based upon the maximum 10-year period and the projected costs over this period. Prior to 2019, the assessment would be based upon the person's life expectancy. Exceptions to these requirements are made when the application is for a temporary visa and there is 'no information known to the Department' suggesting that a person may not meet the health criteria, or where the application is for a permanent visa that is made from a specified country[107] and there is no information known to the Department to the effect that the person may not meet

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105 Policy - Migration Regulations - Schedules > Sch4/4005-4007 at 'Assessing the lawfulness of a MOC opinion'.

106 Legislative Instrument F2011L02242, *Migration Regulations 1994 - Specification under clauses 4005, 4006A and 4007 - Specification of Health Care and Community Services - November 2011*: Exclusions to the 'costing' are '(a) Social Security payments; (b) costs associated with issuing a Health Care Card or Pensioner Concession Card; (c) Pharmaceuticals listed under the PBS that, if ceased, would not be seriously detrimental to the applicant's life or wellbeing.'

107 Legislative Instrument F2014L00322, *Migration Regulations 1994 - Specification of Countries - IMMI 13/161.*

the health criteria.[108] The Minister must take the opinion of the MOC to be correct.[109] If, according to the MOC, an applicant fails to meet the health criteria then the delegate must refuse the visa. For almost all applicants for permanent visas (and visas that lead to permanent visas), all migrating applicants and non-migrating dependants are subject to the health criteria. If the primary applicant or a member of their family unit (whether or not they are migrating) fails the health criteria then the whole application will fail. This is known as the *one fails, all fail* rule. There is provision for a delegate to set aside medical examinations for non-migrating dependents where it is satisfied that the requirement would be 'unreasonable'. However, the decision-making process is opaque, and the reasoning is circular. Specifically, the test for setting aside the requirement is subjective, the notion of 'unreasonableness' does not have a legislated definition, and delegates are directed to consider enforcing the requirement 'in specified circumstances and where there is a strong reason… on the basis that it would be 'reasonable.'' [110]

B HEALTH AND DISABILITY

2.3. The conflation of disease and disability

Australia's is aware that the conflation of health and disability in its exclusionary health rules is contrary to the non-discrimination provisions of the CRPD. This is apparent in its interpretative declaration in respect of Art 18 of the Convention. As noted earlier, this caveat sets out Australia's:

> *understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.*

The declaration is justified on the basis that the health criteria apply to all migrants and operate in the national interest. The argument is that the exclusionary measures are not about a person's disability but with the impact upon (or cost for) the Australian community. In this respect the caveat is unremarkable and probably adds little to traditional understandings of state sovereignty and the preservation of the national interest.

Why Australia's laws attract such on-going criticism, however, is that the health rules go beyond permissible protection of Australia's national interests. This is because the rules *do* discriminate on the basis of disability. This is acknowledged in specifications

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108 *Migration Regulations* regs 2.25A(1)(a)–(b).

109 *Migration Regulation* regs 2.25A(3). But this does not prevent judicial review of an assessment made on the basis of incorrect assumptions: see *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115; *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 148 FCR 182; and *Dang v AAT* [2019] FCAFC 220.

110 Policy - Migration Regulations - Schedules > Sch4/4005-4007 at 'Non-Migrating Family Members'.

that the *Migration Act* is exempted from the operation of s 52 of the *Disability Discrimination Act 1992* (Cth). In practice the health rules can have a devastating effect on people's lives. They operate as a blunt instrument to deny lawful status to applicants based solely on an aspiring migrant's *putative* cost to society rather than any actualities.

First, the rules are express in stipulating that costs are assessed even where an applicant will not access services or will not need to ask for support. In *Minister for Immigration & Multicultural Affairs* v *Seligman*[111] the Full Federal Court confirmed that applicants cannot challenge the accuracy of a costs estimate or the opinion provided by the MOC, provided the assessment is made lawfully.

Second, the skills and benefits that the person with disabilities can bring to the country are disregarded, unless the health waiver applies. This is so even where these positive attributes would be the basis for admitting an able-bodied applicant. In practice, the health criteria often acts to deny admission to applicants who have family members with disabilities: where one family member (referred to as a 'secondary applicant') fails to meet the health requirements, all fail.[112] These people will either be denied visas outright or have visa conditions imposed that differ from those applied for other applicants.

The applicant is not tested against their own circumstances, but those of an objective 'hypothetical person with the same form and level of the applicant's condition'.[113] This will be the first and final assessment for applicants that fail PIC 4005. In the less common instance that the applicant is subject to PIC 4007 then they *may* be eligible to a health waiver. Only at this second stage can the assessment take into consideration the applicant's subjective circumstances.[114]

The facts in the *Seligman* case illustrates well the way in which an MOC estimation of 'significant cost' is based on theory rather than actualities. The applicant was a high-flying business executive with impressive skills and an equally impressive personal nett worth. His application was rejected because his son had Down syndrome and was accordingly assessed as potentially eligible for disability benefits, the putative costs of which pushed him over the allowable then life-time threshold. In fact, this same son was gainfully employed and had even acquired professional qualifications. Not only was he a cherished member of the family unit, he was unlikely to be a burden

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111 (1999) 85 FCR 115.

112 In the 2010 Inquiry into migration treatment of disability, the Department of Immigration provided statistics that the 'one fails, all fail' rule was the basis of the majority of visa refusals on health grounds in the 2008-09 financial year. Specifically, 282 of the 360 visas refused on the basis of significant costs or prejudice to access were due to the 'one fails, all fail' rule. See Joint Standing Committee on Migration, Parliament of Australia, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (Canberra: 21 June 2020) Ch 5.

113 Policy - Migration Regulations - Schedules > Sch4/4005-4007 at 'The Hypothetical Person Test'.

114 Policy - Migration Regulations - Schedules > Sch4/4005-4007 at 'Compassionate and Compelling Circumstances'.

on the community because of both his talents and the degree of family support available to him. There have been a significant number of cases since *Seligman* where similar issues have arisen for applicants seeking permanent residence who have family members with disabilities.

It is worth noting that where a child is born in Australia to non-citizens who do not hold permanent resident status, the child will not become an Australian citizen unless they manage to remain in the country for 10 years.[115] This has led to the situation where children are born in Australia with disabilities who only survive because of the efforts of and resources available to Australian doctors. As we explore below, the health rules create a situation where the child thus saved can face death or ruination if forced to return to their parents' country of nationality or habitual residence.

2.4. Exceptions to the rules – the non-compellable, non-reviewable discretion

Australia's migration laws are notable for the stringency of the statutory scheme. The privatisation of functions such as the health assessments carried out by MOCs increases control by separating out the process of determining putative costs from the visa determination process. The MOCs make their assessment and this becomes binding on the Departmental official. In fact, the only person empowered to override a negative health assessment is the Minister for immigration. As explained in Appendix 2-D the Minister is vested with powers to intervene so as to make a more favourable decision when an applicant fails to meet any requirement for a visa. However, these powers are structured so that the Minister cannot be compelled to consider a request to intervene and any decision the Minister does make cannot be reviewed. The non-compellable nature of an example of such a power was articulated in Ozmanian v MILGEA.116 On appeal, the Full Federal Court stated that:

> [Section] 417(7) makes it clear that the Minister is not under a duty to consider whether to exercise the power under s 417(1) in respect of any decision, whether or not the Minister is requested to do so by the applicant or any other person, or in any other circumstances.[117]

In *Bedlington v Chong*,[118] the Full Court went further to hold that the reference to 'no duty to consider' contained in s 48B[119] was intended to excuse the Minister from any obligation of considering whether to exercise the s 48B power. The court ruled that there was no duty require any matter to be drawn to the attention of the Minister.[120]

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115 *Australian Citizenship Act* 2007 (Cth) s 12. Birthright citizenship was a feature of the 1948 Act, but was removed in 1986 following the case of *Kioa v West* (1985) 150 CLR 559.

116 (1996) 137 ALR 103. That case concerned the operation of s 417 of the *Migration Act* which gives the Minister a non- compellable, non-reviewable to override adverse tribunal rulings on refugee status.

117 *MIMA v Ozmanian* (1996) 141 ALR 322 at 336. See also *Morato v MILGEA* (1992) 39 FCR 401.

118 (1998) 87 FCR 75. See the discussion in Crock and Berg, Ch 19 [19.4].

119 *Migration Act* s 48B(6), and correspondingly s 417(7).

120 *Migration Act* section 417(3) provides that the power under s 417(1) may only be exercised by the Minister personally. In effect, the act of exercising his other discretion cannot be delegated

The net effect of such provisions has been to make the Minister largely immune from the prerogative writs or any equivalent statutory remedy that could compel the performance of this power.[121]

If Australia's migration laws allowed decision makers generally to respond with humanity to unusual cases, there would be fewer concerns about the operation of the health rules. In practice, however, the Ministerial discretion option has become increasingly difficult to access over time. Unless an applicant can find a political route to the Minister or can put their case in the public eye through the media or social agitation such as Change.org petitions, it is very often impossible to avoid the harsh operation of the rules.

C HOW THE MIGRATION HEALTH RULES CAN CAUSE ABUSE AND NEGLECT

2.5. Exclusion of family with disabilities – the Kiane case

The way that the health rules can operate to **exclude** family members is illustrated by the case of Shahraz Kiane. Recognised as a refugee in 1996, he tried on three occasions to sponsor his family for humanitarian visas under the split family provisions that operated at that time. On each occasion the applications were rejected because one of his daughters suffered from cerebral palsy and was therefore deemed to pose a risk of 'significant cost' to Australia. The case was investigated by the Commonwealth Ombudsman after Mr Kiane set himself on fire outside of Parliament House in Canberra. After months in hospital he succumbed to his injuries. The Ombudsman found that:

> DIMA had been warned about Mr Kiane's deteriorating mental state and risk of suicide by a letter dated 23 March 2001 from an ACT counselling service. Despite this advice, there were further delays in DIMA in the referral of a

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by the Minister. However, the ministerial decision to decide not to consider whether to consider exercising the discretion can be delegated to Department staff. This decision can be delegated because it has been held by the Federal Court as not within the scope of s 417(3), and s 496 allows the Minister to delegate his power to refuse a visa. In practice, Departmental officials assess cases against the Guidelines and need not draw to the Minister's attention cases that fall outside those Guidelines. See Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: Inquiry into Australia's Refugee and Humanitarian Program* (Canberra: 1999) at [8.108].

121 For example, in *Kolotau v MIMIA* [2002] FCA 1145 at [8], Tamberlin J stated: 'Relief cannot be available under s 39B of the *Judiciary Act 1903* (Cth) by reason of the Minister's failure to consider a matter which the Migration Act specifically says that he is not obliged to consider'. This view was confirmed but qualified by the High Court in *Plaintiffs M61/M69* (2010) 272 ALR 14. See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

request for a waiver of the health requirement to the Minister and as a consequence of DIMA setting additional requirements for the family to meet.[122]

2.6. The health rules, expulsion and human rights

An example of how the health rules can operate to threaten the life of non-citizens with disabilities in Australia (threatening their ability to subsist) is seen in the case of Kayban Jamshaad. The case concerned a child born to non-citizen parents in Bunbury, WA who developed severe haemophilia and an acquired brain injury following his birth at the local hospital. The parents feared that if required to return to their home country (the Maldives) the child would die because the medical and other supports he required would not be available. The department found that there were no sufficient "compelling" or "compassionate" grounds for the child to be granted a health waiver. On this occasion the family exercised their right of appeal to the AAT. The tribunal remitted the case to the Minister for re-consideration. In the result the family were permitted to stay.[123]

Attempts to expel migrant children with disabilities – often in the context of parents attempting to transition from temporary to permanent status – are met frequently with media campaigns. An example in point is the campaign around attempts by Dr Bernhard Moeller to transition to permanent residence with his son Lukas, another child born with Downs Syndrome.[124] Such strategies underscore the limited legal options available to challenge the operation of the health rules. The *Seligman* case mentioned earlier is a very rare example of an instance where a legal challenge was successful. In fact, any victory from this case was short-lived as the government moved swiftly to close what it perceived to be the legal loophole that had been opened.[125] With these transition cases it is worth noting that the applicant families have typically been living in Australia for extended periods of time. This underscores the questionable logic of rules that suddenly demand the removal of individuals by virtue of the type of visa they seek to hold rather than by dint of any actual detriment to the country they might represent.

The overriding problem with cases such as *Jamshaad, Moeller* and even *Seligman* is that in the absence of organised supporters, the health rules can and do operate to expel migrants with disabilities from Australia into situations where their human rights to life, health and family unity are compromised

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122 See *Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application* (Ombudsman Act 1976: August 2001).

123 Anthony Pancia, 'Kayban Jamshaad, WA child facing deportation over disability, offered hope in form of waiver' *ABC News* (Online Journal, 23 January 2020) <https://www.abc.net.au/news/2020-01-23/kayban-jamshaad-wa-child-facing-deportation-disability-reprieve/11894140>.

124 Britt Smith and Dewi Cooke, 'German doctor wins visa' *The Sydney Morning Herald* (Online Journal, 26 November 2008) <https://www.smh.com.au/national/german-doctor-wins-visa-20081126-6hzr.html>.

125 See the discussion in Crock and Berg, Ch 6.

D CONCLUSIONS AND RECOMMENDATIONS

The current mood in Australia makes it unlikely that law and policy will be amended to allow for withdrawal of the interpretative declaration of Art 18 of the CRPD in the near future. Although, this has been recommended by the United Nations Committee on the Rights of Persons with Disabilities. Another unlikely though significant step would be to remove s 52 from the *Disability Discrimination Act*. However, there is more tangible scope to make domestic migration laws less discriminatory. The relaxation of the rules in 2019 and 2020 were a step in the right direction. However, the changes have reduced but not removed the discriminatory and potentially abusive and neglectful impact of the health rules.

Our concern is that the system does not provide decision makers with adequate discretion to deal with primary or secondary applicants with disabilities seeking to enter or remain in Australia.

It is our submission that the regime for the waiver of the health rules is too narrow in both the range of visas to which it applies and in its operation.

In the interests of creating a system inducive of less abuse and neglect, and less discrimination, we recommend the following:

1. **separate threshold rules** should be devised for disability, instead of disability being conflated with disease and risk to public health. As they stand both PIC 4005 and 4007 evince a medical approach to disability which is greatly at odds with the social approach mandated by the CRPD.
2. all rules should allow for waiver in situations of 'undue cost' rather than the blunt 'significant cost';
3. decision makers at every level should be empowered to weigh the applicant's compelling and compassionate circumstances that favour a health waiver against any costs that might be incurred. Specifically, decision makers should be empowered to weigh the benefits brought by an applicant against any costs that might be incurred;
4. decision makers at every level should be directed to consider and respond in a way that is consistent with Australia's obligations under international human rights law, including the right to life and the right to the highest possible standard of health. This is particularly important in the case of migrant children with disabilities born in Australia;
5. decision makers at the delegate level should receive training on the operation of the Convention on the Rights of Persons with Disabilities;
6. 'Notes for Guidance for Medical Officers of the Commonwealth of Australia' should be publicly accessible.

PART III: ENTITLEMENTS AFTER ENTRY

This Part of the submission will highlight concerns that arise regarding the neglect of migrants with disabilities following arrival in Australia caused by the inadequacy of social security support that they receive. We examine first constraints that have been placed on eligibility for social security, with a discussion of problems associated with very long term temporary visas such as those issued to most New Zealand nationals. Waiting periods for social security which apply to permanent residents, such as the ten-year rule for the Disability Support Pension, are identified as matters of particular concern. In Part III-2 the National Disability Insurance Scheme will be examined in terms of the distinctions made between different classes of migrants with disabilities, and the extent to which persons from CALD communities are denied needed support. In Part III-3 we examine the limited access which people on temporary visas have to any form of government support during the COVID-19 pandemic. We will show that this has had serious impacts on migrants and CALD communities. The Part concludes with the case study of Been Kim which demonstrates how institutional neglect has insidious long-term impacts on migrants with disabilities, particularly children.

A ENTITLEMENT TO SOCIAL SECURITY

3.1. Eligibility: Residency Requirements

We will argue that Australian law and policy is unreasonably restrictive in the support that it offers to migrants with disabilities. Problems arise in relation to who is eligible for any benefit and in the waiting times that are imposed for eligibility. The distinction drawn between 'permanent' and 'temporary' visas is misleading and unfair because some 'temporary' visas can apply to persons who are permanent residents in all but name.

Social security payments are only available for 'Australian residents', a phrase that is defined in the Social Security Act 1991 (Cth) as follows:

> 7 (2) An ***Australian resident*** is a person who:
> (a) resides in Australia; and
> (b) is one of the following:
> (i) an Australian citizen;
> (ii) the holder of a permanent visa;
> (iii) a special category visa holder who is a protected SCV holder[126]

This means that all temporary visa holders are excluded, including most New Zealand citizens who hold Special Category Visas; refugees who are holders of Temporary Protection Visas (TPVs) or Safe Haven Enterprise Visas (SHEVs); and Bridging Visa holders. The New Zealanders and TPV/SHEV holders are for practical purposes

126 *Social Security Act 1991* (Cth), s 7(2).

'permanent' temporary visa holders in the sense that all can and/or do spend long periods in Australia.127

3.2. Neglect of Long-Term Temporary Visa Holders

(a) New Zealand Citizens

For historical reasons, Australia has always had special rules to allow New Zealanders to live and work in the country. The visa issued to New Zealand citizens upon arrival in Australia, and which allows them to stay indefinitely, is the Subclass 444 Special Category Visa (SCV).128 According to the Department of Home Affairs, there were over 670,000 such New Zealand citizens living in Australia in April 2020.129 Over time, however, the law has become more restrictive for these 'special' non-citizens. A distinction is made between two types of SCV holders in terms of entitlements according to the date or a person's first arrival in Australia.

Protected SCV Holders qualify as 'Australian residents' for social security purposes and therefore residentially qualify for all entitlements.130 New Zealanders in the protected category are those who:

- were in Australia on 26 February 2001,[131]
- had been in Australia for a period of, or for periods totalling, 12 months during the period of 2 years immediately before 26 February 2001, and returned to Australia after that day,[132]
- were residing in Australia on 26 February 2001, but were temporarily absent at the time, and returned;[133]
- commenced or recommenced residing in Australia during the period of 3 months beginning on 26 February 2001[134]

SCV holders who came to Australia after February 2001 are considered temporary visa holders despite the fact that they may have stayed in Australia for very long periods of time.[135] Such SCV holders are unable to access the same range of entitlements as

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127 TPV/SHEV visa holders should be in a special category because they have been recognised as refugees, that is, persons in respect of whom Australia owes protection obligations. See the discussion at (b) below.

128 Parliament of Australia, *New Zealanders in Australia: A Quick Guide* (Web Page, 29 August 2016) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/NZAust>.

129 Department of Home Affairs, 'Frequently Asked Questions', *COVID-19 and the border* (Web Page, 19 May 2020) <https://covid19.homeaffairs.gov.au/frequently-asked-questions>

130 *Social Security Act 1991* (Cth) s 7 (definition of 'protected SCV holder' para (2)(b)(iii)).

131 Ibid, s 7 (2A)(a).

132 Ibid, s 7 (2A)(b).

133 Ibid, s 7 (2B), (2D).

134 Ibid, s 7 (3C).

135 *Migration Regulations* 1994, sch 2 cl 444.511. Parliament of Australia, *New Zealanders in Australia: A Quick Guide* (Web Page, 29 August 2016)

their 'Protected' counterparts. It is noted here that New Zealand does not place the same range of restrictions on Australian citizens residing in New Zealand, most especially where a person acquires a disability. [136]

To become eligible for full social security support, unprotected SCV holders need to apply through the family or economic pathways that are available for migrants to become permanent residents, which may include family and skilled visa options. There is the Subclass 189 (Skilled Independent) visa – New Zealand stream,[137] which provides a pathway for long-term residents who satisfy certain income requirements. However, only those who started living in Australia on or before 19 February 2016 are eligible to apply.[138]

Concerns therefore arise in this area regarding the neglect of SCV holders with disabilities, and their dependents, who may have lived in Australia long-term or even for their entire lives. Some of them have been forced to return to New Zealand due to financial hardship despite having lived in Australia for decades.[139] We provide an example of the impact of these restrictions in the case of Mayley Goble at note 43 below.

(b) Refugees: TPV and SHEV holders

Asylum seekers who came to Australia by boat, who are subsequently determined to be refugees, are ineligible for the Subclass 866 permanent Protection visa, and can only be granted the 785 Temporary Protection Visa[140] or 790 Safe Haven Enterprise Visa[141] – both of which are temporary and do not entitle them to the NDIS. The decision to treat these refugees differently because of the date and mode of their arrival in Australia arguably constitutes punishment in breach of Australia's obligations under s 31 of the Refugee Convention.[142]

One residual option which exists for TPV and SHEV holders under *severe* financial hardship is Special Benefit.[143] While there is no waiting period for such benefits, accessing payments can jeopardise the eligibility of SHEV holders to transition to a permanent resident visa.[144]

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/NZAust>.

136 See https://check.msd.govt.nz/services.

137 *Migration Regulations 1994* sch 2 cl 181.231.

138 Ibid, sch 2 cl 181.231(2).

139 Stefan Armbruster, 'New Zealanders with disability in Australia are being treated as "second class"', *SBS News* (online, 28 February 2020) < https://www.sbs.com.au/news/new-zealanders-with-disability-in-australia-are-being-treated-as-second-class>.

140 *Migration Regulations* 1994, sch 2 cl 785.223(5)(a).

141 Ibid, sch 2 cl 790.223(5)(a).

142 Guy Goodwin-Gill 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection' in Feller et al (eds), *Refugee Protection in International Law* (CUP Cambridge 2003), 220-34.

143 *Social Security Act 1991* (Cth,) s 729(2)(e).

144 Ibid, s 739A(6). See also *Migration Regulations,* reg 2.016AAB.

It is our view that Australia's parsimony in these matters could place it in breach of its obligations under international human rights law to ensure that persons in Australia enjoy the highest attainable standard of health.[145] The right to health has long been recognised as a core tenet of human rights law. Moreover, the right to the 'highest attainable standard' of health is regarded as non-derogable.[146] This means that states cannot deny their obligations when emergencies strike. The ICESCR cannot be suspended in any circumstances. For very long term permanent residents – particularly those who have been recognised as refugees, it is arguable that disability support should be regarded as an aspect of a broad obligation to ensure health and wellbeing.[147]

In terms of Australia's human rights obligations, Article 25 of the CRPD provides that State parties have an obligation to 'Provide those health services needed by persons with disabilities specifically because of their disabilities'. This obligation is not qualified by factors such as a person's immigration status.[148]

B WAITING PERIODS

After becoming an Australian resident, through attaining permanent resident status after entry or upon arrival into Australia, migrants do not immediately become entitled to receive social security.[149] A 'newly arrived residents' waiting period' applies before they can receive support.[150]

This waiting period does *not* apply to:

- Australian citizens, for all payments[151]

145 See ICESCR, discussed in Part 1 above.

146 See UN Committee on Economic Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Article. 2, Para. 1, of the Covenant)*, UN Doc E/1991/23 (14 December 1990); UN Committee on Economic Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Article. 11(1) of the Covenant)* UN Doc E/1992/23 (13 December 1991) [8]; UN Committee on Economic Social and Cultural Rights, *General Comment No. 12: The Rights to Adequate Food (Article. 11)*, UN Doc E/C.12/1999/5 (12 May 1999) [7]-[13]. Ee also See Walter Kälin, 'The Human Rights Dimension of Natural or Man Made Disasters' (2012) 55 *German Yearbook of International Law* 119, 121.

147 UN Committee on Economic Social and Cultural Rights. *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant).* 2000. For a comprehensive account of the jurisprudence relating to the ICESCR, see B Saul, D Kinley and J Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP, 2014).

148 Ben Saul, 'Waiting for Dignity in Australia: Migrant Rights to Social Security and Disability Support under International Human Rights Law' (2010) 3 *UCL Human Rights Review* 71.

149 *Social Security Act,* s 739A(1).

150 Ibid, s 23 (definition of 'newly arrived resident's waiting period').

151 https://guides.dss.gov.au/guide-social-security-law/3/1/2/43

- 'Refugees or former refugees'[152] in certain categories of payments. This includes Humanitarian migrants on Subclass 200-217 visas,[153] Subclass 852,[154] and Subclass 866 Protection visa holders. As noted, refugees granted TPVs or SHEVs are not eligible at all.

3.3. Disability Support Pension and Ten-Year Rule

The Disability Support Pension (DSP) has a ten-year waiting period during which migrants who are permanent residents are not eligible to receive social security support.[155] This includes Protected SCV holders who otherwise would enjoy a larger range of entitlements; migrants admitted under family or economic pathways; and their dependents. Since waiting periods were introduced and subsequently extended, concerns have been raised regarding the denial of economic and social rights for migrants.[156]

The delay in eligibility for the DSP has implications for migrants with disabilities in accessing additional support services they may need, as these often require them to be eligible for the DSP.[157] This includes supplementary benefits such as the mobility allowance, which is provided at a higher rate for DSP recipients,[158] or supported employment[159] and assistance programs under the participation requirements for the DSP.[160]

In effect, migrants with disabilities may enjoy no government support until the end of the waiting period, unless they successfully apply for citizenship or an exemption applies to them. The impact of the ten year rule is particularly harsh on children as it can mean that the disability support pension can be denied them for a large part of their childhood.

We explore the impact of this rule for a migrant child born in Australia in the Case Study for this part.

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152 *Social Security Act 1991*, s 7(6).

153 Ibid, *s 7(6AA);* Australian Government, *Social Security Guide* (Web Page, 11 May 2020) <https://guides.dss.gov.au/guide-social-security-law/9/2/4#noteb>.

154 *Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016.*

155 *Social Security Act*, s 94(e)(ii).

156 Ben Saul, Waiting for Dignity in Australia: Migrant Rights to Social Security and Disability Support under International Human Rights Law (2010) 3 *UCL Human Rights Review* 73-4.

157 National Ethnic Disability Alliance, *Migrants with Disability and the 10 Year Qualifying Residence Period for the Disability Support Pension* (Revised Report, May 2009) 11-12.

158 *Social Security Act,* s 1035A(3).

159 Ibid, s 94E.

160 Ibid, s 94A.

C ENTITLEMENT TO THE NATIONAL DISABILITY INSURANCE SCHEME

3.4. Background to Scheme

The National Disability Insurance Scheme (NDIS) was introduced following a Productivity Commission inquiry which revealed issues about underfunding, lack of coordination and inequity with the existing disability support schemes in Australia.[161] One issue that was mentioned was the lack of knowledge about support services and loss of opportunities for people with disabilities.[162]

The *NDIS Act* was passed in 2013,[163] and the Scheme began its rollout across Australia after the initial trial period concluded in July 2016.[164]

3.5. Eligibility: Residential Requirements

The NDIS has a number of access requirements: age[165], disability[166] and residence. In terms of residency, Section 23 of the *NDIS Act 2013* requires satisfaction of the following requirements to be met to be eligible for participation:

(1) A person meets the residence requirements if the person:

- *a) resides in Australia; and*
- *b) is one of the following:*
  - *(i) an Australian citizen;*
  - *(ii) the holder of a permanent visa;*
  - *(iii)a special category visa holder who is a protected SCV holder; and*
- *c) satisfies the other requirements that are prescribed by the National Disability Insurance Scheme rules.*[167]

Therefore, permanent visa holders, Protected SCV holders, and refugees who are Humanitarian or Subclass 866 holders, are eligible for the NDIS. However, temporary visa holders are ineligible. This raises a number of concerns in terms of institutional neglect.

3.6. Accessibility and Neglect of Long Term Temporary Visa Holders

The eligibility requirements for the NDIS raise concerns regarding the neglect of migrants with disabilities who are temporary visa holders. Such temporary visa

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161 Luke Buckmaster and Shannon Clark, *The National Disability Insurance Scheme: a chronology* (Parliamentary Library Research Paper Series, 13 July 2018) 5; Tamara May et al, 'Brief history and user's guide to the Australian National Disability Insurance Scheme' (2018) 54 *Journal of Paediatrics and Child Health* 115, 115.

162 Buckmaster and Clark, ibid, 5.

163 *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act').

164 'History of the NDIS', *NDIS* (Web Page, 5 November 2019) <https://www.ndis.gov.au/about-us/history-ndis>.

165 *NDIS Act*, s 22.

166 Ibid, s 24.

167 Ibid, s 23(1).

holders may have been able to access some state-specific disability services, but would be ineligible under the NDIS, which is replacing such services.[168]
This institutional neglect is particularly concerning when considering the dependent children of temporary visa holders, such as non-protected SCV holders. Such children can become eligible for Australian citizenship when they reach ten years of age, after which they will gain access to NDIS.[169] As we explore further below however, much will depend on the child's support networks and the awareness of relevant entitlements.

An example highlighted in the media is that of New Zealand citizen child Mayley Goble who was born in Australia and diagnosed with cerebral palsy when she was five months old.[170] Without any support from NDIS, her mother was unable to afford all the physiotherapy, occupational therapy and other treatments that Mayley needs.[171] If Mayley were to wait ten years until she could receive support from NDIS, her mobility and ability to do things would be largely compromised due to the failure to provide early-age treatment.[172] Again, the case study to the part demonstrates the devastating impact of a child with disabilities being denied early intervention services.

The failure to provide access to the NDIS for long-term residents like Mayley Goble is an example of sustained, institutional neglect which has long-term impacts, particularly on children with disabilities.

(a) Neglect of Culturally and Linguistically Diverse (CALD) Communities

It has persistently been shown that CALD communities employ lower use of disability services than non-migrant Australian populations, and that this discrepancy is *not* attributable to migrants having lower levels of disability than the general Australian population.[173] The National Disability Insurance Agency (NDIA) noted this diversity within Australia, including the fact that 26% of Australians were born overseas, and sought to establish a strategy specific to these groups' needs.[174]

The strategy acknowledged the importance of 'break[ing] down any barriers to accessing the NDIS for people from CALD backgrounds.'[175] It also highlighted

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168 Federation of Ethnic Communities' Council of Australia, National Ethnic Disability Alliance, Refugee Council of Australia, and Settlement Council of Australia, *Barriers and Exclusions: The support needs of newly arrived refugees with disability* (Report, February 2019) 20-21 (*'Barriers and Exclusions'*).

169 *Australian Citizenship Act 2007* (Cth), s 12 (1) (b).

170 Stefan Armbruster, 'New Zealanders with disability in Australia are being treated as "second class"', *SBS News* (online, 28 February 2020) < https://www.sbs.com.au/news/new-zealanders-with-disability-in-australia-are-being-treated-as-second-class>.

171 Ibid.

172 Ibid.

173 Settlement Services International, *Still outside the tent: Cultural diversity and disability in a time of reform – a rapid review of Evidence* (Occasional Paper No 2, October 2018), 12 *('SSI Report')*.

174 National Disability Insurance Agency, *Cultural and Linguistic Diversity Strategy 2018* (NDIS Strategy, 2018) 3.

175 Ibid, 9.

'engagement' and increasing accessibility of information as areas of priority for the NDIS.[176] However, as the *Barriers and Exclusions* report notes, this strategy is ineffective because the NDIA has failed to commit funding to, or take steps to implement, greater engagement with refugee and migrant communities.[177] Recent data collected by Settlement Services International suggest that, if there are similar rates of disability in CALD and non-migrant populations in Australia, it is to be *expected* that over 25% of NDIS participants would be from a CALD background (that is, the equivalent to their proportion of the Australian population).[178] In reality, only around one-third of persons with disabilities from CALD backgrounds who are eligible for the NDIS actually participate in the scheme.[179] The Productivity Commission's concerns about lack of knowledge about disability support services prior to the introduction of the NDIS, seems to persist for CALD migrants.

The insidious long-term impacts of these deficits are both evident in the Case Study for this part.

D COVID-19 AND ENTITLEMENTS

The neglect of migrants with disabilities who lack community support has been exacerbated by the COVID-19 pandemic, and by their continued inability to access entitlements.

3.7. Inability to Access Government Support

(a) New Zealand Citizens

As highlighted above, only Protected SCV holders are available for the full range of government support in Australia – including Job Seeker and Job Keeper in the pandemic.[180] Non-protected SCV holders are still residentially eligible for Job Keeper, but not for other entitlements. Examples in the media have highlighted the concerning impacts that this has had on New Zealand citizens, including SCV holders who: have experienced homelessness multiple times, are unable to work because of injury and cannot receive support, and serious mental health impacts.[181]

(b) Temporary Visa Holders

Temporary visa holders, including migrant workers, international students, SHEV and TPV holders, are excluded from government support payments such as the

176 Ibid 15-16.
177 *Barriers and Exclusions* (n 40) 20.
178 *SSI Report*, 13-14.
179 Ibid, 14.
180 Department of Home Affairs, 'Frequently Asked Questions', *COVID-19 and the border* (Web Page, 19 May 2020) https://covid19.homeaffairs.gov.au/frequently-asked-questions.
181 Myjanne Jensen, 'Coronavirus has exposed the silent struggle of New Zealanders living in Australia', *ABC News* (online, 31 March 2020) <https://www.abc.net.au/news/2020-03-31/new-zealanders-living-in-australia-silent-struggle-coronavirus/12060174>.

JobKeeper and JobSeeker payment during the pandemic.[182] No exceptions have been made for temporary visa holders with disabilities. A large – scale survey of over 5000 temporary visa holders conducted by UnionsNSW in March and April found that 65% of participants lost their jobs, 39% can't afford basic living expenses, 43% regularly skipped meals and 34% were either already homeless or facing imminent eviction.[183] Not only were the temporary visa holders denied access to government support, they were consistently told by the government to go home if they couldn't support themselves in Australia.[184] In contrast, temporary visa holders in similar situations in the UK, Canada and New Zealand, are offered financial support equivalent of the JobKeeper payments during the pandemic.[185]

(c) Restrictions, Vulnerabilities and Long-Term Impacts

While physical distancing and other lockdown restrictions to control COVID-19 outbreaks have applied across the Australian population, certain measures that were undertaken, combined with a lack of support, have led to a disproportionately negative impact on migrants with disabilities. This is reflective of a broad pattern of neglect of migrants with disabilities throughout the pandemic and how trauma, as one example, can be exacerbated by this disregard of their intersecting needs.

A recent example was the sudden lockdown of nine public housing towers in Melbourne[186] which lasted for two weeks, and commenced prior to further restrictions being implemented on the whole of Victoria.[187] The residents of these towers were reported to have particular vulnerabilities, including ninety of the residents being

182 Department of Home Affairs above n *.

183 Laurie Berg and Bassina Farbenblum, '"I will never come to Australia again": new research reveals the suffering of temporary migrants during the COVID-19 crisis' *The Conversation* (online, 17 August 2020) <https://theconversation.com/i-will-never-come-to-australia-again-new-research-reveals-the-suffering-of-temporary-migrants-during-the-covid-19-crisis-143351>.

184 Department of Home Affairs (n 4).

185 Morris (n 53).

186 Biwa Kwan, 'Concern for vulnerable residents in Melbourne public housing towers in 'hard lockdown' as coronavirus spreads' *SBS News* (online, 4 July 2020) <https://www.sbs.com.au/news/concern-for-vulnerable-residents-in-melbourne-public-housing-towers-in-hard-lockdown-as-coronavirus-spreads>.

187 'The 'traumatising' coronavirus lockdown of Melbourne's last public housing tower has ended' *SBS News* (online, 19 July 2020) <https://www.sbs.com.au/news/the-traumatising-coronavirus-lockdown-of-melbourne-s-last-public-housing-tower-has-ended>.

NDIS recipients,[188] 'people experiencing severe mental illnesses,'[189] migrants, refugees and people from non-English speaking backgrounds.[190]

The public housing lockdown is currently being investigated by the Victorian Ombudsman.[191] Community legal centres who have made submissions have highlighted the distress the experience caused, which is especially concerning for migrants with pre-existing experiences of trauma[192] and potential long-term impacts.

188 Paul Osborne, 'NDIS access to Vic lockdown towers ensured', *Australian Associated Press* (online, 8 July 2020) <https://www.aap.com.au/ndis-access-to-vic-lockdown-towers-ensured/>.

189 Calla Wahlquist and Margaret Simons, 'Melbourne's 'hard lockdown' orders residents of nine public housing towers to stay home as coronavirus cases surge', *The Guardian* (online, 4 July 2020) <https://www.theguardian.com/world/2020/jul/04/melbournes-hard-lockdown-orders-residents-of-nine-public-housing-towers-to-stay-home-as-coronavirus-cases-surge>.

190 Glenn – the Census Expert, 'The challenges of COVID-19 in public housing towers', *id The Population Experts* (Blog Post, 6 July 2020) <https://blog.id.com.au/2020/population/demographic-trends/the-challenges-of-covid-19-in-public-housing-towers/>.

191 'Update on Ombudsman's investigation into public housing lockdown', *Victorian Ombudsman* (Web Page, 18 August 2020) < https://www.ombudsman.vic.gov.au/our-impact/news/update-on-ombudsmans-investigation-into-public-housing-lockdown/>.

192 Jason Om, 'Coronavirus hard lockdown of Melbourne public housing towers left residents feeling like 'criminals', inquiry hears' *ABC News* (online, 25 August 2020) <https://www.abc.net.au/news/2020-08-25/coronavirus-melbourne-public-housing-tower-shutdown-inquiry/12589372>.

CONCLUSION

By denying access to social security for an extended period, waiting periods, specifically the ten-year-rule, have created a problem of the institutional neglect of migrants with disabilities. This lack of financial support, even for those who are permanent residents whose lives are in Australia, is systemically exclusionary, and limits the independence and autonomy of migrants with disabilities to participate in society.

The inability of TPV and SHEV holders to access the NDIS, and most social security payments, also constitutes neglect of these refugees' needs and limits their participation in society. The failure to provide SCV holders with disabilities with social security, in spite of them contributing to Australia's economy and being tax residents, reflects both neglect and exploitation.

The above comparisons of different migrants' entitlements demonstrate the systemic neglect of migrants as a whole, in accessing the disability support services provided by the NDIS. Such neglect also arises with regards to the waiting period for the disability support pension; New Zealand citizens who are not Protected SCV holders; and long-term temporary migrants who are TPV and SHEV holders.

RECOMMENDATIONS:

1. Repeal, or at least significantly reduce, the ten-year waiting period for the Disability Support Pension
2. Provide access to minimum essential support services for temporary visa holders with disabilities, especially children
3. Prioritise outreach to people with disabilities from culturally and linguistically diverse backgrounds and improve availability and accessibility of disability services
4. Improve NDIS plans in catering for the holistic needs of persons with disabilities from CALD backgrounds.

PART IV: 'CRIMMIGRATION' LAW AND DISABILITY

Australian law, policy and practice has become increasingly uncompromising in recent years in the treatment of non-citizens deemed to be of bad character because of their criminal behavior or other conduct deemed unbecoming. We question the propriety of expelling non-citizens who have spent most or all of their lives in Australia, most particularly where the non-citizens in question have disabilities and/or come from countries where return would cause disproportionate harm or constitute *refoulement* under international law.

Using three case studies as examples, we argue that the scheme for removal of 'character concern' non-citizens who have applied for protection visas is woefully unfit for purpose. When a visa is cancelled by the Minister under s 501 of the *Migration Act 1958* (Cth) ('Act'), the visa holder is barred from applying for any other visa except a protection visa. However, character considerations also condition protection visa processes, with no concession made for disabilities. In the result 'character concern' non-citizens who are also persons with disabilities are being detained sometimes in excess of 10 years.

The failure to accommodate persons with disabilities includes situations where a person's refugee background and/or treatment by Australia lead to psycho-social illness which can manifest in disruptive behaviours. While some individuals have won release from detention following judicial review of their cases, the case studies suggest that little or no regard is given to findings by UN Human Rights mechanisms that Australia is in breach of its human rights obligations.

A VISA CANCELLATIONS AND DISABILITY

4.1. Outline of the problem

In this section we examine the intersection in Australia between criminal law, disability and immigration law. The sovereign right of any country to expel or exclude recently arrived non-citizens who pose a threat to the community is beyond dispute. However, the propriety of expelling non-citizens who have spent most or all of their lives in Australia is less clear-cut. This is particularly the case when the non-citizens in question have disabilities and/or come from countries where return would cause disproportionate harm or constitute *refoulement* under international law.

The justice of Australia's uncompromising approach may also be questioned where non-citizens have come to Australia as asylum seekers or refugees and the criminal behavior triggering visa cancellation results from untreated psycho-social disabilities. The injustice is particularly stark where underlying psycho-social disabilities have been caused by either their experience as refugees before coming to Australia or by their experiences in Australia. The harms caused by prolonged immigration detention and by the corrosive uncertainty of temporary protection visas and offshore processing are considered in Parts 5, 6, 7 and 8 of this submission.

Current law and policy settings in Australia mean that non-citizens with disabilities convicted of a crime risk 'double punishment', a situation that can result in both neglect and abuse. First, non-citizens with disabilities are incarcerated in punitive institutions when better outcomes would be achieved through treatment or accommodation of their disability in non-punitive environments. In this sense the non-citizen offender is failed by the system in the same way as many citizens with disability are failed.[193] Second, non-citizens face literal 'double punishment'. Upon release from prison, many non-citizen convicts are now taken straight into immigration detention from whence the process of (permanent) exile from Australia is effected.[194] For non-citizens who have been in Australia on temporary visas for short periods, expulsion may raise few concerns. However, as policy has evolved through the past three decades towards more punitive settings, non-citizens who have spent all, or virtually all, of their lives in Australia now face the threat of removal. Sometimes, most particularly where psycho-social disability is involved, these people may be unaware that they are not citizens.

Further, stateless persons who came to Australia as refugees and have no other country to which they can be safely returned, face indefinite detention. As legal processes grind on, including attempts to find a country that will receive them, these 'criminal deportees' can face years of uncertainty if not indefinite detention. Again, the carceral experience will be shown to be intrinsically harmful, resulting in deaths and the acquisition or exacerbation of disabilities.

Another issue that has emerged in very recent times is that the the scheme for removal of 'character concern' non-citizens who have applied for protection visas is woefully unfit for purpose. When a visa is cancelled by the Minister under s 501 of the *Migration Act 1958* (Cth) ('Act'), the visa holder is barred from applying for any other visa except a protection visa. The problem is that character considerations also condition protection visa processes, with the result that 'deportee' asylum seekers can find themselves in indefinite detention in a system that is indeed well-described as Kafkaesque.[195]

Where asylum seekers have entered Australia by boat without authorization, the law has become increasingly punitive. Individuals have faced years in detention centres in Australia or overseas, often in conditions described by UN authorities as cruel and

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[193] See Human Rights Watch *Australia: Deaths of Prisoners with Disabilities,* 15 September 2020, available at: https://www.hrw.org/news/2020/09/15/australia-deaths-prisoners-disabilities. Their research suggests up to 70% of indigenous persons incarcerated as a result of criminal activity have been persons with disability.

[194] See *Migration Regulations* 1994, Sch 5, Item 5001; and Michael Grewcock, 'Punishment, deportation and parole: the detention and removal of former prisoners under section 501 Migration Act 1958', (2011) 44 *Australian and New Zealand Journal of Criminology* 56-73.

[195] See Satvinder S Juss, 'Detention and Delusion in Australia's Kakfaesque Refugee Law'. (2017) 36(1) *Refugee Survey Quarterly* 146.

inhumane.[196] Where detainees have succumbed to mental illness and engaged in destructive behaviour in detention centres (or in the community after release), they have often been met with a criminal justice response.[197] A number of the case studies in this part demonstrate the human impact of criminalizing behaviours that are then used to instigate a cycle of visa cancelation, incarceration and (where this is even possible) removal.

Australia's criminal deportation scheme has a dual purpose of protecting the community from criminal non-citizens '*while ensuring that Australia fulfills its international and humanitarian obligations towards these non-citizens and their families*'.[198] As a party to the Convention on the Rights of persons with Disabilities[199] (CRPD), Australia's obligations with respect to persons with disabilities on its territory or under its control are not limited to citizens.[200] We will argue that the human impact of Australia's criminal deportation laws breach various aspects of this convention as well as other human rights instruments. This breach of international and humanitarian obligations towards non-citizens particularly affects the most vulnerable non-citizens with disabilities.

This part of the submission begins with an overview of how the Minister's deportation powers under the Act have affected more and more long-term permanent residents with disabilities, including those from refugee backgrounds. There follows a series of case studies that illustrate ways in which laws, policies and practice result in the neglect and abuse of migrants with disabilities who should rightly be Australia's responsibility.

4.2. Legislative Framework

Evolution of current laws

A central tenet of the 'crimmigration' approach[201] is that where a non-citizen commits a serious crime, it is assumed that that person will become subject to removal or deportation.[202] There are aspects of Australia's colonial history that have complicated this narrative, however. The failure to enshrine Australian citizenship in the Constitution has meant that, over time, there have been persons who are not

[196] See further Part 7 of this submission.
[197] See ss 197A and 197B of the Act.
[198] Joint Standing Committee on Migration, The Parliament of the Commonwealth, *Deportation of Non-Citizen Criminals,* (Final Report, June 1998), iii.
[199] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD).
[200] See above, Part 1 at note 14.
[201] See Peter Billings (ed) *Crimmigration in Australia: Law, olicitics and Society* (London: Springer, 2019).
[202] Australia's immigration legislation has always provided for the removal of persons convicted of criminal offences. See *Immigration Restriction Act 1901* (Cth), s 3, definition of 'prohibited immigrant', read with s 8; and the *Pacific Islanders Labourers Act 1901* (Cth). For a discussion of the early deportation laws, see Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (Sydney: UNSW Press, 2007) Chs 1 and 2; and Mary Crock and Laurie Berg *Immigration, Refugees and Forced Migration* (Sydney: Federation Press, 2011), Ch 17.

naturalized Australians, or citizens, who are yet regarded as being beyond the Federal deportation power. British subjects, Irish nationals and 'protected persons' enjoyed special privileges if not outright immunity from expulsion or exclusion on grounds of criminality.[203] Although the concept of citizenship has slowly become more of a binary concept for deportation purposes,[204] as recently as 2020, the High Court in the decisions of Love v Commonwealth and Thoms v Commonwealth[205] ruled that non-citizens of indigenous Australian heritage enjoy a special status that makes them constitutionally immune to deportation.

It is beyond the scope of this submission to provide an exhaustive account of how the law governing the removal of non-citizens convicted of crimes have changed over the years. It suffices to note that this area of migration law has become increasingly extreme in two respects, both of which reflect the political sensitivity of the subject. First, politicians have increasingly subscribed to a view that a 'tough on crime' approach should be reflected in zero tolerance of 'bad aliens'. Successive governments have seen electoral benefit in producing ever more stringent policies for offences involving drugs; sexual assault (particularly of children); groups like motorcycle gangs thought to be socially disruptive; people smuggling; and anything associated with 'terrorism'.[206]

The second way in which 'crimmigration' law has become a legal fault line is in the battle royale that has played out in the courts over who should determine whether an individual should be allowed to enter or remain in Australia. For every tightening of deportation policy, parallel statutory developments have been introduced that are designed to render the administrative decisions made by the Minister and immigration officials outside the scope of judicial oversight.

As politicians saw electoral gain in being tough on criminal migrants, the idea of using citizenship and alienage as binary concepts took hold. Opposition and minor parties have struggled ever since to find electoral traction in suggesting restraint and fairness in this area. The result is legislation that is breathtaking in its complexity and potential to shatter lives. [207]

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[203] For a discussion of this history, see Nicholls, ibid; Crock and Berg, ibid, Chs 2, 3 and 17; and Michael Grewcock, 'Punishment, deportation and parole: the detention and removal of former prisoners under section 501 Migration Act 1958', (2011) 44 *Australian and New Zealand Journal of Criminology* 56-73.

[204] See. For example, *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

[205] [2020] HCA 3.

[206] Peter Billings and Khanh Hoang, 'Characters of Concern or Concerning Character Tests?', in Billings, (above n 9), Ch 6.

[207] See generally: Khanh Hoang, 'The Rise of Crimmigration in Australia: Importing Laws and Exporting Lives', in *The Palgrave Handbook of Criminology and the Global South,* eds. K. Carrington et al. (Palgrave Macmillan, 2018) Michael Grewcock, 'Reinventing "the Stain" – Bad Character and Criminal Deportation in Contemporary Australia', in *Routledge Handbook on Crime and International Migration*, ed. Sharon Pickering and Julie Ham (Abingdon: Routledge, 2014).

Since 1999 the Minister has been empowered to elect to cancel visas with or without observing the 'rules of natural justice'.[208] The cancellation edifice has been complicated over the years with: the addition of special provisions for certain protection visa applicants;[209] the specification that visas must be cancelled in some instances (usually without the right to natural justice); and provisions that allow for both the revocation of the mandatory cancellation of a visa and the Ministerial override of a decision to revoke the mandatory cancellation of a visa.

Under s 501(2) of the Act, the Minister (or a ministerial delegate)[210] has the discretion to cancel a visa if the Minister 'reasonably suspects' that the person does not pass the 'character test' and the person 'does not satisfy the Minister' that they pass the 'character test'.[211] This places the onus on the non-citizen to prove that he or she is, in fact, a person of good character. Sub-section 501(6) provides that a person fails the character test if they fit any of the criteria listed, with the primary focus placed upon an individual's propensity to be involved in criminal offending. This includes consideration of a person's past and present criminal conduct; association with others reasonably suspected of being involved in criminal conduct; and the risk of engaging in future criminal conduct if allowed to remain in Australia.[212] However, s 501(3A) mandates that the Minister must cancel an existing visa where the visa holder-has been sentenced to a custodial sentence of 12 months' duration or more, or has been found guilty of a sexual crime involving a child.[213]

Following the introduction of s 501(3A) of the Act in 2013 the number of visa cancelations increased by over 1,240 percent.[214] At the same time, the length of time that individuals were being held in detention also increased dramatically. [215]

The policies underpinning visa cancellation laws have also become increasingly sophisticated – and prescriptive – over the years. As a result, departmental officials have had their discretion to humanely deal with difficult cases progressively reduced. At the same time, Ministers have become increasingly 'hands-off' in their approach to character cancellation cases. This is reflected in both the overall increase in deportations and the type of cases 'going through to the keeper'. Put simply, there seems to have been an exponential rise in the number of migrants with disabilities who are being arrested, detained and removed on 'character grounds' in

[208] See s 501 of the Act.
[209] SHEV provisions in s 501A of the Act. It is beyond the scope of this submission to discuss these provisions.
[210] See s 496 of the Act.
[211] See s 501(2) of the Act.
[212] See ss 501(6)-(8) of the Act.
[213] See s 501(3A) of the Act.
[214] Australian Government, 'Key Visa Cancellation Statistics', *Department of Home Affairs* (Web Page, 14 August 2020) < https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>
[215] See RCOA, 'Statistics on people in detention in Australia' (Blog post, 28 September 2020). See the discussion in Part 6 of this submission.

circumstances that in earlier times would have attracted a more compassionate response.

Ministerial Direction 79 sets out the factors to be taken into account in deciding to cancel a visa under s 501.[216] The direction is not binding upon the Minister who has an overarching power to make decisions personally.[217] Primary considerations emphasise the protection of the Australian community from criminal conduct; whereas the 'strength, nature and duration' of the visa-holder's ties to Australia; the extent of any impediments the visa-holder may face if deported to their home country; and Australia's international non-refoulement obligations are all categorised as 'other' considerations.[218]

Significantly, neither Ministerial Direction 79 nor the Act itself make any reference to disability as a consideration to be taken into account. Ministerial Direction 79 states that 'primary considerations should be generally given more weight than other considerations'.[219] It continues: 'in circumstances where criminal offending...may be so serious that any risk of similar conduct in the future is unacceptable even other strong countervailing considerations will be insufficient to justify not cancelling the visa'.[220]

The application of s 501 to long-term residents has been widely criticised, including by the Senate Legal and Constitutional References Committee, the Commonwealth Ombudsman, the Australian Human Rights Commission, and by various members of the Federal Court of Australia.[221] Foster argues that 'the idea that criminal activity is indicative of non-absorption [into the Australian community] is difficult to sustain'.[222] She writes:[223]

Given that many long-term residents could be said to be products of their life in Australia, particularly in the case of persons who immigrated to Australia under the age of criminal responsibility and have therefore spent their formative years in Australia, the better view is that they are 'member[s] of society who ha[ve] committed offences'[224] and as such their banishment is best understood as an attempt to 'export' [our] problems elsewhere'[225]

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[216] See *Direction No.79 - Migration Act 1958 - Direction under s 499 - Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (20 February 2018) ('Ministerial Direction 79').
[217] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, [6] (Allsop CJ and Katzmann J).
[218] See Ministerial Direction 79 (n 23) Part A.
[219] Ministerial Direction 79 (n 23) para 8(4).
[220] Ibid para 6.3(4).
[221] Michelle Foster, 'An "Alien" by the Barest of Threads – The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33(2) *Melbourne University Law Review* 483, 486.
[222] Ibid, 500.
[223] Ibid.
[224] Ibid, citing *Hollis* (2003) 202 ALR 483, 491 (Lee J).
[225] Citing *Nystrom (Full Court)* (2005) 143 FCR 420, 430 (Moore and Gyles JJ).

B DEPORTATION, DISABILITY AND INTERNATIONAL LAW

4.3. Disability and refugee protection (non-refoulement obligations)

Amendments to the *Migration Act* dating back as far as 1994 have tried to create a system where legal entitlements are determined at the point of finalizing a person's status: that is, deciding eligibility for a visa and/or deciding to cancel a visa. The post-decision consequences of refusal or cancellation are automated in that unlawful non-citizens must be detained and removed from the country as soon as practicable.[226] Section 197C of the Act underscores the primal focus on visa entitlement where it states that Australia's *non refoulement* obligations are not to be considered in the process of removing a non-citizen from Australia. In practice, this regime has resulted in unconscionable delays in the finalization of decisions in cases where it is clear that Australia's *non-refoulement* obligations are engaged, yet officials are reluctant to condone criminal or risky behaviours by conferring or reinstating a visa.

In *BAL19 v Minister for Home Affairs*,[227] Rares J ruled that character issues could not be used to qualify protection obligations that Australia may owe to a non-citizen seeking asylum. Specifically, he found that persons seeking temporary protection visas under s 36 of the Act were protected from visa cancellation or refusal on character grounds under s 501 because the criteria in this section are inconsistent with s 36 of the Act. Under s 36(1C), a person is eligible to be granted a protection visa as long as he or she is not a person whom the Minister considers, upon objectively reasonable grounds, to be a *danger to the Australian community* on the basis that they have been convicted of a particularly serious crime. In contrast, s 501(6)(d)(v) provides that a person will not pass the s 501 character test if there is a *risk* that he or she would represent a danger to the Australian community.

BAL19 has not been followed in subsequent cases. The Full Federal Court has now held that, in fact, the character grounds under s 501 *can* be relied on by the Minister to cancel even a protection visa.[228] The Court ruled that the words in s501 are unqualified; the section is expressed as a general provision (broadly, to refuse, grant or to cancel a visa on character grounds) applicable to all kinds of visas.[229] The decision in *BFW20* means that an increasingly discretionary and far less stringent character test can now be applied even to those seeking protection visas. This places at unacceptable risk of harm, in the form of indefinite detention and even refoulement, refugees, asylum seekers, those seeking Australia's protection on compassionate or humanitarian grounds. It includes, most particularly, those with the added vulnerability of disability.

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[226] See ss 189 and 198 of the Act.
[227] *BAL19 v The Minister for Home Affairs (the Minister)* [2019] FCA 2189 (Rares J) ('*BAL19*').
[228] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A* [2020] FCAFC 121 (*BFW20*), [160].
[229] *BFW20*, [121].

BAL19 is the first of the three case studies we provide that concern individuals with various disabilities who have fallen foul of the character provisions of the Act in the context of applying for protection as refugees. Of broader concern is the extent to which decision makers should be required to consider *non-refoulement* obligations in the context of determining whether or not an individual should be removed under s 501. A case in which such issues arose is that of Mr Omar, a former child soldier with an intellectual disability and schizophrenia who came to Australia as the dependant of his aunt at the age of 15.[230] The Minister cancelled Omar's visa under s 501(3A) on the basis that he had a 'substantial criminal record', having been sentenced to 12 months in prison for breaching a community correction order. Omar applied for the revocation of the mandatory cancellation order under s 501CA(4), arguing that his return to Somalia would have resulted in brutal and dehumanizing treatment because of his mental disability. The Assistant Minister rejected the application, reasoning that consideration of *non-refoulement* obligations could be deferred until such time as Mr Omar made a separate application for a protection visa.[231] In the result, the Full Court did not decide this issue directly. Rather, it found at [34]-[37] that the Assistant Minister had committed a jurisdictional error by failing to give 'proper, genuine and realistic consideration' to the matters raised by Mr Omar. The Court said:

> 38. In short, … the Assistant Minister has to take responsibility for what he is doing. This responsibility has both a political and a legal dimension.
>
> 39. Giving meaningful consideration to a clearly articulated and substantial or significant representation on risk of harm independently of a claim concerning Australia's *non-refoulement* obligations, requires more than the Assistant Minister simply acknowledging or noting that the representations have been made. Depending on the nature and content of the representations, the Assistant Minister may be required to make specific findings of fact, including on whether the feared harm is likely to eventuate, by reference to relevant parts of the representations in order that this important statutory decision-making process is carried out according to law (see *Ezegbe v Minister for Immigration and Border Protection* [2019] FCA 216 at [32]- [36] per Perram J).
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> 40. That is particularly the case here where representations were clearly made on the respondent's behalf on a significant matter, namely the risk of harm (and serious harm) if the respondent was returned to Somalia given his individual circumstances and the treatment of persons with mental illness in that country. It is difficult to think of a more serious claim than that a person is at risk of harm because it was likely that the person would be chained, imprisoned and at risk of physical injury because of Somalia's treatment of the mentally ill, which claim was supported by the WHO 2010 report. As Robertson J stated in *DOB18* at [190] (with whom Logan J agreed), "the nature and content of submissions made to the Minister" in

[230] See *Minister for Home Affairs v Omar* [2019] FCAFC 188.

[231] This reasoning was also used in the case of *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89. *Omar's case* was heard by a bench of five judges in an effort to settle this question.

> support of a revocation request under s 501CA(4) is relevant. There had to be an active intellectual engagement with the matters raised on the respondent's behalf relating to the risk of harm.

The Court was persuaded by the fact that the Assistant Minister had failed to make findings in respect of the claim that the mentally ill are generally chained and imprisoned in Somalia, and that his dismissive reference to this information was attributed to the wrong source (see [43]). The Court was not prepared to go further and rule that *non refoulement* obligations are mandatory relevant considerations in any determination of s 501 cancellation decisions. The reticence shown by the bench of five judges demonstrates the political pressure that persists in this area of migration law.

In *Omar's* case, as in *BAL19*, success before the courts resulted ultimately in release from immigration detention. As the three Case Studies demonstrate, however, applications for judicial review and even successful complaints to UN human rights bodies are not always effective in securing the release of 'character concern' non-citizens. Some of those detained for the longest periods have not even been convicted of any actual crimes.

4.4. Deportation and disability generally

If the removal of criminal non-citizens who have grown up in Australia is troubling, the fact that many of the offenders sent into exile have suffered from intellectual, physical and psychosocial disabilities raises real questions about Australia's compliance with its international obligations. Crock and Berg wrote in 2011: [232]

> A great many of the very long-term residents deported or removed from Australia in recent years appear to have been suffering from mental illnesses.233 In December 2009, 43-year-old Andrew Moore, who came to Australia at the age of 11, was removed to Britain following cancellation of his visa under s 501. Described as a recovering alcoholic – 'his body racked by a failing liver, hepatitis C, fibromyalgia and bowel problems' – Moore died of unexplained causes within three days of his arrival in London.234 If the policy directives have changed, this is not immediately apparent in the decisional outcomes.

As a signatory to the CRPD, Australia has an obligation to protect the fundamental human rights and freedoms of *all* persons with disability.[235] Article 16 of the CRPD requires signatories to:

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[232] See The Deportation of Permanent Residents: Character, Conduct and Criminality in Crock and Berg, above n10, [17.03].

[233] See, for example, the cases of Stefan Nystrom, Robert Jovicic and others discussed by Nicholls, above n 1, Ch 10 (at 150ff).

[234] See Joel Gibson, 'Deported, ill … and dead days later', *Sydney Morning Herald*, 7 December 2009, at 1.

[235] CRPD, Art 16. On this point, see Mary Crock et al, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (London: Elgar Publishing, 2017), 26 ff.

> Take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.[236]

The current legislative framework under s 501 of the Act is indirectly discriminatory towards non-citizens with a disability, as adequate attention has not been given to the impact of disability on the behavior of the visa-holder. This will become increasingly obvious in the case studies that follow.

Ministerial Direction 79 invites decision-makers to consider the 'extent of any impediments' on the ability of a non-citizen to maintain an 'adequate standard of living' once deported to their country of nationality, including any 'social, medical and / or economic support available to them in that country.237 However, when cancelling a visa, there is no requirement for the Minister or their delegate to assess the extent to which disability may have contributed to the non-citizen's offending, and thus may mitigate the seriousness of the crime and risk of recidivism.

A person will not pass the character test if the person has a 'substantial criminal record'. This includes circumstances where the person has been found by the court to be 'not be fit to plead' or has been 'acquitted of an offence on the grounds of unsoundness of mind or insanity' and has been detained in a facility or institution as a result.238 Article 14 of the CRPD enjoins state parties to ensure that persons with disabilities enjoy the right to liberty and security of the person on an equal basis with others. 239 Paragraph (1)(b) prohibits arbitrary detention and states that 'the existence of a disability shall in no case justify a deprivation of liberty.'240

It is our submission that the character test in s 501(6) of the Act as extrapolated in its subordinate legislation and applied through ministerial directions, contravenes Art 14 of the CRPD because it actively discriminates against non-citizens with psycho-social disability. Although it involved quite different facts, it is worth noting that the CRPD upheld a complaint against Australia in Noble v Australia241 in circumstances where an 'unfit to plead' process resulted in much longer periods in prison than would have been the case if the individual was convicted and sentenced for a criminal offence.

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[236] United Nations General Assembly, *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, United Nations, Treaty Series vol.999 p.3 (entered into force 3 May 2008) art 16(1)

[237] Ministerial Direction 79 (above, n 23), para 10.5.

[238] See ss 501(7)(e)-(f) of the Act.

[239] See Anna Lawson, 'Disability equality, reasonable accommodation and the avoidance of ill-treatment in places of detention: the role of supranational monitoring and inspection bodies', (2012) 16 *International Journal of Human Rights* 845-864.

[240] United Nations General Assembly, *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, United Nations, Treaty Series vol.999 p.3 (entered into force 3 May 2008) art 14(1)(b)

[241] The Committee on the Rights of Persons with Disabilities, *Views; Communication No. 7/2012,* 16th sess, UN Doc CRPD/C/16/D/7/2012, (2 September 2016) (*Noble* v *Australia*). The case involved an indigenous man from Western Australia who was charged with sexual offences involving children. He was taken into custody after pleading unfit to plead and ended up spending over 10 years in custody.

The Committee found that the process contravened Art 14 because it actively discriminated against persons with disabilities.242

Australia's unfitness to plead regimes have been an issue for both the CRPD Committee and for the United Nations Human Rights Council in the Universal Periodic Review (UPR) process. In response to comments by the CRPD Committee in 2013 243 and the UPR Report on Australia in 2016244 the Australian government released national 'principles' on the treatment of persons who are unfit to plead or who are found not guilty by virtue of mental impairment.245

Long-term residents whose visas are cancelled on character grounds may be deported to a country where they have spent little time (or never lived), where they do not speak the language, and where they do not have family or social support.246 These issues are exacerbated for persons with a disability, and it is reasonable to consider that a 'right to life' obligation may be enlivened where a via-holder has a serious disability that could not be treated adequately in the receiving country,247 or worse, where the visa-holder would face persecution as a direct result of their disability.

The different conventions to which Australia is party that are relevant in the case of criminal deportations are discussed in Part 1 of this submission. The government emphasized its commitment to 'ensuring that no one in Australia is deprived of their liberty on the basis of their disability' in its 2018 CRPD report. 248 However, whether this commitment is being realized in practice is highly debatable.

Cases like that of Mr Omar (discussed earlier) and Mr Hussein (Case Study 2) demonstrate that individuals found unfit to plead can find themselves in immigration

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242 Ibid, [8.4]. See also The Committee on the Rights of Persons with Disabilities, *Views; Communication No.17/2013,* 22nd sess, UN Doc CRPD/C/22/D/17/2013 (30 August 2019) (*Leo v Australia*); and The Committee on the Rights of Persons with Disabilities, *Views; Communication No.18/2013,* 22nd sess, UN Doc CRPD/C/22/D/18/2013 (30 August 2019) (*Doolan v Australia*) which involved similar complaints about unfit to plead laws in the Northern Territory. In these cases the Committee added that such laws also contravene the general non-discrimination provision in the CRPD.

243 The Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia,* 10th sess, UN Doc CRPD/C/AUS/co/1, 21 October 2013, [30] & [32].

244 Attorney-General's Department, Commonwealth, *Australia's Universal Periodic Report to the Human Rights Council,* UN Doc A/HRC/WG.6/23/AUS/1 (7 August 2015)

245 Council of Attorneys-General, *National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment* (2016). Available online: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/national-statement-of-principles-relating-to-Persons.aspx>, p.2

246 Australian Human Rights Commission, Submission No 11 to Joint Standing Committee on Migration, *Inquiry into Review processes associated with visa cancellations made on criminal grounds* (27 April 2018), para 70.

247 Commonwealth Ombudsman, Department of Immigration and Multicultural Affairs, '*Administration of s 501 of the Migration Act 1958 as It Applies to Long Term Residents*' (February 2006) 27 [3.43].

248 Attorney-General's Department, Commonwealth, *Combined Second and Third Periodic Reports Submitted by Australia under article 35 of the Convention,* UN Doc CRPD/C/Aus/2-3, 7 September 2018 [183]-[186].

detention and at risk of removal without having been convicted of a 'deportable' crime. Moreover, their detention has been for periods as extreme as that seen in the Noble case. The excoriating effect of that incarceration is the subject of Part 5 of this submission.

Case study 1: Premakumar Subramaniyam (BAL19 v Minister for Home Affairs [2019] FCA 2189)

This case concerned an application for a temporary protection visa (subclass 785) by a Sri Lankan national of Tamil ethnicity ('the Applicant') who arrived in Australia by boat on 20 March 2010. He was held in detention for over 9 years, winning release after the judgement of Rares J in 2019. The Applicant has had and continues to have serious physical and mental health issues, including an eye condition (congenital nystagmus) that renders him legally blind. The application for the temporary protections visa was refused by the Minister for Home Affairs under s 501(1) of the Act, even though the Minister accepted that Australia owed Mr Subramaniyam non-refoulement obligations. Practically, the Minister's decision subjected the applicant to indefinite detention as he could not be return to Sri Lanka and he also had no rights to enter any other country.

The Minister's Decision

The Minister's decision was based ultimately on two matters. First, the Minister formed the opinion that the applicant presented an unacceptable to risk to the Australian community under s 36(1C)(b) of the Act (see [26]). Second, the Minister rejected submissions that the man's status as a refugee would condemn him to indefinite detention. The Minister's reasons included the following statement at [24]:

> I considered that the above claim in relation to the prospects of indefinite detention does not accurately reflect the legal consequences of a refusal decision according to current case law. Rather, the statutory consequence of a decision to refuse to grant [the applicant] a visa is that, as an unlawful non-citizen, [the applicant] would become liable to removal from Australia under section 198 of the Act as soon as reasonably practicable, and in the meantime, detention under section 189. I am also aware that section 197C of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has international non-refoulement obligations in respect of an unlawful non-citizen.

On the first point, the Minister listed many incidents in which the applicant had been violent during and before the nine years of immigration detention that could have fallen under the meaning of s 501(6)(d)(v) (see [16]). The Minister considered the applicant's submissions that he had been 'diagnosed with a number of complex health issues' including diabetes, nystagmus (leading to his legally blind status), and mental conditions such as chronic post-traumatic stress disorder, acquired brain injury, general psychosis with occasional visual and auditory delusions, situational depression and anxiety, dementia and schizophrenia (see [18]). The Minister even

conceded at [17] that his violent and dangerous acts resulted directly or indirectly from his mental illness, which were exacerbated by the detention environment.

Although the Minister found that the applicant's behaviour had improved over time, and that release from detention combined with the support of family, friends and health services would aid him in his rehabilitation, the Minister was unable to 'exclude the possibility that his mental health might deteriorate again' (see [20]). The Minister had considered the applicant's history of non-compliance with prescribed medication.[249]

To complicate this matter, the Minister accepted that the applicant had a well-founded fear of persecution by the Sri Lankan Security Forces and paramilitary groups if he were deported back to Sri Lanka250. The Minister also found that Australia owed to the applicant international non-refoulement obligations, which would be breached if he were deported back to Sri Lanka. Nor was there the possibility of deporting the applicant to another country. The refusal of a protection visa for the applicant would then mean that he would be placed in indefinite detention.

The Minister also noted that the Australian Human Rights Commission found at [25] that the applicant's continuing immigration detention was 'arbitrary and inconsistent with article 9 of the International Covenant on Civil and Political Rights'.

In this winner-takes-all scenario, the need to protect the Australian community allowed for no concessions to be made for a person with mental disabilities. The Minister concluded at [26]:

> I am cognisant that where significant harm could be inflicted on the Australian community, even strong countervailing considerations are generally insufficient for me not to refuse the visa. In the present circumstances, I found that the risk posed by [the applicant] to the Australian community is unacceptable.

The UN Working Group on Arbitrary Detention

1. The **Working Group on Arbitrary Detention** (WGAD) was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate

[249] The Minister's reasoning here is also reflected in the Ministerial Direction No. 41, given under s 499 of the *Migration Act*. At [10.1.1], the directions include mental health considerations. When a non-citizen fails the character test and he or she has been acquitted on the basis of unsound mind or insanity, the decision maker must consider the person's 'degree of recovery'[249] when assessing the risk of harm to the Australian community. Decision makers must be provided with a mental health report from a qualified professional outlining the nature and extent of any mental impairment. They must also consider the hardship that would be faced by the person or the danger they would pose to others if they were to be removed to a country where they would not have access to treatment. Decision makers are required to consider their reliance on any medications.

[250] *BAL19 v Minister for Home Affairs* [2019] FCA 2189, [24].

of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 30 July 2018 the Working Group transmitted to the Government of Australia a communication concerning Ahmad Shalikhan. The Government replied to the communication on 28 September 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

This matter was referred to the UN Working Group on Arbitrary Detention (UNWGAD) by the applicant's lawyer, Ali Battisson of Human Rights For All. The documentation relating to the complaint is provided for the Commission. It is of note that the response submitted by the government defending the prolonged detention of Mr Subramaniyam makes no mention of his visual disability. The complaint was upheld in 2019.[251]

[251] See https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_1.pdf.

Outcome of the Case

In BAL 19 Rares J found that the case turned on:

> whether the Minister failed to consider and weigh the legal and or practical consequences of removing the applicant from Australia when deciding to refuse to grant him the visa…[252]

His Honour set aside the Minister's decision at [53]-[55] on the basis that the Minister had failed to engage in an 'active intellectual process' and so had made a material error of law. He ruled at [63] and [88] that the character test in s 501 of the Act does not apply to temporary protection visas due to the more restrictive and mandatory criterion under s 36(1C)(b).

Although this ruling did not find support in subsequent cases, it was sufficient to persuade the Minister to release Mr Subramaniyam into the care of his family.

Case study 2: Abdalrahman Hussein (BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 94)

Abdalrahman Hussein was a Syrian man who arrived in Australia by boat on 12 January 2013 and sought protection as a refugee. He was released initially into the community but has been held in detention since suffering a psychotic episode in January 2014. He remains in immigration detention in spite of a WGAD opinion stating that Australia is in breach of its obligations under international law and that the group regards his detention for over 6 years as arbitrary.[253]

The WGAD described the case as follows:[254]

> 6…. on 12 January 2014, Mr. Hussein visited a massage spa. During the massage, he answered a phone call from his brother in Syria who informed him that their mother had been killed in a suicide attack in Syria. Mr. Hussein became very agitated and stopped the massage. He asked for his money to be refunded. When this did not occur, he called the police.
>
> 7. When the police arrived, Mr. Hussein reportedly tried to explain to them why he was so upset. He did not speak English very well at this point, and the police did not understand Arabic. According to the source, the police thus misunderstood that Mr. Hussein was trying to explain that his mother had died in a suicide blast in Syria and instead thought that he was indicating that he

[252] *BAL19 v Minister for Home Affairs* [2019] FCA 2189, [3].
[253] Human Rights Council Working Group on Arbitrary Detention, *Opinion No. 28/2017 Concerning Abdalrahman Hussein (Australia)*, UNHRCWGAD 78th sess UN Doc A/HRC/WGAD/2017/28 (16 July 2017) 6 [41].
[254] Ibid 2–3.

was going to kill himself using a suicide vest. Mr. Hussein was therefore arrested by the police.

8. The source reports that Mr. Hussein was subsequently scheduled for mental health reasons at St Vincent's Hospital, 390 Victoria Street, Darlinghurst, NSW 2010. He was released later that night. On or about 13 January 2014, Mr. Hussein was admitted to Bankstown Hospital 68 Eldridge Rd, Bankstown NSW 2200, for mental health reasons. On or about 15 January 2014, he was released from Bankstown Hospital.

9. …. on or about 3 February 2014, Mr. Hussein was arrested by officials from the Department of Immigration and Border Protection (DIBP) on the basis of a detention order. He was subsequently transferred from an office of the DIBP to Villawood IDC.

10. According to the source, it is Mr. Hussein's understanding that he was detained due to the expiry of his visa. Prior to the expiration date of his visa, Mr. Hussein had reportedly notified the DIEP that his visa was due to expire, but he was told by DIBP to wait for them to renew his visa. Mr. Hussein was informed that this was the usual procedure and that he could remain in the community. He was, however, detained on or about 3 February 2014.

11. It is reportedly further Mr. Hussein's understanding that he remains in detention due to security concerns which the DIBP have surrounding the events on 12 January 2014. However, Mr. Hussein has not been charged with any offence relating to these events.

15… the source reports that Mr. Hussein was interviewed by the Australian Security Intelligence Organisation (ASIO) in December 2015, almost two years after he was detained. The DIBP has reportedly informed Mr. Hussein that they have not received a decision from ASIO regarding his security assessment. Given that ASIO interviewed Mr. Hussein almost two years after his detention and still has not issued an assessment approximately six months after his interview, the source submits that this is an unacceptable period of time.

16. In addition, the Inspector-General of lntelligence and Security (IGIS) has reportedly reviewed the treatment of Mr. Hussein by Australia's security agencies (IGIS is unable to disclose which security agency) and found irregularities (IGIS is unable to disclose what these irregularities are). The source believes that the irregularities relate to the period of time that it took ASIO to interview Mr. Hussein as well as the subsequent delay in producing a security assessment.

This matter was brought to the Federal Court in 2019 where a single judge found no legal error in the man's continued detention.[255] On appeal, the Full Federal Court also

[255] See *BHL19 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCA 929

dismissed the application for judicial review. However, Wigney J offered a vigorous dissent. He wrote (emphasis added):[256]

> 19. …I am, however, unable to agree that the Minister acted reasonably, in the legal sense, in deciding to refuse the appellant's protection visa application on the basis that he did not satisfy the character test in subs 501(6) of the *Migration Act 1958* (Cth).
>
> 20. In his reasons for judgment, the primary judge observed (Judgment at [99]):
>
> > There must be a point at which a perceived risk is so unlikely, or the nature of the risk is so trivial, that a decision to refuse a visa under s 501(1), on the basis that the Minister was not satisfied that a visa applicant passed the character test by reason of s 501(6)(d)(v), would be legally unreasonable in circumstances where the consequences of the decision are of the kind they are here.
>
> 21. His Honour found that this was not such a case. White and Bromwich JJ agree.
>
> 22. I respectfully disagree. In my view this is just such a case.
>
> 23. The flaws and deficiencies in the Minister's reasoning and factual findings concerning the supposed risk that the appellant might pose to the Australian community and **the perfunctory and formulaic consideration that the Minister gave to the harsh and seriously deleterious effect that his decision would have on the appellant** compel me to the conclusion that this decision reached the point of unreasonableness referred to by the primary judge. **Not only that, but when one stands back and considers the appellant's circumstances and the effect of the decision, the conclusion that this decision was plainly unjust and manifestly disproportionate is, in my view, unavoidable**.

His Honour then provided a very detailed account of the incident leading up and subsequent to Mr Hussein's arrest. In Mr Hussein's case, Wigney J found at [42] and [51] that the it was able to be inferred that the Minister requested the police officers who interviewed Mr Hussein to give statements three years to their interviews and intelligence assessments with the detainee for the purpose of deporting Mr Hussein.

Wigney J found the adverse security assessment of Mr Hussein to have little basis in fact: a central question that was not considered by the judges in the majority. In refusing Mr Hussein's visa the Minister pointed to several incidents that occurred in immigration detention during which Mr Hussein made repeated references to his membership in, or willingness to join, extremist organisations (see [53] – [67]. These incidents were central to the Minister's determination, despite being founded on weak evidence or third-hand hearsay. It was readily apparent that the genesis of these incidents, to the extent that they occurred, was the acute bipolar disorder that Mr Hussein was suffering from the start of his detention until in or around April 2015.

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[256] *BHL19 v Minister for Immigration, Citizenship and Multicultural Affairs* [2020] FCA 94 [19]–[23] (Wigney J) ('*BHL19*').

Following treatment and until the date of refusal of a visa on character grounds, 4 February 2019, Mr Hussein became a model detainee (see [78] – [84]).

Mr Hussein remains in immigration detention at time of writing this submission, although he has not been charged with a crime. The reason that he remains in detention, and faces deportation to Syria, is because during a period in which he suffered acute bipolar disorder and had lost his mother to a violent suicide attack, he acted irrationally. There are strong grounds that insufficient consideration and accommodation of Mr Hussein's psycho-social disability resulted in extremely unjust and inhumane treatment.

Case study 3: Ahmad Shalikhan: WGAD Case A/HRC/WGAD/2018/74, dated 10 January 2018.

Ahmad Shalikhan is a stateless Kurdish man from Iran who travelled to Australia with his mother, Ms Janabi, by boat without authorization on 25 August 2013. The two were caught by the regime put in place in 2013 to deny permanent protection to 'unauthorised maritime arrivals'. The two became susceptible to possible transfer to Nauru for the processing of their asylum claims.

Shalikhan's mother was recognized as a refugee and granted a five year Safe Haven Enterprise visa on 5 December 2016. However Mr Shalikhan was refused a visa due to concerns about his character which engaged s 501(6) of the Migration Act. Sub-section 501(6)(3) provides that a person will be deemed not to pass the test of good character where

> (c) having regard to either or both of the following:
>
> (i) the person's past and present criminal conduct;
> (ii) the person's past and present general conduct;
> the person is not of good character;

Mr Shalikhan has spent most of the time since his arrival in immigration detention, where his disruptive behavior has resulted in conviction for criminal offences including common assault.

Mr Shalikhan's came to the attention of Ali Battisson of Human Rights for All. She initiated a complaint to the WGAD which issued an opinion criticizing Australia as being in breach of its international legal obligations in 2018.

The young man was identified from the outset as having significant mental health needs. The WGAD writes:

> 41 According to a Department report dated 14 May 2014, "the Department's health service provider, IHMS, advise that Master Shalikhan has been diagnosed with attention deficit hyperactivity disorder and hyperkinetic conduct disorder. He was hospitalized in February 2014 for suicidal ideation and pseudo-psychotic symptoms. He was referred to a clinical and forensic psychologist for further management of his impulsive behavioural

> problems and to a psychiatrist for ongoing monitoring. He remains on a psychological support programme due to chronic risk of harm to self and others." The report also noted that "the psychiatrist advises that remaining in his current confined environment is exacerbating his mental health" and that "Master Shalikhan has been involved in a series of behavioural incidents while held in detention, including incidents of self-harm and threats of self-harm, alleged physical assaults, and abusive and aggressive behaviour.

Mr Shalikhan was released into community detention in June 2014, albeit with the stipulations that the family "should remain subject to transfer to Nauru, pending a further assessment within the next three months". By that stage the 17 year old had already accrued a police record involving common assault charges. By August of that year he was back in detention with his mother at a remote facility. The WGAD report suggests that the various centres to which he was moved struggled to deal with his disruptive behaviour. It reads:

> 8. On 1 June 2015, Mr. Shalikhan's case was reportedly "escalated to Centre Manager and Director, case management for weekly detention network placement meeting for transfer to an alternative facility in a larger city which offers the recommended support services for his known cognitive and behavioural vulnerabilities until outcome of ministerial submission is known.
> 9. On 24 July 2015, Mr. Shalikhan's case review noted that he had been "involved in 6 incidents since last review, 2 of those he was the perpetrator. He has presented [as] aggressive and argumentative on one occasion this month, when case manager ended their interaction early due to his unwillingness to cooperate. His last meeting with case manager was calm, quiet and [he] listened after his mother advised him to stop and listen."
> 10. On 17 August 2015, the incidents referred to in paragraph 9 above were reportedly detailed as "threatened self-harm, behaved aggressively, damaged Commonwealth property and assaulted a number of officers at PIRH". The source notes that no further action appears to have been taken with regard to those incidents…
> 12. According to the source, Mr. Shalikhan's case review, dated 16 November 2015, stated that his "ongoing behavioural issues are a barrier to a community release".

The WGAD issued an opinion criticizing the government for its continued detention of Mr Shalikhan who has been recognized as a refugee in respect of whom Australia owes protection obligations. It found the deprivation of liberty of Mr Shalikhan to be arbitrary and in contravention of articles 2, 3, 7, 8, 9 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights

The Working Group called for Mr Shalikhan's immediate release and recommended that the government accord him an enforceable right to compensation and other reparations, in accordance with international law. It concluded:

123. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Shalikhan and to take appropriate measures against those responsible for the violation of his rights.

124. The Working Group urges the Government of Australia to review the provisions of the 1958 Migration Act in the light of its obligations under international law without delay.

Mr Shalikhan remained in detention at the time of writing this submission.

C CONCLUSION

In this Part we examined the link between criminality and decisions to deport non-citizens with disabilities. The statutory framework of criminal deportation under the Act fails to recognise both the significant impact that disability can have on criminality/ character issues and the dangers facing disabled non-citizens if deported from Australia. This is particularly the case for persons seeking asylum who are without a state to which they can return safely. The case of BAL19 is an example in point. Persons with severe mental, psychical and psychosocial disabilities are especially vulnerable to the harshness and lack of discretion at the core of the character test under s 501(6) of the Act. Australia's framework for criminal deportation breaches our obligations under the CRPD with respect to persons of all disabilities. It places vulnerable, disabled non-citizens at risk of losing Australia as the place they call home.

Recommendations

4.1 Policy guidelines in criminal deportation cases *involving persons with disabilities* should be amended to make consideration of the particular harms faced by these people because of their disabilities a **mandatory relevant consideration** at the point of either visa cancellation or revocation of a mandatory cancellation order.

4.2 Policy guidelines in criminal deportation cases should be amended to make the consideration of Australia's obligations under the CRPD – in particular the rights to life and to freedom from torture, degrading treatment, violence and abuse - mandatory relevant considerations in all cases at the point of either visa cancellation or revocation of a mandatory cancellation order.

4.3 'Character concern' non-citizens with disabilities who cannot be removed from Australia within a reasonable period of time should be exempted from mandatory indefinite detention. This should involve prioritizing the release of such individuals from closed detention environments in accordance with Australia's international legal obligations, especially where United Nations Human Rights mechanisms make findings against Australia.

PART V: DISABILITY AND WRONGFUL IMMIGRATION ENFORCEMENT

The arrest, detention and removal of 'unlawful non-citizens' ceased to be subject to judicial oversight in 1994. The wrongful arrest, detention and removal of over 240 Australian citizens and lawful permanent residents (many with disabilities) between 2000-2004 became a matter of great controversy. In response, the conservative coalition government introduced a raft of oversight measures, including the creation of an Immigration Ombudsman; the creation of National Identity Verification and Advice Unit and the Immigration Health Advisory Group (IHAG).

Since the re-election of the Conservative Coalition government in 2013, a number of these measures have been quietly abandoned. While the Ombudsman maintains a role in reviewing long-term detainees, IHAG no longer exists and the standards for Health care have been downgraded. Our research suggests that the incidence of wrongful arrest and detention is rising again. We identify four cases that have been the subject of internal inquiries between 2017 and 2019.

A DISABILITY AND ARREST AND REMOVAL LAWS

5.1 Consequences of automated rules and no oversight

In Part 4 we explored both the progressive toughening of 'crimmigration law' and the parallel battle that has raged between the government and the courts over determining the circumstances in which persons of bad character should be allowed to enter or remain in Australia.[257] In this section we examine a significant bi-product of the statutory changes that have affected citizens and permanent residents with disabilities: the wrongful arrest, detention and removal of Australians with disabilities.

Changes to the *Migration Act* 1958 in 1994 were of particular significance. At the same time that the Act was amended to provide for uniquely prescriptive mechanisms for the judicial review of migration decisions,[258] the pre-existing regime for the arrest and detention of suspected unlawful non-citizens also underwent dramatic change. Most aspects of enforcement became automated – and placed beyond routine oversight by the judiciary. Detention became mandatory for any person in the migration zone *known or reasonably suspected* to be an unlawful non-citizen.[259] In practical terms, arrest and

[257] See M Crock, 'Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions' (2000) 24 Melbourne University Law Review 190-217.

[258] September 1 1994 marked the entry into force of the first Part 8 of the *Migration Act*, which operated to openly confine the power of the Federal Court to engage in the judicial review of migration decisions. See M Crock, 'Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?' (1996) 18 *Sydney Law Review* 267-303; Crock and Berg, Ch 19.

[259] See *Migration Act* s 189(1). Section 189(2) provides that an officer must also detain any person who is in Australia (but outside the migration zone) who he or she reasonably suspects is seeking to enter the migration zone, and would, if in the migration zone, be an unlawful non-citizen. As noted above, the Act also provides for the detention of persons on board a ship suspected of being involved in a contravention of the Act, and allows those persons to be brought into the migration zone: s 245F(9).

detention became a matter for an officer forming a 'reasonable suspicion' that an individual is an unlawful non-citizen.

Before 1994, in virtually all cases suspected unlawful non-citizens were required to be brought before a 'prescribed authority' (a state magistrate) within 48 hours of arrest. Suspects could not be detained for more than seven days without being re-presented before the court.[260] Detention could then only be authorised for periods of 7 days at a time if the magistrate was satisfied that the detention was reasonably required to determine status or to make a deportation order.[261] Once a deportation order was made, officers were required to inform the detainee the reasons for arrest and particulars of the deportation order.[262] While the system was not perfect in its operation, there were virtually no cases where Australian citizens and lawful permanent residents were arrested and detained for extended periods.

The first decade of the new millennium saw a spate of wrongful arrests, detention and even removals of Australian citizens and permanent residents. Many shared disturbing similarities in that they involved persons with both physical and psycho-social disabilities. It is a reflection of the government's hostility towards the courts that the great scandals of these years prompted no return to judicial oversight of arrest and detention procedures. Instead, a series of inquiries were conducted. An 'immigration Ombudsman' was tasked with making reports to Parliament but otherwise enjoyed no determinative powers. This Ombudsman was asked initially to review only cases where individuals had been in immigration detention for more than two years, a period later revised to 6 months.[263] The first review identified over 240 cases of wrongful detention.[264] The government subsequently paid out millions of dollars in damages for wrongful detention.[265]

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260 See former s 88 of the *Migration Act*.

261 *Grech v Heffey* (1991) 34 FCR 93. This material is taken from Crock and Ber, Ch 16, [16.29] ff.

262 See former s 89 of the *Migration Act*, now s 253(1)-(3).

263 The review period is now 6 months. See See *Migration Act*, Part 8C, ss 486L-486Q.

264 Reports on the findings made by the Immigration Ombudsman are available at <http://www.ombudsman.gov.au/reports/immigration-detention-review/>.

265 Crock and Berg, [16.34] write: It is difficult to ascertain the actual amounts paid out in damages as payouts are usually made in the context of confidentiality agreements. Ms Rau is reported as having accepted $2.4 million in damages for false imprisonment: see *Sydney Morning Herald*, 19 February 2008, at 2; while Ms Solon-Alvarez is reported to have sought compensation in the order of $10 million. Amnesty International has reported that an Iranian man detained at Woomera Detention Centre was awarded $800,000 in damages (see <http://www.amnesty.org.au/refugees/comments/8229/>), while an Iranian child, Shayan Badraie, received a payout of $400,000: see 'Badraie payout not "a backdown"', *The Age*, 5 March 2006; and Dan Box 'Visas follow payout', *The Australian*, 4 March 2006. His story is recounted in Jacqueline Everett, *Bitter Shore* (Sydney: Macmillan, 2008). See, further Meagan Dillon, 'Former detainees and nurse back Iranian asylum seeker suiing over detention centre treatment'. ABC News, 29 April 2019 https://www.abc.net.au/news/2019-04-29/refugee-daniel-hanssen-sues-over-treatment-in-detention-centres/11049298.

The problem has not gone away. Our research suggests that Australian citizens and lawful permanent residents continue to be arrested and detained by immigration authorities. Disability continues to be an indicator for misapplication of the law. For this reason, we urge that arrest, detention and removal policy and practice and its impact on persons with disabilities be considered by the Disability Royal Commission.

In this Part we will begin in section 5.2 with an account of two cases that scandalised the nation in 2004. Vivian Solon Alvarez is a citizen with two Australian-born children who was arrested, detained and deported to the Philippines where she was abandoned in the arrivals hall of Manila Airport. Cornelia Rau was a long term permanent resident and German national who spent 10 months in South Australia's Baxter Detention Centre during some of the most tumultuous times of that centre's existence. Both Vivian and Cornelia were women with serious psycho-social disabilities.

In section 5.3 we outline the policy and practical changes that were made following separate inquiries into these cases. Our concern is that key elements of these reforms have been quietly dropped or wound back. In section 5.4 we set out recent cases that suggest that Australians with disabilities continue to be at risk of wrongful arrest, detention and removal at the hands of immigration authorities. Described as the 'trojan horse which exposed the cruelty and inhumanity of the immigration detention system',[266] Cornelia Rau's case in 2004 also exposed the deficiency of policies underpinning health mechanisms in Australia's immigration detention centres. As we will explore in greater detail in Part 6 of the submission, immigration detention for persons with disabilities has also involved abuse and gross neglect.

B THE FAULTLINE CASES

5.2 *Vivian Solon Alvarez*

> "Would Mother Teresa proceed to arrivals." Though Calcutta's saint-in-waiting had been dead four years, travellers at Manila's Ninoy Aquino International Airport heard her being paged one night in July 2001 to meet a frail, tiny, penniless woman in a wheelchair.[267]

Vivian Solon Alvarez was born and raised the Philippines. After marrying Australian Robert Young she became an Australian citizen in 1986, eventually giving birth to two children.[268] Her marriage was not a happy one and she fell into a destructive cycle. By

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[266] Daniel Keane, 'Cornelia Rau, Australia's immigration wars and the true story behind TV drama Stateless', *ABC* (online, 1 March 2020) < https://www.abc.net.au/news/2020-03-01/cornelia-rau-and-the-story-behind-stateless/12001280>.

[267] See 'The lies that kept Vivian Alvarez hidden for year' *Sydney Morning Herald* 20 August 2005, available at: https://www.smh.com.au/national/the-lies-that-kept-vivian-alvarez-hidden-for-years-20050820-gdlwu8.html

[268] Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter* (Report No 3, 2005) 9.

1999, she had moved to Lismore and been diagnosed with 'a paranoid psychotic illness complicated by alcohol and illicit substance misuse.'[269]

On the 30th of March, 2001, Solon Alvarez appears to have been struck by a car and was found injured in a park in Lismore, New South Wales. She was taken to Lismore Base Hospital where she was treated for injuries to her spine that rendered her wheelchair dependent (see p 12). Following her initial physical assessment, her mental state was such that she was admitted directly into the psychiatric unit of Lismore Base Hospital, known as the Richmond Clinic. On the 2nd of April, Solon Alvarez was examined by a psychiatrist who determined that she had a mental disorder rather than a mental illness. This meant that she could not be involuntarily detained under the Mental Health Act 1900 (NSW), as this Act only applies to those with mental illnesses. A social worker from the Richmond Clinic became suspicious that Solon was an illegal immigrant and notified the immigration authorities (se p 12). The woman was treated in Lismore, then moved to Liverpool Hospital and back to Lismore. She was interviewed by immigration officials on the 3rd of May 2001. From this point forward it was assumed that she was indeed an unlawful non-citizen (see p 13). When discharged from St Vincent's Rehabilitation Unit in Lismore on the 12th of July, immigration officials collected her and took her to their office in south-east Queensland.

Solon Alvarez was interviewed the following day, apparently without the appointment of an advisor, guardian or 'next friend'. The confused state of her mind was reflected in simultaneous assertions that she was an Australian citizen; and that she wanted to apply for a visa so that she could remain in Australia. The officers formed the view that Solon was an unlawful non-citizen. One week later, on the 20 July 2001, Vivienne Solon Alvarez was flown to Manilla airport. She was left sitting in her wheelchair in the arrivals hall. When nobody came for her, she was taken into the care of the Overseas Workers Welfare Administration, an agency that assists distressed Filipino workers returning from abroad. The agency delivered her into the care of nuns from the order founded by Mother Teresa of Calcutta.

The Department of Immigration appears to have realised the error made in July 2003.[270] By that time, the woman's husband, Robert Young, had reported her missing, although searches focused on looking for a 'Vivian Young'. Even so, it was not until 15 May 2005 that Solon Alvarez was located in the Philippines (still in the care of Mother Teresa's nuns) and returned to Australia.[271]

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[269] Ibid 10.

[270] Ibid 18. See also the detailed discussion at 28ff. See further https://www.smh.com.au/national/the-lies-that-kept-vivian-alvarez-hidden-for-years-20050820-gdlwu8.html.

[271] Ibid 23; 28ff. The litany of missteps and deliberate cover ups within the Department makes for disturbing reading. It was not until the Minister became aware of the problem that any action was taken.

5.3 *Cornelia Rau*

Cornelia Rau was born in Germany but lived in Australia for most of her childhood. She became a permanent resident in 1983.[272] She had a history of mental illness, diagnosed variously as having bipolar disorder, schizoaffective bipolar disorder or chronic schizophrenia. Rau escaped from a psychiatric facility at Sydney's Manly Hospital on 17 March 2004. Her family originally chose not to report her as missing to the police, primarily because she had previously absconded and would later present herself again. It was not until 11 August of that year that her family became concerned enough to formally lodge a missing person report (see p 13).

After leaving Manly Hospital, Rau made her way to Queensland where she was picked up by police on 31 March 2004. Again, Rau was detained as a suspected unlawful non-citizen. Unlike Solon Alvarez who asserted consistently that she was a citizen, Rau claimed that she was a German tourist who had unlawfully overstayed her visa. She gave her name as 'Anna Brotmeyer' and 'Anna Schmidt' (at 10) and provided conflicting accounts of her identity, her arrival, and travels in Australia. It is thought that she was motivated by a desire to be deported to Germany, a trip that she would not otherwise have been able to afford.

Rau was detained at the Brisbane Women's Correctional Centre (BWCC) for approximately 6 months during which time her behaviour became increasingly bizarre. On 10 August 2004, Rau was seen by the Prison Mental Health Team psychiatrist who recommended Rau undergo an in-patient psychiatric assessment (see p 13 - 15). On the 20th of August 2004, she was transferred to Princess Alexandra Hospital in Brisbane for a psychiatric assessment which would take place over 6 days. Whist under observation for this period, it was ultimately concluded that 'although displaying some odd behaviour, [she] does not fulfil any diagnostic criteria for mental illness'. On the 26th of August, Rau was returned to BWCC. At no stage was an attempt made to link her to missing persons registers in other states.

On 6 October 2004 Cornelia Rau was transferred to Baxter Immigration Detention Centre, an immigration detention and processing facility established in the South Australian desert after the centre at Woomera was mothballed following rioting in 2003. In order to be transported, Rau had to be sedated and restrained. She was examined by a psychologist the next day, who determined that Rau's problems appeared to be 'behavioural in nature.' In the months that followed, Rau was reviewed by several health care professionals. On 12 October, a psychologist found that because Rau's disorder was a personality disorder, she would not respond to therapy or medication. On 6 November, a consulting psychiatrist recommended that Rau seek a further assessment at a psychiatric facility as he was unable to make a definitive diagnosis. On 4 January 2005, an International Health and Medical Services medical practitioner found that Rau expressed 'schizoid or schizotypal personality features

[272] Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (Report, 6 July 2005) 1 ('Palmer Report').

and possibly schizophrenia.'(see p 17) This practitioner recommended that Rau be further assessed by a clinical psychiatrist.

It was not until 31 January 2005 that Cornelia Rau's situation hit the press. In fact her story emerged as a result of her fellow detainees (asylum seekers) calling attention to her plight in their interaction with lawyers and advocates visiting the remote centre. The Age newspaper published a news article and photograph reporting that the 'Mystery woman held at Baxter could be ill'.[273] On 3 February of that year, Rau's family contacted the Manly police and officially identified the woman pictured in the news article as Cornelia Rau. If the Department of Immigration was contrite, this was not apparent in the manner in which Rau was transferred to Glenside Psychiatric Hospital the following day.[274] She was dragged naked from her shower cubical at night by male officers in riot gear and forcibly restrained on a hospital gurney. The video recording of the extraction obtained by ABC's 4Corners concludes with the following exchange:

OFFICER: You understand? You're being detained under the Mental Health Act.

CORNELIA RAU: But I haven't done anything wrong.

OFFICER: I'm not saying you've done anything wrong at all.

CORNELIA RAU: I just was having a shower.

OFFICER: Anna you're not in any trouble whatsoever, right?

QUENTIN MCDERMOTT: She is handcuffed to the stretcher.

(Excerpt continued):

CORNELIA RAU: Could I get my teddy please? Could you bring me my teddy?

OFFICER: All right. We'll get something in the bag for you eh?

CORNELIA RAU: If you could just bring my teddy please?

OFFICER: All right. We'll bring some clothing for you as well.

CORNELIA RAU: No just the teddy will be fine.

CAMERA OPERATOR: Room two has been secured.[275]

[273] Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (Report, 6 July 2005), 19.
[274] Ibid 20.
[275] See https://www.abc.net.au/4corners/the-guards-story/8953104.

C REFORMS FOLLOWING INQUIRIES BY COMRIE AND PALMER

5.4 Safeguards

Common to the Solon Alvarez and Rau cases was the gross mistreatment of persons with a psycho-social disability which lead to catastrophic process failures in immigration enforcement processes. Both became the subject of inquiries, with the Solon Alvarez case leading to the creation of a Commonwealth Ombudsman position specifically for immigration detention centres in Australia. [276]

The inquiries by Ombudsman Neil Comrie and former policeman Mick Palmer both focused on the failures to properly identify the two women both in terms of officials understanding of the law and cultural bias in the administration. Reporting before Comrie, Palmer found that 'many of the DIMIA officers who were interviewed and who use the detention powers under [the *Migration Act 1958*] had little understanding of what, in legal terms, constitutes 'reasonable suspicion' when applying it to a factual situation.'[277] Departmental officers merely accepted that detention occurred as a matter of course. The cultural attitude of the department's officers was that detention of non-citizens was a 'paramount consideration'.

Both cases revealed systemic cultural problems within the Department of Immigration. Palmer recommended that significant changes be made to the way that staff were trained, especially in relation to the treatment of suspected non-citizens who had not committed a criminal offence and/or who were under a mental disability (see pp 49-50). Technical changes to the way that identities were ascertained were also recommended, with the inquiry noting the implementation of a **National Identity Verification and Advice Unit**. The broader problem with the Department which persists in its present iteration as the Department of Home Affairs, is that the culture operated to 'stifle individual thought, inhibit individual action, and discourage wider consultation or referral.' (see p 54)

The lack of accountability, and cultural problems exemplified by the actions of the staff that involved in both the Cornelia Rau and Vivian Solon cases were roadblocks to further progress. The disconnect between the planning department located in Canberra and the staff in the various field positions that encountered both Cornelia Rau and Vivian Solon Alvarez was stark. An 'assumption culture' developed with the result that the ongoing reasonableness of the detention of both women was not consistently revisited. Comrie wrote:

> The most disturbing feature of the culture is that senior officers in DIMIA who became aware that an Australian citizen had been unlawfully removed failed to take any action to redress the situation.

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[276] See *Migration Act*, Part 8C, ss 486L-486Q.

[277] Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (Report, 6 July 2005), 24.

> Also of serious concern is the fact that the unlawful removal of Vivian was a matter of considerable discussion in the Brisbane Compliance and Investigations Office in 2004, yet no one there took any action. In the Inquiry's view, the failure of the senior manager in this office to take the necessary action would have had a negative influence on others in the office.
>
> It is difficult to form any conclusion other than that the culture of DIMIA was so motivated by imperatives associated with the removal of unlawful non-citizens that officers failed to take into account the basic human rights obligations that characterise a democratic society.
>
> For some DIMIA officers, removing suspected unlawful non-citizens had become a dehumanised, mechanical process. The Inquiry is particularly worried by the fact that some DIMIA officers it interviewed said they thought they would be criticised for pursuing welfare-related matters instead of focusing on the key performance indicators for removal.[278]

When met with the exceptional cases of Cornelia Rau and Vivian Solon, as well as when presented with other persons with psycho-social disabilities, immigration officials have failed to adequately inquire into the reasonableness of detention decisions. Both inquiries also highlighted the poor record keeping and case management systems in place. A shocking aspect of the Solon Alvarez case is that Queensland Missing Person Bureau sought information about a missing person Vivian Solon @ Young and the Department responded by providing the name Vivian Alvarez Solon @ Young in July 2001. In spite of having made this connection they carried through with her removal shortly afterwards.[279]

5.5 The Establishment and Abolition of the Immigration Health Advisory Group

A significant finding in both the Cornelia Rau and Vivian Solon inquires was that persons with a mental disability were at a higher risk of unjust detention and misidentification in the mandatory detention regime.[280] A key recommendation to redress this risk was the establishment of an 'independent, external review body' to safeguard the welfare of those in immigration detention. This recommendation formed the basis of the government's establishment of the Detention Health Advisory Group on 1 March 2006. The Detention Health Advisory Group would later be renamed the Immigration Health Advisory Group ('IHAG'). IHAG was designed to provide oversight to the department overseeing immigration detention and consisted of nominees from professional health authorities.[281]

Following its establishment, IHAG commissioned the Royal Australian College of General Practitioners (RACGP) to provide policies, referred to as 'standards', for

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[278] Commonwealth Ombudsman *Inquiry into the Circumstances of the Vivian Alvarez Matter* (Report No 5 2005) 26 September 2005, 31.
[279] Commonwealth Ombudsman *Inquiry into the Circumstances of the Vivian Alvarez Matter* (Report No 5 2005) 26 September 2005, 34.
[280] Commonwealth Ombudsman *Inquiry into the Circumstances of the Vivian Alvarez Matter* (Report No 5 2005) 26 September 2005,, 9; Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (Report, 6 July 2005), 1; Department of Immigration and Citizenship, *Detention Health Framework: A policy framework for people in immigration detention* (2007), 8.
[281] Joint Standing Committee on Migration, Parliament of the Commonwealth of Australia, *Immigration Detention in Australia* (Third Report, August 2009) 77.

health care in immigration detention and a tool for self-assessment and quality improvement.[282] The RACGP standards included the statement that 'the quality of care in immigration detention should be consistent with the quality of health service provision in the general Australian community.'[283] For those in immigration detention with mental illness IHAG was a key accountability body for the standard of care being provided to this vulnerable group.

The Palmer Report stressed the importance of creating an independent review body to ensure accountability of those responsible for immigration detention. However, IHAG did not survive the change of government in 2013. It was quietly disbanded by the Abbott government shortly after the federal election in that year.[284] In place of IHAG, the Australian Defence Force's medical expert, Dr Paul Alexander, was appointed as Independent Health Advisor. This move took away an independent review body for health services in immigration detention. The Australian National Audit Office, in their 2016 review of health care provision in immigration detention, found that in the aftermath of this decision:

> … there was limited expertise within the relevant branch of the department with responsibility for detention health service delivery to provide clinical governance over decisions relating to health care delivery in detention settings. There were no staff employed in a clinical capacity and decisions that needed clinical expertise were submitted for ad hoc advice from the department's Chief Medical Officer or the Independent Health Advisor. [285]

The Independent Health Advisor does take advice from external bodies on specific health issues.[286] However, the role is materially different from the independent oversight provided by IHAG and has resulted in poorer health outcomes for those with psycho-social disabilities in immigration detention.[287]

By 2018, five years after the abolition of IHAG, the private contractor tasked with providing health services in immigration detention, International Health and Medical Services ('IHMS') published its own standards. Instead of using the RAGCP standard of 'consistent with' health care provided to the Australian community as a benchmark, the IHMS standards aspire to providing care 'broadly comparable' with health care

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[282] Public Interest Advocacy Centre, *In Poor Health: Health Care in Australian Immigration Detention* (Report, 2018) 30.
[283] RACGP *Standards for Health Services in Australian Immigration Detention Centres* (Report, 2007) 2.
[284] Public Interest Advocacy Centre, *In Poor Health: Health Care in Australian Immigration Detention* (Report, 2018) 30–1.
[285] Australian National Audit Office, *Delivery of Health Services in Onshore Immigration Detention* (Report, 2016) 50–1.
[286] Ibid, 51 fn 39.
[287] Public Interest Advocacy Centre (n 37) 31; and Joint Select Committee Inquiry on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (2012) 6 [1.22].

provided to the Australian community.[288] This lower standard was endorsed by the Department of Home Affairs.[289]

The failure to make adequate provision for those with mental illnesses had disastrous consequences for Cornelia Rau and Vivian Alvarez Solon. The risk that what occurred in these cases could recur in a detention regime that lacks oversight, must be addressed. Recent cases indicate that the risk of unjust detention persists for persons with a mental illness or who cannot otherwise speak for themselves.

D RECENT CASES

5.6 The problem has not gone away

The fact that unlawful arrests and detentions at the hands of immigration officials is apparent in the Department's ad hoc appointment of Dr Vivienne Thom, former Inspector-General of Intelligence and Security, to inquire into a series of cases in 2017.[290] In 2018 journalist Paul Farrell published an article recounting the wrongful detention of two further citizens.[291] The cases suggest that not all of the system defects or the discriminatory culture issues in the Department have been corrected. Following are summaries of the anonymised cases.

Mr X (2017)

Mr 'X' was a New Zealand citizen who had been born in Australia and lived in Australia his entire life.[292] In April 2010, he travelled outside of Australia, and upon his return using his New Zealand passport, he was granted a Special Category (subclass 444) visa. In November, 2016, Mr X was taken into criminal detention. His subclass 444 visa was then cancelled under the section 501(3A) of the Migration Act 1958. In December 2016, Mr X was released from criminal detention and taken into immigration detention. He was held under section 189(1) of the Act on grounds that an officer had formed a reasonable suspicion he was an unlawful non-citizen.

Mr X consistently advised the Department that he was an Australia citizen who was born in Australia and had lived in Australia his entire life. Yet, it was not until March 2017 that the Department confirmed that Mr X was indeed an Australian citizen. By that stage Mr X had been unlawfully detained for 97 days.

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[288] Public Interest Advocacy Centre (n 37) 31.
[289] Ibid.
[290] See David Hardaker, 'Who is Vivienne Thom', https://www.crikey.com.au/2020/10/26/who-is-vivienne-thom.
[291] Paul Farrell, 'Two Australian citizens unlawfully detained in immigration detention in last 12 months', *ABC News* (online, 21 October 2019) < https://www.abc.net.au/news/2019-10-21/two-australians-held-in-immigration-detention-in-last-12-months/11622198>.
[292] Vivienne Thom, *Independent review for the Department of Immigration and Border Protection into the circumstances of the detention of two Australian citizens* (Final Report, 9 June 2017) 4.

Mr Y (2017)

Mr 'Y', originally from the External Territory of Papua prior to Papua New Guinea gaining its independence, was granted an Australian permanent return visa in 1992.[293] This visa converted to a transitional permanent visa in 1994. This visa remains effective indefinitely unless the holder of the visa departs Australia after a prescribed period. Mr Y never left Australia after 1992.

In February 2017, Mr Y was arrested and taken into criminal detention. His visa was cancelled under the section 501(3A) of the Migration Act 1958. He applied for revocation of his visa cancellation, which included a statement that he had been born in Papua New Guinea to Australian citizen parents. In March 2017, Mr Y was released from criminal detention and detained in an immigration detention centre under section 189(1) of the Act on grounds that an officer had formed a reasonable suspicion he was an unlawful non-citizen.

Mr Y was identified as an Australian citizen by birth, and was released from immigration detention 13 days after being detained. His revocation request for his visa cancellation had not been actioned at the time of his release.

Unidentified (September 2018)

The individual described had a lengthy criminal history, but relevantly was convicted of an offence in October 2016.[294] During this time, the individual's visa was cancelled on what was believed to be character grounds. At the end of the individual's custodial sentence in September 2018, they were taken to immigration detention. Later that month, Australian Border Force officers realised that the individual had been an Australian citizen since March 1986.

Unidentified (October 2018)

The individual described was convicted of an offence in January 2018.[295] In October 2018, at the end of the custodial sentence, the individual was taken into immigration detention.[296] The individual was released within the same month after the Department found proof the individual was an Australian citizen.

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[293] Vivienne Thom, *Independent review for the Department of Immigration and Border Protection into the circumstances of the detention of two Australian citizens* (Final Report, 9 June 2017) 4-5.
[294] Paul Farrell, 'Two Australian citizens unlawfully detained in immigration detention in last 12 months', *ABC News* (online, 21 October 2019) < https://www.abc.net.au/news/2019-10-21/two-australians-held-in-immigration-detention-in-last-12-months/11622198>.
[295] Ibid.
[296] Ibid.

E IMPLICATIONS

The role of disability in wrongful arrests

The case reports from 2017 and 2018 do not reveal whether the wrongfully detained individuals had any sort of mental illness or disability. However, the cases suggest that significant defects persist in the immigration detention system in Australia. It is our submission that citizens and lawful permanent residents with pscho-social disabilities continue to be at risk of wrongful arrest and detention at the hands of immigration officials.

Examining the cases up until 2009, Soldatic and Fiske found that of the 200 people who had been wrongfully detained by that year, 13 were persons with disabilities.297 Of the 13, most were unable to identify themselves. A small number of those individuals, including Vivian Solon, were able to self- identify but were not believed – an issue that underpinned three of the four wrongful detentions in 2017 and 2018.298 If individuals who were able to accurately identify themselves as Australian, yet were disbelieved and detained, it is not hard to see the overwhelming challenges facing vulnerable persons who are unable to self-identify.

RECOMMENDATIONS

5.1 Arrest and detention of persons with disabilities in immigration contexts should be subject to independent oversight so that the question of what constitutes a 'reasonable suspicion' of unlawful status is not solely the preserve of unaccountable immigration officials.

5.2 The recommendations of the **Palmer Report** continue to be apposite and sensible. **The measures taken previously in response to that report should be reinstated.** In particular, a designated detention oversight body such as the former IHAG should be reinstated and given sufficient powers to regulate the provision of health care to persons with disabilities in immigration detention.

5.3 We draw the Commission's attention to Recommendation 39 of the Australian Human Rights Commission in its 2019 Report.[299] We agree that the Department of Home Affairs should ensure that all people in immigration detention have an opportunity for regular, face to face contact with status resolution officers and it should provide adequate resourcing for this.

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[297] K Soldatic and L Fiske, 'Bodies 'locked up': intersections of disability and race in Australian immigration' (2009) 24(3) *Disability & Society* 289, 292.
[298] Ibid.
[299] See AHRC *Inspection of Australia's immigration detention facilities 2019 Report,* 3 December 2020, available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention

PART VI: DISABILITY AND MANDATORY IMMIGRATION DETENTION

Part 6 of the submission explores the relationship between immigration detention and disability. Australian law mandates the detention (and removal) of all non-citizens in Australia without a visa. Although mechanisms exist for the grant of visas to allow for release, policy settings mean that thousands of non-citizens who either have had their visa cancelled or who have entered the country without a visa are held in both closed and other forms of community detention. Persons seeking protection in Australia as refugees (asylum seekers) are included in this group.

In late September 2020, the average time that non-citizens were being held in 'closed' immigration detention was 545 days.[300] This is up from an average of 454 days in 2016 when the UN Special Rapporteur expressed concern that a majority of detainees had spent more than 730 days in custody.[301]

This Part begins with a brief overview of the history of immigration detention in Australia, noting that while exceptions can be made for children, there is no statutory or policy constraint on the detention of non-citizens with disabilities.

Part 6.2 examines the incidence of disability in immigration detention. We note the persistent criticisms that Australia's detention laws, policies and practices have attracted from international and domestic human rights bodies. We note also the trend in recent years to ignore international calls to remedy human rights abuses that are occurring.

Our research suggests that the available data on the incidence and nature of disability in immigration detention in Australia is poor. In 2019, the poor data on disabilities generally was a matter of concern to the CRPD Committee in its review of Australia. The Committee noted the lack of:

> national disaggregated data on students with disabilities, including on the use of restrictive practices and cases of bullying, [and the]… absence of national data disaggregated by disability at all the stages of the criminal justice system, including data on the number of persons unfit to plead who are committed to custody in prison and other facilities.[302]

'Other facilities' include closed immigration detention environments.

Part 6.3 examines shortcoming in mechanisms used for the identification of disabilities in immigration detention.

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[300] RCOA, 'Statistics on people in detention in Australia' (Blog post, 28 September 2020).

[301] See End Mission statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia (1-18 November 2016), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E.

[302] See Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Australia,* UN CRPD 22nd session, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), paras, 45(c) and 25(f) respectively.

Part 6.4 examines shortcoming in the accommodations made for persons with disabilities in immigration detention. Limited data on the incidence of impairments complicates the process of accommodating disability. Without clear identification of disability or possible disability, there is an increased risk of mistreatment. The AHRC provides three examples of apparent bad practice. The first involved the routine use of handcuffs in moving detainees, even where injuries to wrists through incidents of self-harm. The second concerned the inappropriate isolation of a new mother suffering post-partum depression. The third involved the inappropriate management of a man suffering from schizophrenia and auditory hallucinations who was placed in mechanical constraints in a police watch house when released after 5 weeks in a mental health facility.

This sub-part notes particular issues for persons with mobility disabilities and for persons with sensory impairments.

Part 6.5 provides a brief overview of the extensive research that has been done showing that prolonged immigration detention causes or exacerbates all manner of disabilities in detainees. This is most particularly the case for persons who enter detention environments with pre-existing injuries, vulnerabilities or disabilities. The injuries caused to children by immigration detention are considered in Part 7.

A DISABILITY AND THE EVOLUTION OF IMMIGRATION DETENTION LAWS

In Part 6 of this submission we explore the relationship between immigration detention and disability. The Royal Commission has acknowledged that it 'should consider…the position of people with disability seeking asylum, including those in Australian immigration detention.'[303]

Asylum seekers with disabilities have been detained routinely within Australian immigration detention for extended periods of time, in an environment which has been unaccommodating, and even productive of, disabilities. Immigration detention, particularly offshore processing, has added another layer of invisibility[304] to asylum seekers with disabilities who already face significant barriers in the migration process. Routine processes which are uncalibrated for identifying disability have led to wilful ignorance and abuse downstream. We argue that asylum seekers with psycho-social disabilities have suffered an exacerbation of their disabilities when reckless force has been used against them, asylum seeker children with physical disabilities have struggled to gain independence and autonomy in offshore detention centres designed only for able-bodied persons and treatment plans for disabilities, where they have

[303] Transcript of Proceedings, *Ceremonial Open Sitting* (Disability Royal Commission, Public Hearing 1, Ronald Sackville AO QC, 16 September 2019) p 19 <https://disability.royalcommission.gov.au/system/files/2020-02/Transcript-First%20Public%20Sitting-16-September-2019.pdf>.

[304] Caroline Fleay, 'The Limitations of Monitoring Immigration Detention in Australia' (2015) 21(1) *Australian Journal of Human Rights*, 22.

been provided, have been stalled by the delays of delivering vital medicine to far-flung locations from the Australian mainland.

Institutional neglect of persons with disabilities is pronounced in the Australian immigration detention system and this has led to numerous abuses of human rights, including death.

In this Part we examine first the extent to which the identification of disability has been used as a ground to ensure that an individual is released from closed detention. This invites consideration in Part 6.2 of how many persons in detention have disabilities – and how immigration authorities go about identifying disabilities. We find that data on incidence is limited and that this operates to stifle the accommodation of disabilities downstream. Part 6.3 examines the human impact of prolonged immigration detention. We review the academic literature and the international human rights jurisprudence on immigration detention and the causation and exacerbation of disabilities, particularly psycho-social disabilities. The overwhelming evidence is that immigration detention has an adverse impact on health and that it exacerbates the challenges facing persons with disabilities. In Part 6.4 we examine the extent to which Australia has provided reasonable accommodations for persons with disabilities in immigration detention.

Immigration detention is not a 'niche' issue in human rights in Australia. It affects thousands of people and frequently involves prolonged and egregious abuse and neglect. **In late September 2020, the average time that non-citizens were being held in 'closed' immigration detention was 545 days.**[305] This is up from an average of 454 days in 2016 when the UN Special Rapporteur expressed concern that most detainees had spent more than 730 days in custody.[306]

Appendix A details available data on the incidence of disability in immigration detention populations. Appendix B provides an overview of case studies involving detainees with disabilities and the accommodation provided. Appendix C sets out sources of health care entitlements for detainees under international law. Appendix D is an extract from the Australian Border Deaths database prepared by Monash University.

6.1 A brief history of immigration detention in Australia

It is hard to think of another area of federal public administration that has attracted more controversy, scrutiny and criticism than Australia's policy of mandatory immigration detention for all non-citizens who are in Australia without a valid visa. As we explained in Part 4, the policy evolved in the context of social or political crises relating to asylum seekers arriving in Australia by boat without authorisation. The

[305] RCOA, 'Statistics on people in detention in Australia' (Blog post, 28 September 2020).

[306] See End Mission statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia (1-18 November 2016), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E.

first laws mandating detention were passed in 1992, in response to the arrival of several hundred Sino-Vietnamese, 'boat people' from Cambodia. Successive changes were made over the years in response to various 'waves' of irregular maritime arrivals.[307] These events triggered major power struggles between the executive and the courts.

Although amended over time, the underlying mandatory detention policy has remained constant. It is defended on the basis that the Australian community expects the effective control and management of Australia's borders.[308]

There are several types of detention facilities used in mainland Australia.[309] These include:

Immigration detention centres – the most secure form of closed immigration detention. The Australian Human Rights Commission has repeatedly stated that closed detention facilities of this nature should never be used for children.34 As of October 2019, there were no children held in immigration detention centres on the Australian mainland. Two Sri Lankan children have been held in detention on Christmas Island since August 2019.[310]

Immigration residential housing – secure facilities with family-style housing in a community setting. These are generally situated adjacent to immigration detention centres.

Immigration transit accommodation – secure facilities designed to accommodate short-term stays (although in practice, people may be detained for extended periods in such facilities). Detainees are housed in hostel-style accommodation, with shared meals and semi-independent living. (The use of such facilities for holding children is concerning, as there are generally fewer support services available.)

Alternative places of detention (APODs) – Under the Migration Act, the Minister for Immigration can decide that a person should reside at a specified place other than a detention centre. These places can include alternative places of detention (APODs). APODs can include low security detention centres, hotels or apartments, home-based

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[307] The Refugee Council of Australia (RCOA) has a full timeline of Australia's history of refugee policy. See Refugee Council of Australia, 'Timeline of refugees and Australia', (Timeline, 6 May 2020) <https://www.refugeecouncil.org.au/timeline/>. See also Mary Crock and Daniel Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals" (2010) 19 *Griffith Law Review* 238

[308] Joint Select Committee on Australia's Immigration Detention Network (Report, March 2012) p 221. See also Commonwealth, *Parliamentary Debates,* House of Representatives, 18 September 2001, 30869 (Philip Ruddock, Minister for Immigration and Multicultural Affairs). See Mary Crock 'A legal perspective on the evolution of mandatory detention' in Mary Crock (ed) *Protection or Punishment: The Detention of Asylum Seekers in Australia,* (Sydney: Federation Press, 1993), ch 4.

[309] The following information is taken from Crock et al, *Children and Young People in Asylum and Refugee Processes: Towards Best Practice* (Sydney: The Federation Press, 2020), 122-124.

[310] See https://www.abc.net.au/news/2020-12-16/biloela-family-in-offshore-detention-receive-christmas-cards/12986648.

placements with friends or relatives, and placements with community organisations.[311]

Offshore processing in third countries (also known as the 'Pacific Solution') was introduced in 2001,[312] creating a distinction between asylum seekers arriving by plane who are processed on the Australian mainland and those arriving by boat, designated as Irregular Maritime Arrivals (IMAs).[313] Arrivals intercepted outside Australia's migration zone at an excised offshore place were treated as Offshore Entry Persons (OEPs). All IMAs are mandatorily detained for identity, health and character checks and while their protection claims are processed. In contrast, non-citizens who arrive by plane with a visa of some kind are generally given bridging visas which permit them to live, and sometimes work, in the community. The Pacific Solution was abandoned by a Labor government in 2008, only to be reinstated in even more punitive form in 2013.[314] Regional processing policy was implemented, re-introducing offshore processing of IMAs.315 As Crock writes:[316]

> While it was Labor Prime Minister Kevin Rudd who decreed that no IMA should ever be allowed to resettle in Australia, it was successive, conservative, Prime Ministers who prosecuted this policy, albeit unevenly.[317] As Nauru and Manus Island had very small capacities not all IMAs could be transferred. Who was chosen for exile became highly arbitrary, which in itself provided scope for cruelty in the form of arbitrary separation of family groups.[318]

As we explore in Part 9 of this submission, thousands of IMAs have had protection claims processed outside the Australian mainland, on Christmas Island and abroad in Nauru and Papua New Guinea (PNG)'s Manus Island.[319] In 2015, Nauru Regional Processing Centre (RPC) became an 'open' centre, allowing detainees to move around

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311 As of March 2020, the only children being held in APODs were those being held at the facility on Christmas Island.

312 *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth).

313 Janet Phillips and Harriet Spinks, 'Immigration Detention in Australia' (Parliamentary Library Social Policy Section, 20 March 2013) 6-9.

314 Janet Phillips, 'The Pacific Solution revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island' (Parliamentary Library Social Policy Section, 4 September 2012) 10.

315 Prime Minister's Office, 'New arrangement with Nauru Government' (Media Release, 3 August 2013) 1. See also Prime Minister's Office, 'Regional Resettlement Arrangement' (Joint Press Conference, 19 July 2013).

316 Chronicles

317 See generally Madeline Gleeson's background papers, including https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-refugee-status-determination-asylum-seekers-nauru.

318 See, for example, https://www.kaldorcentre.unsw.edu.au/news/kaldor-centre-responds-united-nations-high-commissioner-refugees-statement.

319 Elibritt Karlsen, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources' (Parliamentary Library Law and Bills Digest Section, 19 December 2016) 3. See also RCOA, 'Offshore processing statistics' (Blog post, 4 October 2020) <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/>.

the tiny island at will.[320] Manus Island Regional Processing Centre was closed in 2017.[321] In August 2020, 350 of Australia's refugees remained in Port Moresby, PNG and Nauru. Of these 244 (70%) have been recognised as Convention refugees.[322] The last refugee child was transferred from Nauru to Australia in February 2019.[323] As we explore in Parts 7 and 8, the problem is that these children and their families have not been permitted to resume anything like a normal life in Australia as they remain under constant threat of removal.

As a matter of law, immigration detention facilities serve a very different purpose to prisons and other punitive institutions. Officially, immigration detention is administrative rather than punitive because it is necessary to allow processing of identity, health, refugee status or other entitlement to a visa.[324] In practice, however, closed detention centres like the one constructed on Christmas Island function like a high security prison.[325] Both are authorised by a legal power to detain people and are run by private contractors (sometimes by the same contractors).[326] Closed detention centres are places of confinement which share the physical features and administrative arrangements commonly found in prisons.[327] Children and parents say they experience immigration detention as punishment.[328] Clinical psychologist Jeanette Gibson goes so far as to claim that the prison system treats prisoners more humanely than immigration detention.[329]

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[320] RCOA, 'Recent changes in Australian refugee policy' (Blog post, 15 March 2019) <https://www.refugeecouncil.org.au/recent-changes-australian-refugee-policy/9/>.

[321] Australian Border Force, 'Operation Sovereign Borders Monthly Update: August 2020' (Media Release, 16 September 2020) <https://newsroom.abf.gov.au/channels/operational-updates/releases/operation-sovereign-borders-monthly-update-august-2020>.

[322] Department of Home Affairs, 'Key Statistics as at 31 August 2020', (Factsheet) <https://www.homeaffairs.gov.au/about-us-subsite/files/population-and-number-of-people-resettled.pdf>.

[323] Guardian Staff, 'Final four children held on Nauru to be resettled with their families in US', *Guardian Australia* (online, 3 February 2019) <https://www.theguardian.com/australia-news/2019/feb/03/final-four-children-held-on-nauru-to-resettled-with-families-in-us>.

[324] Australian Border Force, 'Immigration Detention in Australia' (Web page, date unknown) <https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention#:~:text=A%20person%20who%20does%20not,under%20the%20Migration%20Act%201958.&text=In%20Australia%2C%20immigration%20detention%20is,entry%20and%20permanent%20migration%20programs>,

[325] Matthew Groves, 'Immigration detention vs imprisonment: Differences explored' (2004) 29(5) *Alternative Law Journal* 228.

[326] Michelle Peterie, 'Deprivation, Frustration, and Trauma: Immigration Detention Centres as Prisons' (2018) 37(3) *Refugee Survey Quarterly*, 279–306, 291.

[327] *Al-Kateb v Godwin* (2004) 219 CLR 562, 636 [264] (Hayne J).

[328] AHRC, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014) 68 <https://humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>.

[329] Russell Skelton, 'Jail "better" than detention centres', *Sydney Morning Herald* (online, 22 September 2010) <https://www.smh.com.au/national/jail-better-than-detention-centres-20100921-15lei.html>.

6.2 Persons with disabilities are not immune from immigration detention

Because the detention of non-citizens who do not hold a visa is mandatory and universal, Australian migration laws make no distinction for personal attributes such as age, infirmity or disability. It is a feature of the stringency and cruelty of successive governments that 'bridging' visas have not been provided as a matter of course to obviously vulnerable migrants such as the very old, the very young – and persons with disabilities. Over time, Australia's detention of children has been the subject of persistent and vehement criticism, leading to the insertion of s 4AA into the Migration Act 1958.330 This section legislates the principle set out in Art 37 of the Convention on the Rights of the Child, namely that children should only be detained as a matter of last resort and for the shortest possible period of time.331 It is our submission that a similar provision should be introduced to allow for the discretionary release of non-citizens with disabilities.

Recommendation 6.1

> The Minister for Home Affairs or other responsible Minister should release all persons with disabilities into community-based alternatives to closed immigration detention. In particular, persons with disabilities should not be sent to the detention centre on Christmas Island where the conditions are inherently harsh, with poor health care facilities and poor communication with the mainland. We call on the Commission to recommend amendments to the Migration Act 1958 to extend the operation of s 4AA to include persons with disabilities.

B THE INCIDENCE OF DISABILITY IN IMMIGRATION DETENTION

It may be accepted that non-citizens with all manner of disabilities are routinely taken into detention; they have been deliberately chosen for removal to Nauru and PNG's Manus Island;[332] and they have been held in detention for inordinate periods of time. Australia's standing and positioning as an international citizen (and immigration nation) has fallen in recent decades in no small part due to its mandatory immigration

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330 See, for example: Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention', 2014); Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Federation Press, 2006); Susanna Dechent, Tania Sharmin and Jackie Mapulanga-Hulston, 'Asylum Seeker Children in Nauru: Australia's International Human Rights Obligations and Operational Realities' (2019) 31(1) *International Journal of Refugee Law* 83; Kate Douglas, 'Lost and Found: The Life Narratives of Child Asylum Seekers' (2006) 3(1) *Life Writing* 41; Gillian Triggs, 'The impact of detention on the health, wellbeing and development of chldren: findings from the second National Inquiry into Children in Immigration Detention' in Mary Crock and Lenni B Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing, 2018), ch 20; and Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty' (November 2019).

331 See, for example Ghezelbash, Daniel, 'The Rise and Rise of Mandatory Immigration Detention' in Mary Crock and Lenni B Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing, 2018), ch 21.

332 See Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Australia,* UN CRPD 22nd session,
UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), paras 13, 35.

detention regime. The regime has been subject to overwhelming international criticism since 1992[333] and with renewed vigour over the first two decades of the 21st century.[334] Australia's practices place it at risk of breaching Arts 14-17 and Art 18 of the CRPD. In 2019, the CRPD Committee expressed concern over the discrimination against people with disabilities under the *Migration Act 1958* and *The Disability Discrimination Act 1992* which exempts certain provisions within the Migration Act 1958.[335] was the transfer of refugees and asylum seekers with disabilities to Nauru, Papua New Guinea and other 'regional processing countries.'[336] The Committee recommended (inter alia) that Australia 'cease the transfer of refugees and asylum seekers, particularly persons with disabilities, to Nauru, Papua New Guinea and other "regional processing countries", as requested by the Office of the United Nations High Commissioner for Refugees in a factsheet on the protection of so-called "legacy caseload" asylum seekers, and establish a minimum standard of health care and support for persons with disabilities held in immigration detention'.[337]

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[333] *Migration Act 1958* (Cth) s 189. See also *Disability Discrimination Act 1992* (Cth) s 52(a)(i); Legal and Constitutional References Committee, Senate, *Administration and operation of the Migration Act 1958* (Report, March 2006), Ch 5.

[334] See, eg, United Nations High Commissioner for Refugees (UNHCR), 'UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates' (Media Release, 12 October 2018); UNHCR, 'UNHCR appeals to Australia to act and save lives at immediate risk' (Media Release, 23 October 2018); Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant – Concluding Observations of the Human Rights Committee: Australia, 95th sess, 2624th mtg, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [23]-[24]; Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 And 17 of the Covenant – Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, 42nd sess, 26th mtg, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [25], [30]; Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia, 60th sess, 1725th mtg, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [31], [80]; Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict – Concluding observations: Australia, 60th sess, 1725th mtg, UN Doc CRC/C/OPAC/AUS/CO/1 (11 July 2012) [24]; Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by States parties under article 9 of the convention – Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia, 77th sess, 2043rd mtg, UN Doc CERD/C/AUS/CO/15-17 (27 August 2010) [24]; Anand Grover, Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest standard of physical
and mental health – Mission to Australia, 14th sess, Agenda Item 3, UN Doc A/HRC/14/20/Add.4 (3 June 2010) [64]; Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1: Australia, 10th sess, UN Doc A/HRC/WG.6/10/AUS/2 (15 November 2010) [47]-[49]; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia, 17th sess, Agenda Item 6, UN Doc A/HRC/17/10 (24 March 2011) [18], [42], [78].

[335] These result in the exclusion of persons with disabilities. The 10-year qualifying period for certain migrants to access the Age Support Pension and the Disability Support Pension was criticised. Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Australia,* UN CRPD 22nd session,
UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019). See the discussion in Part 3 of this submission.

[336] Ibid, para 35

[337] Ibid, para 36.

6.3 Data on disabilities in immigration detention is poor

The bulk of domestic criticism of immigration detention generally has rested on increasingly sturdy statistical foundations. For example, the Australian Human Rights Commission (AHRC) was given access to detailed statistics in 2004 for its report into children in immigration detention. The Commission was given data on the number of children in detention; where they were held; their originating country and age.[338] Statistics on the number of women detained in immigration detention centres have also been readily available.[339] These illustrate the extent to which there are unique vulnerabilities or risk factors among a group of persons, for example, children being particularly at risk of assault or female asylum seekers facing a pronounced risk of gendered violence.[340] Knowing the numbers is the starting point to accommodation for those with vulnerabilities. Not having effective data on at-risk persons is a critical ingredient of neglect.

Statistical data on the incidence of disability in the immigration detention population can be gleaned from a variety of sources, including material obtained under Freedom of Information requests.[341] However, it is unclear whether all available sources use the same definition of disability to create a coherent picture of incidence. It is our view that the statistics provided should be treated with a degree of caution. We could not identify a government or other official source which exhaustively described the prevalence of disability among persons held in immigration detention. It seems entirely possible that complete data is not available on the public record.

A formal request by the National Ethnic Disability Alliance (NEDA) for government data on incidence of disability in detention did not receive any specific data in reply.[342] As the Refugee Council of Australia (RCOA) notes, 'statistics on the number of refugees with a disability are difficult to obtain, reflecting a general lack of awareness about the issues faced by this group'.[343] The lack of transparency points to the limited accountability of the immigration detention system regarding its treatment of persons with disabilities. The data that does exist (see below and Appendix A) suggests a

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[338] See, eg, Australian Human Rights Commission (AHRC), *A last resort? National Inquiry into Children in Immigration Detention* (Report, 1 April 2004) 3.2; AHRC, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014) <https://humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>.

[339] See, eg, RCOA, 'Numbers of men, women and children held in detention: Monthly total' (Online spreadsheet) <accessible here>.

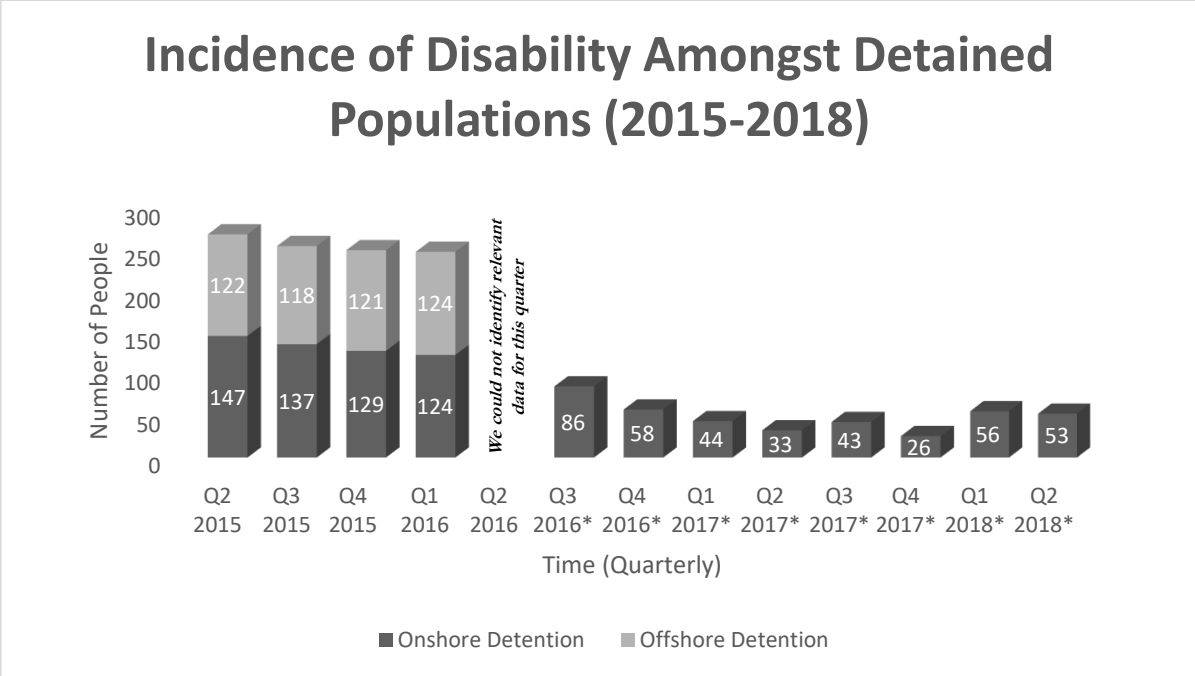
[340] Nick Evershed, Ri Liu, Paul Farrell and Helen Davidson, 'The Nauru Files: The lives of asylum seekers in detention detailed in a unique database', *Guardian Australia* (online, 10 August 2016) <https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive>.

[341] See Appendix A.

[342] National Ethnic Disability Alliance (NEDA), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (Report, March 2015), 16.

[343] Settlement Council of Australia, *Barriers and Exclusions: The support needs of newly arrived refugees with a disability* (Report, February 2019), 9.

consistent number of detainees with disabilities between 2015 and 2018 which has decreased annually in line with the reducing size of regional processing populations. The overall utility of these numbers remains limited because they say nothing about the type or extent of disability and, as detailed in Part III, are likely to be underreported and not provide a total picture of disability among this group in any case.



Reported migration decisions and visa appeals[344] provide a useful snapshot of the number of applicants in immigration detention with particular disabilities. Using a Boolean search string,[345] we found a number of migration law decisions that make tangential reference to the applicant's requirement for a wheelchair.[346] Psycho-social disabilities, including various forms of mental illness, depression and anxiety, were

[344] Tom Stayner, 'Migration tribunal predicts appeals backlog to surpass 60,000 after surge in visa rejections', *SBS News* (online, 27 September 2019) <https://www.sbs.com.au/news/migration-tribunal-predicts-appeals-backlog-to-surpass-60-000-after-surge-in-visa-rejections>.

[345] An example search string is: "detention" and "immigration" and "[relevant disability e.g. wheelchair, depression, deaf, blind]"

[346] See, eg, *XTZM and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 2153 (7 July 2020); *HLQV and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 685 (30 March 2020); *1709735 (Refugee)* [2018] AATA 5172 (29 October 2018); *EWR18 v Minister for Home Affairs* [2018] FCA 1460 (21 September 2018); *Ahmed and Minister for Immigration and Border Protection (Migration)* [2017] AATA 1908 (25 October 2017); *AUU15 v Minister for Immigration & Anor* [2017] FCCA 2220 (13 September 2017); *Nguyen v Minister for Immigration & Anor* [2017] FCCA 339 (28 February 2017); *N98/26275* [2000] RRTA 83 (20 January 2000); *Pham, Anh Tuan* [2001] MRTA 5406 (16 November 2001); *He, Gui Zhu* [2002] MRTA 391 (23 January 2002); *SCAR v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1481 (28 November 2002); *V03/15616* [2003] RRTA 1103 (18 November 2003); *SZBAZ v Minister for Immigration* [2004] FMCA 790 (24 November 2004); *V96/04995* [1996] RRTA 3218 (11 November 1996); *V94/01901* [1995] RRTA 438 (3 March 1995).

also common,[347] as were sensory disabilities including vision and hearing impairment.[348] Not all these cases concern asylum seekers in detention. Some involve mandatory visa cancellations.[349]

In 2019, the poor data on disabilities generally was a matter of concern to the CRPD Committee in its review of Australia. The Committee noted the lack of:

> national disaggregated data on students with disabilities, including on the use of restrictive practices and cases of bullying, [and the]… absence of national data disaggregated by disability at all the stages of the criminal justice system, including data on the number of persons unfit to plead who are committed to custody in prison and other facilities.[350]

In this context 'other facilities' include psychiatric hospitals and immigration detention centres.

Recommendation 6.2

> The Department for Home Affairs should collect and publish data on the incidence of disabilities in all forms of immigration detention, disaggregated by age and type of disability. Statistics should include data on the length of time persons with disability are kept in detention

[347] See, eg, *Swannick v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 165 (1 October 2020); *Ibrahim and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 3822 (1 October 2020); *Cowley and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 3814 (30 September 2020); *CTP20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1401 (30 September 2020); *Tran and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 3600 (16 September 2020); *FSR18 v Minister for Immigration & Anor (No.2)* [2020] FCCA 2585 (14 September 2020*); Selvarasa v Minister for Home Affairs & Anor* [2020] HCATrans 133 (8 September 2020*); Okoh and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 3313 (26 August 2020).

[348] See, eg, *CKR16 v Minister for Immigration & Anor* [2020] FCCA 390 (26 February 2020); *1003756* [2011] RRTA 177 (4 March 2011); *1006544* [2010] RRTA 1048 (23 November 2010); *Tercero (Migration)* [2018] AATA 1204 (26 March 2018).

[349] *Migration Act 1958* (Cth) s 501. See Part 4 of this submission.

[350] See Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Australia,* UN CRPD 22nd session,
UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), paras, 45(c) and 25(f) respectively.

C HOW DISABILITY IS IDENTIFIED IN IMMIGRATION DETENTION POPULATIONS

Refugees with disabilities have specific needs that can be overlooked during identification and registration processes.[351] Such processes should be accessible and inclusive to ensure that persons with disabilities are not disadvantaged.[352] As the UNHCR notes, persons with special needs are generally less likely to come forward and make their needs known.[353]

Our review of laws, policies and practice suggests that numerous obstacles exist to accurate and effective identification of disability in detention populations. These include the absence of systematic identification procedures, inconsistent and narrow categorisations, insufficient identification tools and the limited understanding of staff regarding different conceptualisations of disability.[354] Processes for identification tend to favour visible disabilities.[355]

A common thread in the criticisms of Australia's system is that access to detention centres is limited and physical inspections are intermittent and not thorough.[356] Inspections have been conducted by health groups such as the now disbanded Immigration Health Advisory Group (IHAG). The health focus can obscure disability considerations, insofar as the social model of disability, which forms the basis of the *Convention on the Rights of Persons with a Disability (CRPD),* is concerned.[357] Soldati et al note, the 'positioning of disability within a health paradigm negates the social, cultural and economic factors that lead to disability exclusion, marginalisation and

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[351] UNHCR, *Working with persons with disabilities in forced displacement* (Report, 2011) 9 <https://www.un.org/disabilities/documents/WHS/Working-with-persons-with-disabilities-UNHCR-2011.pdf>.

[352] UNHCR, *Resettlement Assessment Tool: Refugees with Disabilities* (Report, April 2013) 5 <https://www.unhcr.org/51de6e7a9.pdf>. But note this tool is for resettlement which may be many years after first contact.

[353] UNHCR, *Procedures and standards for registration, population data, management, and documentation* (Report, September 2003) 7 <https://www.refworld.org/pdfid/3f967dc14.pdf>.

[354] Laura Smith- Khan, Mary Crock, Ben Saul and Ron McCallum, 'To 'Promote, Protect and Ensure': Overcoming Obstacles to Identifying Disability in Forced Migration' (2015) 28(1) *Journal of Refugee Studies* 38-68, 54.

[355] Ann Davis, 'Invisible disability' (2005) 116(1) *Ethics* 153-213, 154.

[356] People with Disabilities (NSW), Submission No 24 to Australian Human Rights Commission (AHRC), *National Inquiry into Children in Immigration Detention* (February 2002), 5. Note that the AHRC inspections for 2019 were not reported until December 2020. See AHRC *Inspection of Australia's immigration detention facilities 2019 Report,* 3 December 2020, available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention.

[357] NEDA *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (Report, March 2015), 16. See also People with Disability Australia, 'Social Model of Disability' (Blog post, date unavailable) <https://pwd.org.au/resources/disability-info/social-model-of-disability/>.

discrimination'.[358] There is no history of independent disability advisory groups in immigration detention.[359]

According to the Federal Government, people who arrive in Australia by boat are screened and assessed for disabilities, within 72 hours of arrival, by 'Australian standard screen instruments', and that this is a 'quite a comprehensive assessment'.[360] However, there is some inconsistency over exactly when screening takes place. Research undertaken by NEDA suggests that screening can occur within 10-30 days of entering immigration detention.[361]

The precise nature of the assessment and whether persons with identified disabilities are given any form of priority is unclear. As NEDA writes, 'there is no way of robustly or confidently determining [that a comprehensive assessment is actually undertaken].'[362] However, screen instruments employed have included the Health of the Nation Outcome Scores (HoNOS), the Health of the Nation Child and Adolescent Outcome Scores (HoNOSCA), the self-rated Kessler 10 (K-10) and the Harvard Trauma Questionnaire (HTQ).[363] These screening tools are *capable* of identifying and recording disability.[364]

In its 2013 inquiry into human rights standards for immigration detention, the AHRC stated that the benchmark for the humane induction of detainees should involve immediate screening on arrival by health staff, in private and using interpreters of the appropriate ethnicity. [365] The screening results should then be recorded in each detainee's health summary. Any risk of self-harm or suicide should be assessed before allocating accommodation.[366]

It is not clear to what extent identification processes incorporate ongoing disability awareness training for screening staff or outreach initiatives aimed at emphasising the rights of persons with disabilities. Effective identification of disability is

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[358] Karen Soldatic, Helen Meekosha and Kelly Somers, 'Finding Ernesto: Temporary Migrant Labour and Disabled Children's Health' (2012) *International Journal of Population Research (Special Issue on Child Migrant Health*).

[359] NEDA *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (Report, March 2015), 5.

[360] NEDA *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (Report, March 2015), 15.

[361] Peter Young and Michael Gordon, 'Mental health screening in immigration detention: A fresh look at Australian government data' (2016) 24(1) *Australian Psychiatry*, 19-22, 20.

[362] NEDA *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (Report, March 2015), 15.

[363] Peter Young and Michael Gordon, 'Mental health screening in immigration detention: A fresh look at Australian government data' (2016) 24(1) *Australian Psychiatry*, 19-22, 20.

[364] See, eg, Scales 4, 5 and 10 of the HoNOS.

[365] AHRC, *Human rights standards for immigration detention* (Report, April 2013) p 20 <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention>.

[366] See ibid.

overwhelmingly contingent on self-disclosure which can be deterred by various factors including:

- Misunderstandings about the implications of disability on assessment;[367]
- The social and cultural stigma of psycho-social disabilities,[368] including internalisation of stigma resulting in concealing of stigmatised status;[369]
- Perceptions of institutional preference for people of good health;[370]
- Limited affordable means of accessing health services to obtain medical diagnosis of disability in developing countries;[371]
- No awareness of their disability;[372]
- The lack of culturally accessible information surrounding the scope and meaning of disability;[373]
- The incentive to withhold information which might otherwise attract discrimination based on their perceived additional costs to the community under the Health Rules;[374] and
- The perception that one has recovered from a psycho-social disability and no longer needs to disclose it.[375]

These factors are not mutually exclusive and often compound each other, increasing the cumulative barriers facing disclosure of disability at the screening stage.[376]

As discussed in Parts 6.5 and 6.6 below, detention can exacerbate existing disabilities and also increase the likelihood of onset of particular types of disabilities, including psycho-social disabilities in children.[377] Therefore, any process of identification and screening for disability should not only occur at the initial screening stage. Screening

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[367] UNHCR (n 40) 3.

[368] Patrick Corrigan, 'How Stigma Interferes with Mental Health Care' (2004) 49(7) *American Psychologist* 614-625, 617.

[369] Shirli Werner, Patrick Corrigan, Nicole Ditchman and Kristin Sokol, 'Stigma and intellectual disability: a review of related measures and future directions' (2012) 33(2) *Research in Developmental Disabilities,* 748-765, 750.

[370] Women's Refugee Commission, *Disabilities among refugees and conflict-affected populations* (Report, June 2008) 35.

[371] Smith-Khan et al (n 53) 23.

[372] Human Rights Watch, *I needed help, Instead I was punished* (Report, February 2018). But note this was reported In the context of prisons.

[373] People with Disabilities (NSW), Submission No 24 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002). Three out of four people from a Culturally and Linguistically Diverse (CALD) background with disability miss out on receiving non-government disability services

[374] See Public Interest Criteria 4005 and 4007. See also Joint Standing Committee on Migration, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (Report, 21 June 2010) Chapter 3 'The Migration Health Requirement.'

[375] *Tapara and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 3808 (30 September 2020) at [116] (Senior Member K Millar).

[376] Karen Soldatic, Kelly Somers, Amma Buckley and Caroline Fleay, 'Nowhere to be found: disabled refugees and asylum seekers within the Australian resettlement landscape' (2015) 2(1) *Disability and the Global South* 501-522, 508.

[377] Martha von Wethern, Katy Robjant, Z Chui, R Schon, L Ottisova, C Mason and C Katona, 'The impact of immigration detention on mental health: a systematic review' (2018) 18 *BMC Psychiatry* 382, 15.

for disability needs to take place at recurring intervals during detention, especially when the period of detention is not determinate.[378]

Identification issues do not disappear when a person leaves immigration detention and is resettled in the community. Persons with disabilities must still be linked to available support services. A failure to identify disability or the extent of disability at the immigration detention stage may result in flow-on gaps of knowledge at the resettlement stage and further hinder the full and effective participation in society of persons with disabilities.[379]

Settlement and health services have indicated that they receive little or no information of clients' needs prior to arrival, including limited notification of disability, even under the health alerts system. In one case, a service provider has mentioned that they were not notified that a person needed a wheelchair and the family were forced to carry that person as a result.[380] This can significantly delay the provision of key services such as education and disability services.[381] Further, ongoing stigmatisation of disability is not effectively addressed due to the limited penetration of disability awareness and education campaigns into culturally and linguistically diverse (CALD) communities.[382] The experience of immigration detention can be an isolating experience which increases the level of mistrust towards the government.[383] Effective disability awareness programs must begin in immigration detention but should not end following the end of detention. There remains no specialist disability service for refugees resettling in Australia.[384]

It is worth noting that the identification of disabilities in migrant communities generally is also problematic. The RCOA notes that the Australian Census and Migrants Integrated Dataset asks humanitarian migrants whether they have a 'need for assistance'. However, this question is generic and unsuited to assessing the incidence of disability among detained populations. It is possible the question captures persons with disabilities, but it may likewise include the elderly, unwell and

[378] Adele Garnier and Lloyd Cox, 'Twenty Years of Mandatory Detention: The Anatomy of A Failed Policy' (Conference paper, Australian Political Studies Australian Conference, September 2012)
[379] *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007 [2008] ATS 12 (entered into force 16 August 2008) Art 1 ("*CRPD*").
[380] Settlement Council of Australia (n 25) 12.
[381] Rachel Heenan, Thomas Volkman, Simon Stokes, Shidan Tosif, Hamish Graham, Andrea Smith, David Tran and Georgia Paxton, 'I think we've had a health screen: New offshore screening, new refugee health guidelines, new Syrian and Iraqi cohorts: Recommendations, reality, results and review' (201() 55(1) *Journal of Paediatrics and Child Health* 95-103, 100.
[382] National Ethnic Disability Alliance (NEDA), Submission No 210 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002).
[383] See ibid.
[384] Karen Soldatic, Kelly Somers, Amma Buckley and Caroline Fleay, 'Nowhere to be found: disabled refugees and asylum seekers within the Australian resettlement landscape' (2015) 2(1) *Disability and the Global South* 501, 509.

infirm. It also precludes people with disabilities who may not require physical assistance.[385]

Recommendation 6.3

> The Department for Home Affairs should make public the mechanisms it uses to identify disability in non-citizens in all forms of immigration detention.

D ACCOMMODATION OF PERSONS WITH DISABILITIES IN IMMIGRATION DETENTION

Persons with disabilities have a right to 'reasonable accommodation'. For asylum seekers this includes changes to detention policy and practices to meet their specific requirements and needs.[386] This right is arguably one of the cornerstones of the CRPD, underpinning the right to equal treatment, dignity and indeed life itself.[387] Reasonable accommodation is defined as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'[388]

In determining what is 'reasonable accommodation,' it is necessary to examine how the public structures and elements of detention can affect asylum seekers with disabilities. This does not deny the impact of a person's impairment, but challenges 'the physical, attitudinal, communication and social environment to accommodate impairment.'[389] The idea is that society should adapt for people living with impairment. This reflects the CRPD's object of respecting the inherent dignity and autonomy of persons with disabilities and protecting against discrimination.[390] In order to promote these objects, the State 'shall take all appropriate steps to ensure that reasonable accommodation is provided.'[391] Reasonable accommodation must be provided to persons with disabilities deprived of their liberty through any process.[392]

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[385] Settlement Council of Australia, *Barriers and Exclusions: The support needs of newly arrived refugees with a disability* (Report, February 2019) 9.
[386] UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Report, 2012) 38, Guideline 9.5.
[387] See CRPD, article 5(3), as well as articles 13,14, 24, and 27. See CRPD Committee, General Comment No 6, n 36, para 14ff; See also the discussion in Stephanie A Motz, 'The Persecution of Disabled Persons and the Duty of Reasonable Accommodation: An Analysis under International Refugee Law, the EU Recast Qualification Directive and the ECHR' in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer, and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill 2015) 146ff.
[388] *CRPD,* Art 2.
[389] People with Disabilities (NSW), Submission No 24 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002). See also Tom Shakespeare, 'The Social Model of Disability' in Lennard Davis (ed), *The Disability Studies Reader* (Routledge, 2010).
[390] *CRPD*, Art 3.
[391] Ibid, Art 5(4).
[392] Ibid, Art 14(2).

The AHRC has described Australia's onshore immigration detention system as becoming 'more and more like prison.'[393] The consequences have sounded in accessibility issues for people with disability.[394] The analogue between prisons and immigration detention centres is quite clear. Prisons also lack processes for proper assessment and identification of a disability resulting in the failure to provide appropriate services and accommodations for disabilities. In prisons, the lack of support and reasonable accommodation, particularly for persons with psychosocial or cognitive disabilities, can leave those persons at higher risk of violating rules and facing violence from staff.[395]

In short, many asylum seekers who experience severe and long-term physical, mental, intellectual and sensory impairment are detained. This occurs despite UNHCR Guidelines providing a 'general rule' that persons with such disabilities should not be detained at all — a view supported by International Health and Medical Services.[396] The case studies in Appendix B suggest deficits in standard operating procedures for classifying the severity of disability and frequent failures to provide reasonable accommodation.

Limited data on the incidence of impairments complicates the process of accommodating disability. Without clear identification of disability or possible disability, there is an increased risk of mistreatment. The AHRC provides three examples of apparent bad practice: the use of physical restraints; isolation practices; and failure to manage known mental health conditions.

The routine use of handcuff restraints in conducting transfers between immigration detention centres may adversely punish and worsen the conditions of persons with pre-existing disabilities.[397] In one case examined by the AHRC (at p 42), Mr AY, who had an existing self-inflicted wrist wound, was required to wear handcuffs over the wound for a period of eight and a half hours during the course of a transfer to another detention centre. The Commission reported at p 119 in 2019 that Mr AY was suffering from depression and post-traumatic stress disorder caused by his detention in general and by his treatment during this transfer in particular. The AHRC recommended that Mr AY be compensated for loss and damage suffered. Mr AY's case is one example of how mistreatment can also contribute to the onset of disability, as examined in Part

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[393] Helen Davidson, 'Australia's onshore immigration detention "unlike any other liberal democracy"', *Guardian Australia* (online, 18 June 2019) <https://www.theguardian.com/australia-news/2019/jun/18/australias-onshore-immigration-detention-unlike-any-other-liberal-democracy>.

[394] AHRC, *Risk management in immigration detention* (Report, May 2019) 36.

[395] Human Rights Watch, *I needed help, Instead I was punished* (Report, February 2018).

[396] Letter from International Health and Medical Services (IHMS) to IHMS Management and Executive, November 2013, 60 <https://www.rch.org.au/uploadedFiles/Main/Content/immigranthealth/Xmas%20Island%20-%20letter-of-concern.pdf>.

[397] AHRC, *Use of Force in Immigration Detention* (Report 130, May 2019) 31 <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>.

6.5. Although it was not stated whether Mr AY's self-harm was the product of any psycho-social disability, IHMS did indicate Mr AY had 'reached a point where he may potentially engage in self harm' (see p 42).

Of course, knowledge of disability does not guarantee that treatment of detainees with disabilities will be modified to accommodate the disability. The AHRC provided the example of Ms LC who had given birth while in detention, after which she suffered from depressive symptoms, hyperventilation, and panic attacks. She was then clinically diagnosed with postpartum depression. Detention management responded by placing the woman in a cell by herself, separating her from her husband and 37-day old baby for 32 hours, all without notice or warning (see p 106). Since her release from detention, Ms LC has been assessed with symptoms consistent with post-traumatic stress disorder and a major depressive disorder. The AHRC found that other steps were available to the Department other than separating Ms LC from her baby if it had concerns for the baby's safety. This included the provision of a support person. The AHRC recommended the Commonwealth apologise to Ms LC and pay compensation to Ms LC's family (see p 125).

Similarly, Mr ME had been diagnosed with schizophrenia and auditory hallucinations. Upon his return to detention after five weeks of psychiatric treatment, he was detained using flexi-cuffs and mechanical restraints and taken into a police watch-house. The AHRC found at p 113 that the Department did not take sufficiently account of Mr ME's mental health issues.

An overview of case studies involving disabled asylum seekers suggests that reasonable accommodation is rarely provided. When modifications are made, they are often provided in an inconsistent and patchwork manner and rarely upon request. This is consistent with what is known about the variability in service delivery standards across detention centres.[398] Bulk transfers of detainees between differing detention centres can complicate the provision of reasonable accommodation for disabled asylum seekers. This has corresponding effects on the wellbeing of a detainee.[399] While a detainee's 'physical and mental health and wellbeing' are considerations in assessing placement location,[400] it is not clear whether disability and the particularly disruptive effect of transfer on disabled asylum seekers is considered.

Mobility requirements - A failure in accommodation

Immigration detention infrastructure is more akin to the 'architecture of displacement'.[401] Centres are rarely designed to enable physical accessibility, limiting

[398] Australian National Audit Office (ANAO), *Individual Management Services Provided to People in Immigration Detention* (Report no 21, 11 February 2013) 16.
[399] Ibid 106.
[400] Ibid 101, citing Department of Immigration and Citizenship, Procedures Advice Manual, Case Management Handbook, paragraph 4.
[401] Elizabeth Grant, 'The architecture of detention: why design matters', *Architecture Australia* (online, 5 December 2016) < https://architectureau.com/articles/the-architecture-of-detention-why-design-matters/>.

the equal participation of detainees with mobility needs. The Australian Government, which has pursued greater access to premises for persons with disability,[402] is not ignorant of the 'positive impact'[403] of 'dignified, equitable, cost effective and reasonably achievable access to buildings'.[404] Immigration detention facilities tend to fall short of these standards, notwithstanding Departmental promises to provide people in immigration detention with 'accommodation commensurate with Australian community standards and expectations'.[405]

In its submission to the AHRC's National Inquiry into Children in Immigration Detention, People with Disabilities NSW (PWD) recommended an amendment to the Immigration Detention Standards to ensure accessibility for people with disability.[406] The Commission defined the benchmark standard for humane treatment of disabled detainees as ensuring that 'all goods, services and facilities are accessible to detainees with disabilities, and that they are integrated into the routine of the facility, including activities and recreation'.[407]

Basic accessibility for people with mobility needs is not consistent across immigration detention facilities. The use of elevated demountable buildings[408] with stair access prevents detainees in wheelchairs, for example, from independently accessing living quarters. This is a pronounced difference between 'life in detention' and 'life at liberty'[409] which deprives individuals of their dignity, particularly for children with mobility difficulties who are 'subjected to an environment that denies them the

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[402] See, eg, *Disability (Access to Premises – Buildings) Standards 2010* (Cth) made under s 31(1) of the *Disability Discrimination Act 1992* (Cth).

[403] Craig Laundy MP, 'Disability Access Standards reforms set to improve access to public buildings' (Media Release, 3 March 2017) <https://www.minister.industry.gov.au/ministers/laundy/media-releases/disability-access-standards-reforms-set-improve-access-public>.

[404] Department of Industry, Innovation and Science, *Review of the Disability (Access to Premises – Buildings) Standards 2010* (Report, April 2016) <https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/review_of_the_disability_access_to_premises-buildings_standards_2010_report.pdf?acsf_files_redirect>.

[405] Department of Immigration and Citizenship, *Standards for the design and fitout of immigration detention facilities* (Report, October 2007).

[406] People with Disabilities (NSW), Submission No 24 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002).

[407] AHRC, *Human rights standards for immigration detention* (Report, April 2013) <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention>) 50.

[408] At several locations. See, eg, Curtin Detention Centre; Woomera Detention Centre (NEDA *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (Report, March 2015); Christmas Island; Nauru. This includes more than living quarters. It extends to demountable hospitals at Nauru and Pontville IDC. See also photographs taken of Manus Island accommodation in 2013.

[409] Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines* (Report, March 2000) 5 <https://oldahrc.humanrights.gov.au/sites/default/files/content/pdf/human_rights/asylum_seekers/idc_guidelines.pdf>.

opportunity to grow and develop as individuals.'[410] Further, common recreational activities such as modified sports or recreational equipment may not be available. This limits a detainee's access to recreation on an equal level to their peers and can limit the development of 'independence in self-care, life skill tasks and participation in the wider community'.[411] Children who are forced into relationships of dependency during a formative developmental stage as a result of an inaccessible physical environment, are likely to experience further impairment and restriction into adulthood.[412]

Baxter Immigration Reception and Processing Centre (IRPC) is one example where minimum standards for accessible design for detainees with physical disabilities was met. It had two purpose-built unit buildings to accommodate disabilities including wheelchair access. The Port Hedland IRPC also provided basic accommodation for mobility requirements like ground floor amenities and level building access.413 Neither of these centres remain in operation.

E CAUSATION AND EXACERBATION OF DISABILITY

Many asylum seekers have experienced traumatic events in their country of origin and during their migration journey. These are persons who, prior to immigration detention, already have significant vulnerabilities.[414]

There is significant consensus in the media, academic publications and medical research on the relationship between detention and detainees' physical and mental health problems. Many have argued that long-term or indefinite detention has contributed to, exacerbated or caused a range of health problems of detainees, particularly in relation to mental health issues. Based on a study of approximately 700 detainees over 2005-2006, Green and Eagar's research revealed a definite relationship between detention and the presentation of new health problems.[415]

According to Bull et al, there is a definite connection between the duration of detention and an individual's degeneration in health.[416] From a systematic sample, they identified mental health conditions resulting from long-term detention. Silove et al

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[410] People with Disabilities (NSW), Submission No 24 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002).
[411] Multicultural Disability Advocacy Association of NSW, Submission No 122 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002).
[412] See ibid.
[413] Multicultural Disability Advocacy Association of NSW (n 105). See also AHRC (n 20) 550.
[414] Medicins Sans Frontieres, *Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru* (Report, December 2018) 20 <https://msf.org.au/sites/default/files/attachments/indefinite_despair_3.pdf>.
[415] Janette Green and Kathy Eagar, 'The Health of People in Australian Immigration Detention Centres', (2010) 192(2) *Medical Journal of Australia* 65-70, 68.
[416] Melissa Bull, Emily Schindeler, David Berkman and Janet Ransley, 'Sickness in the System of Long-Term Immigration Detention' (2013) 26(1) *Journal of Refugee Studies* 47, 56. See also Commonwealth Ombudsman, *Suicide and Self-harm in the Immigration Detention Network* (Report, May 2013) 62.

found the effects of detention stemmed from prolonged uncertainty, highly stressful interactions while detained and rare opportunities to engage health professionals.[417] The effects were directly linked to reduction in mental health in both adults and children, with minors having a particularly acute reaction to these experiences, irrespective of any history of pre-migration trauma.

Steel et al report on the progressive degeneration of detainees' mental health where initially 50 per cent of the adults exhibited PTSD and at a point of assessment in the future, every adult was suffering from major depressive disorder with the majority exhibiting PTSD symptoms.[418] Further, all inhabitants experienced at least one traumatic event during their detention[419] with common examples being riots between the guards and the detainees, witnessing suicide acts and facilities being set on fire. Witnessing the negative impacts of detention on other detainees can also inflame experiences of trauma.[420]

While detention acts as a causal factor to poorer health conditions, it can also have an exacerbating effect on pre-existing health conditions. There is a developing body of jurisprudence that incarcerating a person with pre-existing disabilities with a lack of access to adequate healthcare may worsen those disabilities and carry human rights implications.[421] The detention experience was highlighted as reducing the rehabilitative effects of treatments for mental health in 36 per cent of cases. This was further reflected in the 20 per cent of cases where health professionals, department representatives and detainees identified difficulties with engaging in the migration process due to ailments. Consequently, this increased the duration of detention by an average of three to five months.[422] This bilateral relationship created a cyclical effect with increased detention leading to poorer health and eventually added time in detention. Unfortunately, the necessary range and accessibility of research evidence is hindered by the lack of access to the general population, chance of transcultural errors in diagnostic instruments and absence of the opportunity to verify verbal reports.[423] Mares and Jureidini note that authorised individuals such as medical and health staff

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[417] Derrick Silove, Robert Brooks, Shakeh Momartin, Zachary Steel, Marianio Coello and Jorge Aroche, 'A comparison of the mental health of refugees with temporary versus permanent protection visas' (2006) 185(7) *Medical Journal of Australia* 357-361, 359.

[418] Zachary Steel, Shakeh Momartin, Catherine Bateman, Atena Hafshejani and Derrick Silove, 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia' (2004) 28(6) *Australia and New Zealand Journal of Public Health* 527-536, 533. See also Graham Davidson, Kate Murray and Robert Schweitzer, 'Review of refugee mental health and wellbeing: Australian perspectives' (2008) 43(3) *Australian Psychologist* 160-174, 164.

[419] Ibid, 530.

[420] RCOA, 'Australia's detention policies' (Webpage, 20 May 2020) <https://www.refugeecouncil.org.au/detention-policies/3>.

[421] See, eg, *R v White* [2007] VSC 142; *Price v United Kingdom* [2001] 34 EHRR 1285; Paladi v Moldova [2007] ECHR Application No 39806/05 (10 July 2007).

[422] Melissa Bull, Emily Schindeler, David Berkman and Janet Ransley, 'Sickness in the System of Long-Term Immigration Detention' (2013) 26(1) *Journal of Refugee Studies* 47, 65.

[423] Pauline McLoughlin and Megan Warin, 'Corrosive places, inhuman spaces: Mental health in Australian immigration detention' (2008) 14 *Health and Place* 254, 256.

are restricted by contracts that prevent them from speaking publicly of the situation within detention centres.[424]

A marker of poor mental health is the incidence of self-harm. A study of 560 incidents of self-harm suggests that self-harm rates for asylum seekers in all types of closed immigration detention in Australia were up to 200 times higher than rates found in the general population. The average rates did not reduce in facilities with lower security features.[425]

Recommendation 6.4

The Federal Government should establish an independent disability advisory group to monitor and review the effect of immigration detention on persons with disabilities. The group should include persons with disabilities.

Recommendation 6.5

We agree with the AHRC recommendation 8ff in its 2019 Report[426] that the Department of Home Affairs should commission a comprehensive review of the mental health care provided in immigration detention. The review should include review of the inclusiveness training given to all staff (including private contractors) interacting with detainees with disability.

Recommendation 6.6

We agree with the AHRC recommendation 12 in its 2019 Report[427] that the Department of Home Affairs should revise transfer and placement policy to ensure that people are not selected for involuntary transfer to another immigration detention facility where this would interfere with timely access to health care.

Recommendation 6.7

We agree with the AHRC recommendations 17-20 in its 2019 Report[428] concerning the use of constraints in escort operations (transfers from or between detention environments). Policy and procedures should make it clear that restraints should not be used on persons with a physical disability or other frailty.

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[424] Ibid. See also Sarah Mares and Jon Jureidini, 'Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues' (2004) 28(6) *Australian and New Zealand Journal of Public Health* 520-526, 520.

[425] See Kylie Hedrick, Gregory Armstrong, Guy Coffey and Rohan Borschmann, 'Self-harm among asylum seekers in Australian onshore immigration detention: How incidence rates vary by held detention types' (2020) 20 *BMC Public Health* 592. See further the discussion of these issues in Part 8 of this submission.

[426] See AHRC *Inspection of Australia's immigration detention facilities 2019 Report,* 3 December 2020, at 144, available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention.

[427] Ibid, 145.

[428] Ibid, 145-6.

PART VII: CHILDREN, DISABILITY AND IMMIGRATION DETENTION

Part VII of the submission considers the situation of children with disabilities in immigration detention. Although there were only two children in closed detention at time of writing (the 'Biloela' children on Christmas Island), we have included this submission because no change has been made to law and policy in Australia to prevent abuses of the past re-occurring. If only for this reason it is important to document the harms done.

More importantly, children continue to suffer as a result of detention and offshore processing policies which prioritise deterrence of putative irregular migrants over the rights of actual (embodied) child migrants.

A significant issue is that data on the incidence and nature of disabilities in children in immigration detention of any kind is poor and sometimes non-existent. This is particularly the case for children being held in community detention.

We outline concerns that Australia's immigration detention policies contribute to causing disabilities in children and fail to provide children with pre-existing disabilities with access to the life and standard of health care to which they are entitled under international law. Australia is obliged to make the 'best interests' of children in immigration detention a 'primary consideration', regardless of children's immigration status. The mandatory detention policy, which often results in the detention of children for prolonged periods, has drawn repeated criticisms from domestic and international human rights oversight mechanisms. The practice of transferring children for processing in foreign countries has been nothing short of cruel and inhumane.

We note that detention centres both in Australia and in Nauru and Papua New Guinea (PNG) suffer from a chronic lack of specialist paediatric health care services. For children with disabilities the situation breaches their 'right to special care' under international law, frustrating their right to achieve their full potential.[429]

Long periods of detention and inadequate health care and support can lead to deterioration of pre-existing conditions.[430] Case studies reveal that children in both on-shore and offshore detention facilities without pre-existing disabilities have developed 'Resignation Syndrome'.[431] This is a life-threatening psychiatric condition,

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[429] Ibid, art 23(2)-(3).

[430] Multicultural Disability Advocacy Association of NSW, Submission No 122 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002). Mental health services: see e.g. *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63; *AYX18 v Minister for Home Affairs* [2018] FCA 283; *BAF18 as litigation representative for BAG18 v Minister for Home Affairs* [2018] FCA 1060; *EMK18 v Minister for Home Affairs* [2018] FCA 1357. Paediatric treatment: see e.g. *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050.

[431] See e.g. Shayan Badraie – Jacquie Everitt, *The Bitter Shore* (Macmillan, 2008); *DWE18 as litigation representative for DWD18 v Minister for Home Affairs* [2018] FCA 1121; *FJG18 by his litigation representative FJH18 v Minister for Immigration* [2018] FCA 1585.

in which children mentally and physically withdraw from life to the point they can enter an unconscious state and require hospitalisation.[432]

Arbitrary and prolonged periods of detention, including exposure to adults suffering from severe mental illnesses, frequently cause children to develop a range of psycho-social disabilities.[433] While the incidence of pre-existing psychiatric disorders in children arriving in detention facilities is low, research has revealed that after two years all children involved in the study suffered from at least one psychiatric disorder.[434] Many detained as children experience ongoing symptoms of PTSD into their adulthood.[435]

The case studies make it clear that Australia has failed to uphold its duties towards children with disabilities in immigration detention under international law.

A AUSTRALIA'S OBLIGATIONS UNDER INTERNATIONAL LAW

Under international law, Australia is obliged to give primary consideration to the 'best interests of the child' in all decisions affecting children. In the context of immigration detention there are numerous aspects of the law that suggest children generally – and children with disabilities in particular – should not be detained.[436] For example, Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) enshrines the right to freedom from arbitrary detention.[437] The UN Human Rights Committee has stated that detention must not only be lawful but also necessary, reasonable and appropriate in all the circumstances of the case, and an 'proportionate means of achieving a legitimate aim'.[438] Article 37(b) of the *Convention on the Rights of the Child* (CRC) also prohibits arbitrary detention, stipulating that the detention of a child 'be

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[432] Louise Newman, 'What is resignation syndrome and why is it affecting refugee children?' *News GP* (online, 28 August 2018) https://www1.racgp.org.au/newsgp/clinical/what-is-resignation-syndrome-and-why-is-it-affecti.

[433] See, Australian Human Rights Commission (AHRC) *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014), <https://humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>. 30, 61.

[434] Zachary Steel et al, 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia' (2004) 28(6) *Australia and New Zealand Journal of Public Health* 527-536, 532-3.

[435] AHRC (n 6), 205.

[436] *Convention on the Rights of the Child* (CRC), art 3(1); *Convention On The Rights Of Persons With Disabilities* (CRPD), art 7(2). See also Mary Crock and Hannah Martin, 'First Things First: International Law and the Protection of Migrant Child Children' in Mary Crock and Lenni Benson (eds) *Protecting the Migrant Child: Central Issues in the Search for Best Practice* Elgar Publishing, 2018), ch 4; Mary Crock et al, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (Edward Elgar Publishing Ltd, 2017), 26; and *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 292 per Mason CJ and Deane J.

[437] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). (ICCPR).

[438] Human Rights Committee, *Van Alphen v Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) [5.8]; Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April1997) [9.4].

used only as a measure of last resort and for the shortest appropriate period of time'.[439] The CRC mandates certain standards of treatment for children deprived of liberty generally.[440] In 2012, the Committee on the Rights of the Child provided specific guidance on the detention of children in immigration contexts, affirming that

> the detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.. [States should..] expeditiously and completely cease the detention of children on the basis of their immigration status.[441]

Article 22 of the Convention on the Rights of the Child extends enjoyment of rights under the Convention to children seeking refugee protection.[442] As former Human Rights Commissioner, Prof Gillian Triggs writes:

> Broader obligations under the CRC related to ensuring that children can develop and thrive, and are protected from harm, are also highly relevant in a detention context. These include the right to freedom from discrimination (Article 2); the right to life, survival and development (Article 6); the right to privacy and family life (Article 16(1)); the right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19(1)); the right to the highest attainable standard of health (Article 24(1)); the right to education (Article 28); the right to engage in play and recreational activities (Article 31); and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 37(a)).[443]

Children with disabilities are entitled to special protection under international law. They possess a recognised 'right to special care', deemed necessary for them to achieve their full potential and individual development.[444] These measures are provided on the basis that children with disabilities are entitled to enjoy equal rights and freedoms with other children.[445] Such children are vested with all of the rights vested by the CRPD on persons with disabilities generally.

Australia's detention regime can result in children being subjected to prolonged and arbitrary periods of detention, and as such clearly puts Australia in breach of

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[439] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 37(b) ('CRC')

[440] It provides that such children must be treated with humanity and respect and in an age-appropriate manner and that their right to family unity is respected. See CRC, art 37(c) and art 37(d) which concerns the right to challenge the legality of their detention.

[441] Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The rights of all children in the context of international migration* (28 September 2012) [78]. At <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf >.

[442] *CRC,* art 22. See Mary Crock and Phoebe Yule, 'Children and the Convention Relating to the Status of Refugees' in Mary Crock and Lenni Benson (eds) *Protecting the Migrant Child: Central Issues in the Search for Best Practice* Elgar Publishing, 2018), ch 5.

[443] See Gillian Triggs, 'The Impact of Detention on the Health, Wellbeing and Development of Children: Findings from the Second National Inquiry into Children in Immigration Detention', in Mary Crock and Lenni Benson (eds) *Protecting the Migrant Child: Central Issues in the Search for Best Practice* Elgar Publishing, 2018), ch 20.

[444] CRC, art 23(2)-(3).

[445] CRPD, art 7(1).

international law.[446] The *Migration Act 1958* (Cth) (the Act) mandates the detention of all unlawful non-citizens until they are either granted a visa or removed from Australia.[447] The words of art 37(c) of the CRC are echoed in s 4AA (stating that, as a general principle, children shall only be detained as a measure of last resort).[448] However, the practice is to detain children automatically, without a prior assessment of whether detention is appropriate. As noted earlier,[449] Australian law and policy places no time limit on detention and there is no clear articulation of minimum standards for conditions in detention. There is no judicial or other review of decisions to detain.[450]

No children have been held in immigration detention centres on the Australian mainland since October 2019. Two Sri Lankan children have been held in detention on Christmas Island since August 2019.[451] As we explore in greater detail in Part 10, children have not been exempted from transfer to Nauru and Manus Island where they were detained in environments that caused serious physical and psychosocial harms. While all child transferees had been either resettled in third countries or returned to Australia for medical treatment by late 2019, a great number remain in very challenging situations even though they are no longer classified as being in closed detention.

These matters should be of concern to the Commission because no substantial change has been made to Australian law and policy that would prevent the government from once again detaining migrant children. It is also concerning that little data is available on the incidence and nature of disabilities of children in community detention settings in Australia.

Recommendation 7.1

> The Minister for Home Affairs or other responsible Minister should ensure that all children are released from closed detention with their parents or guardians into community-based alternatives. Policy settings should be changed to ensure that detention practice complies with s 4AA of the Migration Act, most particularly in situations where children present with disabilities.

Recommendation 7.2

> The Minister for Home Affairs or other responsible Minister should publish regular data on the incidence and nature of disabilities in children held in community detention.

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[446] CRC, art 37(3).
[447] *Migration Act 1958* (Cth), ss 189, 196.
[448] Ibid, s 4AA.
[449] See the discussion in Part 4 of this submission.
[450] See the discussion in Parts 5 and 6 of this submission.
[451] See https://www.abc.net.au/news/2020-12-16/biloela-family-in-offshore-detention-receive-christmas-cards/12986648.

Recommendation 7.3

The Minister for Home Affairs or other responsible Minister should ensure that no children are transferred to offshore processing centres, most particularly in situations where children present with disabilities.

B FAILURE TO TREAT = FAILURE TO THRIVE

The prolonged detention of children with existing disabilities may result in development of further disabilities due to the limited facilities and medical resources available in detention centres. The extraordinarily high incidence of mental health issues amongst children in immigration detention reflects what has been a pervasive inadequacy or even absence of mental health facilities available to children in closed detention environments.

Due to the particularly vulnerable nature of children with disabilities, a detailed assessment of their requirements should be conducted at an early stage. Disabilities related to sight and hearing are of particular concern as they may lead to secondary issues within the detention centre. The burden of dealing with these disabilities in addition to coping with the stress of detainment can result in emotional and behavioural difficulties if left unmanaged.[452]

For example, the 2014 AHRC inquiry into children in immigration detention highlighted the case of a family comprising two profoundly deaf adults and their profoundly deaf baby. Without the provision of any hearing aids or assistance with sign language support during their detention for over six months, the parents encountered extreme difficulties in communicating and intervening to advocate for the baby.[453] In this case the family obtained appropriate hearing assistance following intervention by the AHRC inquiry team.

Children are at particular risk of suffering from an exacerbation of developmental disabilities because of the static facilities and environment in detention which are uncalibrated for their ongoing development through childhood and adolescence. For example, a young person with a poorly fitted wheelchair will be at greater risk of developing scoliosis if appropriate equipment is not provided during their growth.[454]

Australian has a duty under international law to provide the highest attainable standard of health.[455] Australia is bound to take appropriate measures to ensure early identification of disabilities and intervention as appropriate, as well as, to design

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[452] See Multicultural Disability Advocacy Association of NSW, Submission No 122 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002).
[453] See, Australian Human Rights Commission (AHRC) *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014), <https://humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>, 68.
[454] See Multicultural Disability Advocacy Association of NSW, Submission No 122 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002).
[455] CRPD, arts 18, 25.

services which minimise and prevent further disability.[456] This includes a requirement to provide those services as close as possible to the children's community.[457] This duty cannot be met where medical care is inaccessible as and when required, particularly where the illness is grave or of immediate consequence.

Recommendation 7.4

If the Australian Government does revert to detaining children in immigration detention facilities, it should:

- Ensure adequate medical treatment is available and facilitate prompt transfer to specialist facilities where this is in the best interest of the child.
- Provide all resources necessary to ensure children with disability in immigration detention have equal access to medical treatment and advocacy.

Recommendation 7.5

The Australian Government should initiate prevention education programs for responsible adults on mental health causes, symptoms and how to seek help children develop coping strategies and improve distress tolerance.

C IMMIGRATION DETENTION CAUSES DISABILITY IN CHILDREN

Experience in Australia as in other countries shows that children acquire disabilities when placed in closed immigration detention for prolonged periods. Particular problems have been identified when children are held in remote detention facilities (both in Australia and in offshore processing countries). While Australian politicians have argued that punitive policies have been necessary to discourage irregular maritime migration and so 'save lives at sea', the harms caused by detention to actual child asylum seekers cannot be justified as a proportionate response.[458]

Detention environments have caused disabilities in migrant children in two key ways. First, detention environments present 'situational risks' of physical harms which can lead to disabilities. Second, detention environments can lead to a failure to treat medical conditions or a failure to respond to critical events.

1. Situational Risks

Children are entitled to protection from all forms of physical or mental violence and are entitled to the highest attainable standard of physical and mental health.[459] Exposure to detained adults, who are suffering from mental health issues can cause and compound disabilities in children detained in the same facilities. Adults suffering moderate to severe mental illnesses place children in their vicinity at significant risk

[456] CRC, art 25.
[457] Ibid.
[458] See Mary Crock, 'Of Relative Rights and Putative Children: Re-thinking the Critical Framework for the Protection of Refugee Children and Youth' (2013) 20 *Australian Journal of International Law* 33-53.
[459] *Convention on the Rights of the Child* art 19, 24.

of violence and assault.[460] Isolated locations – including desert detention facilities in Australia and the camps on Nauru and Manus Island – are inherently dangerous for children because of the opportunities presented for predatory behaviour. Children face multiple and intersecting challenges in being 'seen' by responsible authorities.

The Royal Commission into Institutional Responses to Child Sexual Abuse reviewed numerous public inquiries and investigations into immigration detention in Australia. It found a consistent failure to report on the occurrence of child sexual abuse and harm in immigration detention.[461]

This Royal Commission noted the creation in 2015 of a Child Protection Panel in response to the 'Moss Review' which was conducted in response of specific reports of child and other sexual abuse of detainees in detention centres on Nauru.[462] The Panel analysed a sample of 214 child abuse incidents, of which 37 occurred in regional processing centres. The Panel found that children with disabilities were at increased risk of sexual abuse because of their lack of autonomy and the need for parental supervision.[463] These situational risks are heightened by the child's co-residence in a confined area, particularly for unaccompanied minors.[464]

A failure to address and respond to the particular needs of each child further exacerbates these issues. For example, in determining to transfer 27 unaccompanied children to Nauru the same generic reasoning was given: 'appropriate arrangements are in place in Nauru, therefore the child's transfer was appropriate.'[465] The responsibility of departmental officers to make decisions in the 'best interests of the child', requires an individual focused assessment, based upon consideration of a wide range of factors.[466]

2. 'Resignation syndrome' and other psycho-social disabilities caused by detention

Research has shown that children in detention who entered without pre-existing disabilities have developed Pervasive Refusal Syndrome,[467] also known as

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[460] Ibid 330.

[461] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) vol. 15, 175-180.

[462] See *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru: Final Report.* Available at: https://www.homeaffairs.gov.au/reports-and-pubs/files/review-conditions-circumstances-nauru.pdf.

[463] Ibid 196. See Child Protection Panel https://www.homeaffairs.gov.au/reports-and-publications/reviews-and-inquiries/departmental-reviews/child-protection-panel
See generally, Patrick Parkinson & Judy Cashmore, *Assessing the different dimensions and degrees of risk of child sexual abuse in institutions* (Report, June 2017) 39.

[464] Patrick Parkinson & Judy Cashmore, *Assessing the different dimensions and degrees of risk of child sexual abuse in institutions* (Report, June 2017) 93.

[465] AHRC (n 6) 193.

[466] *Convention on the Rights of the Child* art 3(1).

[467] Goran Bodegard, 'Pervasive loss of function in asylum-seeking children in Sweden' (2007) 94(12) *Acta Paediatrica* 1706-1707.

'Resignation Syndrome.' Resignation syndrome is a psychiatric condition sometimes accompanied by major depressive disorder and symptoms of social withdrawal, loss of consciousness and dissociation.[468] Children may stop talking, eating and drinking, to the point that they enter an unconscious state and require hospitalisation for intravenous fluids.[469] This condition is life-threatening and carries the risk of organ failure and death as a result of dehydration and malnutrition.[470]

Research conducted in 2000-2004, when Australia was detaining a great number of children, showed that the incidence of psychiatric disorders in asylum seeking children, prior to their arrival at detention centres, was low. After two years in custody, however, all children were found to exhibit at least one psychiatric disorder and most displayed multiple psychiatric disorders.[471] The children were exposed to the same distressing situations as adults, with some experiencing their own parents attempting suicide.[472]

Disturbing events witnessed by children in detention can have deep psychological impact. The saga of the Bakhtiyari family - including five children - detained at Woomera Immigration Detention Centre between 2001 – 2004 is an example in point. A psychologist and Youth worker found that 'ongoing detention was causing deep depressive effects upon the children.' The children were engaging in acts of self harm, including cutting and voluntary starvation. Having seen their mother's lips sewn shut, two of the Bakhtiyari boys stitched their lips together.[473]

In 2014, 34 percent of children in closed detention were found to have mental health issues to a degree which required outpatient mental health services in Australia.[474] Less than 2 percent of children required such services in the Australian population.[475] Furthermore, many people who were formerly detained as children experience ongoing symptoms of PTSD, which continue well into adulthood.[476]

Several children detained on Nauru displayed resignation syndrome.[477] Two children suffering from this condition were granted applications for transfer to Australia in

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[468] Louise Newman (n 11).
[469] Ibid.
[470] Ibid.
[471] Zachary Steel et al, 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia' (2004) 28(6) *Australia and New Zealand Journal of Public Health* 527-536, 532-3.
[472] Ibid 532.
[473] *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, UN Human Rights Committee (HRC), 6 November 2003 at [4.1].
[474] See, Australian Human Rights Commission (AHRC) *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014), <https://humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>, 29.
[475] Ibid.
[476] Ibid, 205.
[477] Louise Newman (n 11); Lane Sainty, 'Australia's Child Refugees Are Suffering A Rare Psychological Illness Where They Withdraw From The World', *Buzzfeed News* (online, 13 August 2018)

DWE18 as litigation representative for DWD18 v Minister for Home Affairs and *FJG18 by his litigation representative FJH18 v Minister for Immigration, Citizenship and Multicultural Affairs*, due to the absence of the standard of treatment they required on Nauru.[478]

D CONCLUSION

Article 37 of the Convention on the Rights of the Child dictates that detention should be used as a measure of last resort and for the shortest appropriate period of time.[479] Further, Australia is bound to ensure that no child is deprived of their right to access health care services which secure enjoyment of the highest attainable standard of health.[480] While the last child was evacuated from Nauru in February 2019, the available information is that former child detainees suffer ongoing negative psychological and physical impacts.[481] The pattern of neglect, inadequate treatment and a lack of pro-active measures to address acquired disabilities has led to detrimental outcomes for an especially vulnerable class of persons. Australia has been in clear breach of its international legal obligations.

Australia has a specific duty to disabled children to ensure they receive 'special care.' This involves making available adequate resources to the child which are appropriate to the child's condition.[482] It simply cannot be said, in light of the evidence evinced that containment is appropriate treatment let alone in the 'best interests of the child.'[483] Failure to promptly transfer children requiring urgent or specialised treatment catalyses or attributes to the deterioration of their condition. This is directly contrary to assuring they receive appropriate medical treatment and ensuring the maximal possible development of the child. Indeed, in instances where children are suicidal in detention, containment often leads to the occurrence of further suicide attempts, directly in contradiction with Australia's obligation to ensure to the maximum extent possible the *survival* of the child.[484]

<https://www.buzzfeed.com/lanesainty/australias-child-refugees-are-being-diagnosed-with-swedens?utm_term=.nwzY5dAAg#.ba0NxnWWy>; Ben Doherty, 'Begging to die': succession of critically ill children moved off Nauru', *The Guardian* (online, 25 August 2018) https://www.theguardian.com/australia-news/2018/aug/25/begging-to-die-succession-of-critically-ill-children-moved-off-nauru.

[478] [2018] FCA 1121; [2018] FCA 1585.

[479] *Convention on the Rights of the Child* art 37.

[480] Ibid art 24; see also *International Covenant on Economic, Social and Cultural Rights* (ICESCR) art 12.

[481] Guardian Staff, 'Final four children held on Nauru to be resettled with their families in US', *Guardian Australia* (online, 3 February 2019) <https://www.theguardian.com/australia-news/2019/feb/03/final-four-children-held-on-nauru-to-resettled-with-families-in-us>.

[482] Ibid art 23.

[483] Ibid art 3.

[484] Ibid art 6.

E CASE STUDIES

1. 'Resignation syndrome' cases

(a) Shayan Badraie

Shayan Badraie is an Iranian refugee who arrived in Australia in March 2000 with his family when he was 5 years old. Shayan is one of the earliest known cases of a child suffering from resignation syndrome in the Australian immigration detention system. Whilst in Woomera and later the Villawood detention centre, he witnessed violent acts of self-harm, hunger strikes, suicide attempts and riots which involved the use of tear gas in response.[485] At Woomera Shayan witnessed a man threatening to slash his chest with a mirror shard, a man who had attempted to set himself on fire and a man who threatened to jump from a tree.[486] At Villawood, Shayan witnessed a man attempt suicide by slashing his wrists.[487] Jacquie Everitt, a human rights lawyer who assisted Shayan's family in their immigration appeal case described Shayan's appearance upon meeting him for the first time at Villawood in July 2001[488]:

> *'The child's dark, half-open eyes stare sideways, unmoving and unblinking. It is the first time I have met him and this lifelessness shocks terribly. Although I knew before I came he was not eating, drinking or speaking, I see now that his skin has the waxy colourless look of death, and I wonder how long there is left.'*

His condition required emergency admission to Westmead Hospital for intravenous fluids on 9 occasions whilst he was at Villawood from March 2001 until his release into foster care in August 2001.[489]

Shayan was first diagnosed with Post-Traumatic Stress Disorder (PTSD) at Woomera in early December 2000.[490] In a report dated 10 May 2001, Westmead's Department of Psychological Medicine, directly attributed the development of his PTSD to the context of the detention centre environments he had resided in for the past 14 months, including the exposure to 'aversive events'.[491] The specialists noted his condition was exacerbated by the uncertainty of how long he and his family would remain in detention and that he was at high risk of experiencing recurring symptoms without a change from this environment.[492] Throughout this period, medical specialists advised that Shayan was at risk of permanent damage as a result of his condition, including

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[485] Jacquie Everitt, *The Bitter Shore* (Macmillan, 2008) 122, 134-5; Australian Human Rights Commission (AHRC), *A last resort? National Inquiry into Children in Immigration Detention* (Report, 1 April 2004) 343-4, 346.
[486] Jacquie Everitt, *The Bitter Shore* (Macmillan, 2008) 118-9, 146-7, 149-150, 152, 171-2; Australian Human Rights Commission (AHRC), *A last resort? National Inquiry into Children in Immigration Detention* (Report, 1 April 2004) 343-4, 346.
[487] Jacquie Everitt, *The Bitter Shore* (Macmillan, 2008) 171-2.
[488] Ibid vi.
[489] Ibid 216.
[490] Ibid 173.
[491] Ibid; Australian Human Rights Commission (AHRC), *A last resort? National Inquiry into Children in Immigration Detention* (Report, 1 April 2004) 346-7.
[492] Ibid.

the risk of 'long lasting psychological damage and distortion of personality development' and failure of his internal organs.[493]

In their further letter to Villawood on 18 May 2001, the doctors at Westmead Hospital stated it was not in Shayan's 'best interests' to be discharged back to the environment at Villawood.[494] This is legally charged, as 'best interests' refers to the obligation of the government to ensure his interests were given 'paramount consideration'.[495] The government's decision to return Shayan to detention following his release from the hospital was a breach of their legal duty owed him.[496] Furthermore, the government acted contrary to Shayan's 'best interests' in placing him into foster care in August 2001, rather than removing him and his family from detention in accordance with the advice of independent medical experts.[497]

Following the findings of the AHRC that the government had breached its obligations owed to Shayan under the *Convention on the Rights of the Child*, a claim was brought against the Commonwealth government on his behalf, by his father as tutor.[498] Notably, the Department of Immigration did not accept the findings of the report.[499] Although proceedings were commenced, these were ceased following the landmark settlement in which the government's offer of $400,000 in compensation was accepted in March 2006.[500] The commencement of proceedings was nevertheless significant as this was the first claim in Australia brought on behalf of a refugee child, whose psychological injury sustained in detention is likely to have an impact on his adult life.[501] It is apparent that the Minister for Immigration failed to consider Shayan's 'best interests' in making various decisions concerning him, at least up until granting him, his sister and mother bridging visas in January 2002. This is encapsulated in annotations to an assessment included in a DIMA Minute Paper referred to in the court proceedings. The word 'Bucklies' – apparently in the handwriting of the then Minister for Immigration - was scrawled next to the recommendation that Shayan be released with his family from the detention environment.[502]

In 2008, Shayan was nearly 14 and his parents believed his 'pre-detention spirit' had 'begun to reignite'.[503] However, following his release from detention, Shayan

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[493] Jacquie Everitt (n 103) 174, 216.
[494] Ibid 175; *Convention on the Rights of the Child* art 3(1).
[495] Ibid.
[496] Jacquie Everitt (n 103) 182; see *Convention on the Rights of the Child* art 3(1).
[497] Jacquie Everitt (n 103) 209, 216-7; see *Convention on the Rights of the Child* art 3(1), 9(1).
[498] Australian Human rights Commission, *Report of an inquiry into a complaint by Mr Mohammed Badraie on behalf of his son Shayan regarding acts or practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)* (HREOC Report No 25, 2002); see *Convention on the Rights of the Child* art 3(1), 9(1) 19(1), 37(c).
[499] Jacquie Everitt (n 103) 270.
[500] 'Landmark payout to detention child' *The Sydney Morning Herald* (online, 3 March 2006) https://www.smh.com.au/national/landmark-payout-to-detention-child-20060303-gdn2wd.html.
[501] Jacquie Everitt (n 103) 273.
[502] Ibid 238.
[503] Ibid 294.

continued to suffer from symptoms of PTSD. He appeared detached in social situations and struggled to interact with other children and experienced difficulties at school.[504] Dr Louise Newman recommended ongoing treatment, which she advised would 'take a long time to resolve'.[505] By the end of 2003, he had not made improvements due to the 'deep roots' of his PTSD, the symptoms of which his psychologist, Dr Martin, notes complicates his recovery as he continued to experience nightmares, flashbacks and discuss self-harm.[506] The boy was taking anti-depressants and other psychiatric medication at 10 years of age.[507]

(b) DWE18 as litigation representative for DWD18 v Minister for Home Affairs [2018] FCA 1121

Resignation Syndrome is a disorder that affects children in the midst of a 'strenuous and lengthy migration process'.[508] This case was one in a series of applications made with respect to child refugees caught up in the second 'Pacific strategy' which saw hundreds of children transferred to Nauru or PNG for processing. Although processes were put in place to allow the Minister for Immigration to transport individuals back to Australia for treatment, many requests were denied. This forced many applicants to resort to Federal Court actions, seeking injunctions to require the Minister to transfer on the basis that a tort was being committed.

The female child subject of this application had refused food and water for 6 days and was suffering from symptoms of severe depressive disorder.[509] The expert evidence recommended her urgent transfer to Australia for treatment and noted she was at risk of developing 'severe dehydration, renal failure and malnutrition' in addition to long-term risks of metabolic compromise, organ failure, neurological damage and increased duration of her unresponsive state.[510]

The Federal Court accepted the applicant's submission, finding that her current medical situation was not being monitored or managed and she was at 'serious risk of permanent complications'.[511]

Dr Connor noted recovery requires a 'secure and hopeful environment', which is very difficult in the context of family members being worried about separation.[512] The court made orders for the transfer of the child and her younger sister due to the

[504] Ibid 248, 268.
[505] Ibid 253.
[506] Ibid 270-1.
[507] Ibid 275.
[508] [2018] FCA 1121 [14]. (Evidence of Dr O'Connor).
[509] *DWE18 as litigation representative for DWD18 v Minister for Home Affairs* [2018] FCA 1121 [22], [24].
[510] Ibid [24].
[511] Ibid [26], [32].
[512] *DWE18 as litigation representative for DWD18 v Minister for Home Affairs* [2018] FCA 1121 [7].

unavailability of the treatment she required on Nauru.[513] This resulted in the separation of her from the rest of her immediate family, including her mother.[514]

The failure of Australian government authorities to provide the applicant with the standard of medical treatment she required – and the subsequent separation of the child from her family - amounted to clear breaches of international law.[515]

(c) FJG18 by his litigation representative FJH18 v Minister for Immigration [2018] FCA 1585.

The applicant in this case was a 12-year old UMA boy who had been transferred from Australia to Nauru in February 2014.[516] Expert medical evidence, accepted by the court, stressed he was 'at imminent risk of death' as he had refused food and fluids for 10 to 15 days, had lost 14% of his body weight and was 'unable to get up from his bed or even raise his head without feeling dizzy'.[517] His mental health had also significantly deteriorated and he was suffering from depression, not sleeping, increasingly withdrawn and not communicating.[518]

Associate Professor Karen Zwi, a Community Paediatrician, concluded his symptoms demonstrated 'the diagnostic features of Pervasive Refusal Syndrome' and required high level of urgent medical care, including rehydration and safe-refeeding – without which his life was at risk.[519] She noted he was at risk of further kidney damage, the longer his refusal of fluids continued.[520] The doctor attributed the development and continuation of this condition to the context of the detention to which the applicant was subject.[521]She stated that he presented to her 'a strong intention to die if hope for his future is not restored' and that as he is 'not interested in life in his current context', she did not believe he could be 'convinced to eat and drink' if he remained where he was.[522]

The judge accepted that the applicant required 'immediate stabilisation and transfer to an Australian tertiary Children's Hospital for intensive management within 24-48 hours', accompanied by his family.[523] Although the judge did not rule on damages claim made by the applicant, the order to transfer the child confirmed that the

[513] Ibid [31], [36].
[514] Ibid [36].
[515] See *Convention on the Rights of the Child* art 6(2), 24(1).
[516] [2018] FCA 1585.
[517] Ibid [1].
[518] Ibid.
[519] Ibid [2].
[520] Ibid [5].
[521] *FJG18 by his litigation representative FJH18 v Minister for Immigration, Citizenship and Multicultural Affairs* [2018] FCA 1585 [5].
[522] Ibid.
[523] Ibid [5].

Commonwealth government had failed to provide the applicant with the required standard of medical care.[524]

2. Further Case Studies Involving Medical Transfers From Nauru (Medevac Cases)

(a) AYX18 v Minister for Home Affairs [2018] FCA 283

In March 2018, an application was made by an Iranian mother on behalf of her then **10 year-old son,** for an urgent mandatory interlocutory injunction to transfer him from Nauru to a specialist in-patient child and adolescent psychiatrist unit in Australia for assessment. The boy was suffering from serious mental illness, a medical condition and had suicidal tendencies.[525]

The child and his parents arrived in Australian waters by boat from Iran in 2013. The family was taken to Christmas Island and classified as UMAs.[526] They were removed to Nauru where they were recognised as refugees and granted temporary settlement visas in 2014.[527] They were housed in Nauru's demountable Camp Ijum. The father suffered a brain injury following a bicycle accident and was removed to Australia for specialist treatment. He has remained ever since in Brisbane Immigration Transit Accommodation.

The boy suffered disrupted sleep (night terrors) from the start, but his mental health deteriorated significantly after the departure of his father. He became aggressive and had episodes of suicidal ideation with threatened self-harm which occurred after he reported 'seeing things.' In tandem with psychological issues, he was suffering pain from an undescended testicle.[528] Perram J noted at [14] that the hospital at Nauru was not equipped to treat the boy: 'Two of its patients died as a result of the actions of the anaesthetist on the island who was then arrested'. IHMS advised against referring the boy to the hospital. In 2017 a Dr Martin recommended the boy be transferred to Brisbane for surgery but the request was rejected.[529]

Evidence presented to the Federal Court suggested that the boy's mental health continued to decline. A Dr Gordon reported that the boy had suffered severe physical groin pain, adding to his depression. In 2018 'he attempted suicide using paracetamol and antibiotics where he was taken to emergency, unconscious.' While in hospital, he attempted to strangle himself with a curtain. After being discharged, a few weeks later, 'he grabbed a paring knife in a highly agitated state which had to be wrestled from him.'[530]

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[524] Domestic law: duty to provide reasonable care whilst in detention (see *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* [2004] FCAFC 93 [33], [37]; International law: *Convention on the Rights of the Child* art 24.
[525] *AYX18 v Minister for Home Affairs* [2018] FCA 283 [1]-[3].
[526] Ibid [6].
[527] Ibid [8], [12].
[528] Ibid [13]-[14].
[529] Ibid [15].
[530] *AYX18 v Minister for Home Affairs* [2018] FCA 283 [16].

The child was evaluated by psychiatrists who recommended he be closely supervised and that he required specialist child psychiatry assessment at a facility that was safe with adequate resources. A Dr Reynolds stated 'we do not have the ability to provide this kind of support, supervision or specialised care in Nauru and are unable to safely manage the level of risk presented by this boy.' He also stated, 'without such care, the risks of further impulsive and dangerous acts of self-harm and suicidal behaviour are significant.'[531]

Dr Reynolds requested the IHMS team make an urgent referral via the OMR process, with immediate recommendation to move the family to the RPCI RAA unit where they would be contained in a gated community for observation. Dr Gordon stated 'the treatments provided to [AYX18] on Nauru have not improved his condition…it is in fact deteriorating' and strongly recommended he be removed to Australia. He was concerned that if his recommendations were not followed, the boy was at significant risk of 'developing a more chronic severe mental health problem which will be very difficult to treat' and that 'his current and real risk of further suicide attempts and complete suicide, as well as the risk of his mother attempting or completing suicide' would be exacerbated.[532]

Despite the fact the IHMS dispatched a 'child development team' to Nauru, Dr Martin stated they 'do not provide a lasting form of treatment for patients, particularly when ongoing inpatient psychiatric treatment is required.'[533] Indeed, Perram J noted at [21] Dr Reynolds had left Nauru which 'for the foreseeable future had no child psychiatrist.'

Injunctive relief was granted and the young boy was ultimately transferred to Australia for treatment.

(b) EMK18 v Minister for Home Affairs [2018] FCA 1357

A Somalian husband and wife arrived in Australia by boat without a valid visa and were detained at the Nauruan Regional Processing Centre. They were subsequently recognised as refugees by the government of Nauru. They gave birth to a daughter in 2017 and all family members held visas which entitled them to remain in Nauru.[534] The mother and the husband, on behalf of his then 16-month old daughter, applied for an interlocutory injunction to transfer to a location in Australia for urgent medical treatment constituting psychiatric and paediatric evaluation, which they contended were not available on Nauru (AT [2]).

The mother suffered from a 'range of debilitating physical and psychiatric conditions' (see [13]) including severe depressive illness with psychosis and PTSD and had attempted suicide by hanging (see [14], [22]). The daughter had 'concerning

[531] Ibid [17].
[532] Ibid [18].
[533] Ibid [20].
[534] *EMK18 v Minister for Home Affairs* [2018] FCA 1357 [11].

presentations, which the evidence demonstrates require some urgent investigation in order to secure an accurate diagnosis.' (see [13]) Dr Bauert, a paediatrician, formed the opinion [at [26]) the daughter suffered from severe agitation and aggression. He stated she would need access to a paediatric hospital to undergo full assessment, requiring performance of an EEG and MRI. Mortimer J accepted this evidence and stated at [27] there was a 'worrying and unexplained medical situation for [the] daughter.'

There was discussion of potential medical evacuation to Taiwan under a Memorandum of Understanding between the Commonwealth of Australian and the Taipei Economic and Cultural Office in Australia (see [28]). However, evidence was given (at [29]) the father did not consent to his daughter being transferred nor to an arrangement that would separate mother from daughter. Despite seeking urgent evacuation from Nauru to Australia through direct communication with the Minister, the Minister continued to pursue the option of transfer to Taiwan (see [331]).

Mortimer J granted the interlocutory injunction for transfer to Australia emphasising the importance of ensuring the daughter is healthy and cared for but also that she has a mother who is cared for, who can bond with her appropriately. However, no specific time limits were imposed and orders were made for medical evacuation 'as soon as reasonably practicable.'(see [39])

(c) FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection [2018] FCA 63

In 2013, a nine year old girl (FRX 17) and her family arrived at Christmas Island by boat and sought asylum. Classified as unauthorised maritime arrivals (UMAs) the family were transferred to Nauru, a designated regional processing country.[535] In 2014 they were released from detention on temporary settlement visas to reside in the Nauruan community. While technically such visas permit residents to leave and re-enter Nauru, this is of no consequence. A country must be willing to admit them. Australia does not permit resettlement.[536]

In 2017 an application for an interlocutory injunction was made to remove the young girl from Nauru to receive care. Not yet a teenager, she had attempted suicide by overdosing on medication and had continued suicidal ideation with possible development of psychotic depressive illness. Medical evidence suggested an extreme risk she would commit suicide or engage in self harm. She required immediate admission to a specialist child mental health facility.

Being unable to leave Nauru for over 3 years exacerbated the decline of the child's mental health. Clinical notes from a child psychologist and psychiatrist in 2017 state she blamed the Australian government for her mental state as she felt 'trapped.' She had low mood and social withdrawal and was diagnosed as suffering from

[535] *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 [2].
[536] Ibid [3].

Adjustment Disorder. She was highly anxious with associated symptoms of disinterest, reduced appetited, tearfulness, panic episodes and disturbed sleep. She experienced intrusive thoughts and frequently heard a 'mean' man laughing in a sinister tone, making distressing comments. In an incident where she was left alone in her bedroom, she threw things around and banged on a cupboard, crying that the man was inside. She stated the voice in her mind told her 'dying is better than living, you'll be free.' She had knowledge of the suicide of a Sri Lankan man on Manus Island and expressed wishes to die as he had.[537]

In December of 2017 she attempted suicide and told staff she would try to commit suicide again. She was discharged and a home visit was arranged for the following day. IHMS advised the mother that she was discharged from hospital as they could not provide the mental health care she required. Her mother was advised to hide dangerous objects and to supervise her closely. At the home visit, she told the counsellor, 'the medication didn't kill me, I will try something else…I will kill myself with a knife or jump off the rocks.' She disclosed that the attempted suicide had made her feel good. She saw a psychiatrist the following day, whose clinical notes state, 'she interspersed the theme of wanting to die with hopes of leaving Nauru and starting a new life elsewhere.'[538]

She showed no improvement and a few days later, she ran away from her mother who found her in a position of height ready to jump and stopped her from suiciding. The girl stated a voice was telling her to 'jump, jump, jump.' Clinical notes confirmed that she had not been prescribed medication and was not receiving regular specialist psychiatric care.[539]

Professor Newman saw her and concluded this was an extremely serious presentation with immediate risk of suicidal behaviour. The child was in need of immediate psychiatric assessment by a qualified specialist and required treatment in an inpatient child mental health facility with appropriate supervision. He noted she had been 'managed with *only* supportive mental health approaches and monitoring and had not received any medical treatment until her suicide attempt.' He criticised medical treatment provided to the child, stating there was a failure to consider the significance of hallucinations and deterioration she experienced and that it was particularly concerning that 'even after a significant suicide attempt [she was] discharged from hospital still in a suicidal state with no documented consideration of the role of anti-depressant and anti-psychotic medications and the need for specialist psychiatric hospitalisation.'[540]

Australia has a duty to ensure children with disabilities have access to appropriate medical treatment which includes a proactive duty to mitigate the development of

[537] Ibid [18].
[538] Ibid.
[539] Ibid.
[540] Ibid [19]-[20].

disability.[541] Professor Newman stated there is a 'high risk of prolonged disorder and suicidal behaviour if inadequately treated.' Despite the expert medical opinion of Professor Newman that she should be transferred urgently and multiple attempts to request transfer, these were declined.[542]

She was instead placed in the RPCI Immigration Detention Centre which constitutes containment, as opposed to treatment. Yet, detention of children should be used only as a measure of last resort and for the shortest appropriate period of time.[543] While free healthcare services are available on Nauru such as access to the Settlement Health Clinic, the RoN hospital which provides after-hours care, the RPC and RAA, Professor Newman stated, 'the Nauru IDC cannot be seen as a *specialist* mental health setting for a suicidal [age redacted] year-old.' He stated, containing her 'is a wholly inadequate and inappropriate response…and will potentially increase risk of mental deterioration.'[544] Dr Martin, a GP who worked as a Senior Medical Officer on Nauru stated at [35], 'Nauru is ill equipped to handle complex mental health cases, particularly child mental health' and 'there is no permanent child psychologist available.' Indeed, Mr Tran, counsel for the respondents, stated at [36] that the next scheduled visit by a child psychiatrist was in February 2018, two months later.

There is an established process on Nauru for seeking outside medical assistance. If her condition deteriorated she would be referred to the RoN hospital for assessment. If the RoN hospital formed the view they could not treat her on Nauru, they would engage in the Overseas Medical Referral process. A committee would consider the case and make a determination whether she should be transferred or assistance be requested for treatment to be provided on Nauru. An OMR was not received in relation to the young girl (see [32]-[34]).

Nonetheless, Dr Martin stated the OMR process was inadequate to deal with the deterioration in her mental health. For instance, if the child's condition were to escalate, proper processes were not in place to 'provide an emergency medical evaluation.' It was his opinion that the 'request for medical movement form' and transfer system was 'inefficient' and that 'evacuation deadlines…recommended, were frequently not met and at times appeared to be ignored by the Australian government…[while patient's] conditions worsened.' Dr Martin stated, 'to the best of my recollection, there were six serious cases where asylum seekers had been waiting for months beyond medically recommended timeframes without treatment during my tenure on Nauru.' This included an instance where a patient waited 12 months for transfer despite a one month recommended treatment time. He also stated at [37]

[541] *Convention On The Rights the* Child art 23, 24.
[542] *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 [25].
[543] *Convention On The Rights the* Child art 37(b).
[544] *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 [27].

follow-ups and requests were 'routinely ignored by the OMR committee with no reasons given.'

Murphy J noted at [57] the respondents 'did not contradict the evidence of Professor Newman and Dr Martin that there is no specialist child mental health facility on Nauru' and that the respondents did not submit the evidence was incorrect. Furthermore, at [58] Murphy J stated he was 'disinclined to accept that a child psychiatrist visiting every few months (or even every month)…[was sufficient]' and at [70] stated he did not consider the OMR process 'adequate or likely to be sufficiently swift to adequately protect against the risk of suicide.'

Consequently, the court ordered that 'as soon as reasonably practicable' the Respondents place the child in a specialist child mental health facility. It was conceded serious questions to be tried remained, including whether the respondents owed the applicant a duty of care to provide her with a level of medical care reasonably designed to meet her mental health care needs and whether this included a duty to remove her from Nauru to receive specialist care. On the balance of convenience, it was held the extreme risk she would commit suicide and her mental health would deteriorate if an injunction was refused outweighed any expenditure potentially suffered by the Commonwealth.

(d) BAF18 as litigation representative for BAG18 v Minister for Home Affairs [2018] FCA 1060

The applicant in this case was a 17-year-old boy, who had resided on Nauru with his mother since he was 11 years old.[545] Both were recognised as refugees ([3]). The court preferred and accepted the medical evidence of Drs O'Connor, Mares and Coventry, whom were doctors engaged by the applicant's solicitors.[546] The expert evidence provided by these doctors at [31] formed the basis for a diagnosis of Major Depressive Disorder (MDD), Post-Traumatic Stress Disorder (PTSD) with persistent suicidal ideation and intent. They identified this risk as of high urgency and 'increasing intensity', particularly if he remained on Nauru.[547] His IHMS medical records also detailed he was suffering from social withdrawal, panic attacks, increased anxiety, sleep disturbance, threats of self-harm, 'significant suicidal preoccupation and at least one thwarted suicide attempt', which his mother had prevented (see [32]).

The court ordered transfer of the applicant to Australia within 48 hours, on the basis that his continued residence at Nauru was a 'causative and continuing factor to his mental illness and substantial risk of self-harm' and did not provide an appropriate context for which he could receive effective treatment.[548] Moreover, the adequate standard of medical care required by the applicant was not held to be available on

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[545] *BAF18 (as litigation representative for BAG18) v Minister for Home Affairs and Anon* (2018) 162 ALD 115 [1].
[546] Ibid [25], [29], [35].
[547] Ibid [4], [31].
[548] Ibid [51], see also orders at (iv).

Nauru contrary to the Commonwealth's submissions – there was no Child and Adolescent Psychiatrist nor continuity of care available.[549] It was also noted at [53] that the applicant had lost trust and willingness to engage with the services available that were provided by the Australian Border Force.

Dr Coventry's recommendation that the applicant 'requires certainty regarding resettlement and the capacity to build a functional life and hope' for his recovery and effective treatment directly conflicts with the policy of mandatory detention.[550] Furthermore, despite the evidence of Dr Mares that medical treatment would be most effective 'in the absence of an overhanging threat' that the applicant might be returned to Nauru, the court was not satisfied that, if an application for permanent removal to Australia was sought, this would be granted (see [61]).

(e) DJA18 as litigation representative for DIZ18 v Minister for Home Affairs [2018] FCA 1050

The application in this case was brought on behalf of a two year old girl suffering from herpes encephalitis, described by the court as a 'serious and life-threatening neurological condition', involving 'serious ongoing risks' that will likely require ongoing treatment.[551] She was born in Nauru in 2016 and subsequently granted refugee status (see [2]). She became ill on 7 June 2018 and IHMS diagnosed her as suffering from severe sepsis with a provisional diagnosis of meningo-encephalitis. In consultation with Dr Field, an Australian based intensive care specialist, IHMS recommended her urgent transfer to a tertiary level hospital in Australia, or a third country with 'comparable medical capabilities to manage a paediatric emergency.'(see [6],[26])

The court accepted the expert evidence of paediatric specialist, Dr Michael Harbord, as to the standard of care required for her condition.[552] This included undergoing an MRI under anaesthetic within a week following onset, which is 'regularly and safely undertaken in Australian hospitals', in addition to an EEG within the same time frame.[553] Delay in obtaining such an MRI carries the risk of potential brain damage and scarring not being detected, which effectively limits the extent to which treating practitioners can be prepared for future treatment plans.[554]

In response and contrary to the concerns of the IHMS that the Pacific International Hospital (PIH) in Papua New Guinea (PNG) did not have the necessary capabilities, an officer of the Australian Border Force made arrangements for the applicant to be transferred to PIH on 14 June with her mother (see [4]). PIH had not obtained such an

[549] Ibid [48], [50].
[550] Ibid [37](ii).
[551] *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050 [1], [14].
[552] Ibid – see orders of the court; also at [45], [49]-[50].
[553] Ibid [45], [51].
[554] Ibid [45], [49]-[50].

MRI nor could they perform an EEG.[555] It is clear from the evidence PIH did not have the required treatment equipment or specialist capabilities required to provide appropriate treatment.

Moreover, the court addressed concerns the government intended to transfer the applicant back to Nauru by confirming that the required 'reasonable standard of medical care' for her condition was also unavailable on Nauru, due to the absence of a paediatric neurologist, to oversee and monitor her on an ongoing basis.[556]

The court granted an interlocutory injunction on 3 July 2018, ordering that the applicant be transferred to Australia to receive treatment at a tertiary level hospital within 48 hours with her mother, and her father to also be transferred within 3 days of this order.[557] This was made on the basis there was a 'strongly arguable case that PIH did not have appropriate capabilities' and that the government breached their accepted duty of care to provide her with an appropriate level of treatment by transferring her there.[558]

[555] Ibid [45], [48], [52].
[556] Ibid [55], [57], [58], [60].
[557] Ibid – see orders.
[558] Ibid [6], [12], [49], [53].

PART VIII: DISABILITY AND THE 'LEGACY CASELOAD' REFUGEES

The 'Legacy Caseload' are unauthorised maritime arrivals (UMAs) detained between 13 August 2012 and 1 August 2014 making up a cohort of around 30,000 asylum seekers and refugees. In this part we explain who is included in this group and their relationship with the so-called 'offshore processing regime'. We explain the impact of prolonged processing delays followed by a precipitous policy change to 'Fast Track' processing and the corrosive uncertainty and anxiety attending the temporary visas issued to those accepted as refugees.

Although a very substantial cohort of refugees and asylum seekers, the Legacy Cohort seems to be the group about which least is known in terms of incidence and nature of disabilities. There is virtually no data that we can find on this subject. We were unable to find any organization (including the Australian Human Rights Commission) who had uncovered this information.

This part attempts to identify mechanisms to gain at least an impression of how Australian law, policy and practice is causing disabilities. The most obvious impact has been on the mental health of these refugees and asylum seekers. We show that at least eleven members of the legacy caseload have taken their own lives since 2014. Some researchers have described the situation of these people as one of 'lethal hopelessness'. Another marker of mental illness is reports of self-harm. Here some detailed research has been conducted on incident reports over a one year period. This shows that rates of self-harm in asylum seeker populations is up to 200 times the rates reported in the general community.

We identify one other proxy for the identification of disabilities in this cohort in the Primary Application and Information Service (PAIS) which is an assistance scheme offered to asylum seekers deemed to be 'particularly vulnerable'. By mid-2017 3,224 (of around 30,000) had received PAIS assistance. Unfortunately, we were unable to find any form of disaggregated data on the make-up of the PAIS recipients.

A WHO IS INCLUDED IN THE 'LEGACY CASELOAD' COHORT?

Unauthorised maritime arrivals (UMAs) who landed in Australia on or after 13 August 2012 but before 1 August 2014 represent a cohort of around 30,000 asylum seekers and refugees singled out for exceptional treatment, all in the interest of deterring irregular maritime migration.[559] Those who arrived when the Labor Party was in office were barred from applying for asylum or any visa under a so-called 'No advantage' test for up to four years.[560] This created an automatic backlog of cases that grew over time to quite alarming proportions. When offshore processing was

[559] See Morrison MP, Second Reading Speech, *Hansard*, available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/a526371b-b2dd-4037-ba7a-649c0c3fb696/0021%22

[560] See UNHCR 'Factsheet on the protection og Australia's so-called "Legacy Caseload" asylum seekers' 1 February 2018, available at https://www.unhcr.org/en-au/5ac5790a7.pdf.

reintroduced in 2013, UMAs became liable for transfer to Nauru and Papua New Guinea's (PNG) Manus Island, designated as regional processing countries. Those who were not so transferred and other is in a class of persons specified by legislative instrument[561] became known as 'Fast Track' applicants.

The critical issues for this cohort are both substantive and procedural. From late 2014, they have been barred from applying for any form of visa in Australia, absent the exercise by the Minister of a 'non-compellable, non-reviewable' discretion to allow an application to be made. Where other asylum seekers enjoy access to a comprehensive status determination and appeal process, Fast Track applicants are subject to arbitrary time constraints on applications[562] and truncated review procedures[563] that generally do not include an oral hearing. Having waited for years to have their cases considered, in May 2017, persons in the Legacy caseload were told that all applications had to be lodged by 1 October 2017. The penalty was that that failure to lodge an application by this deadline would mean that applicants would be 'deemed to have forfeited any claim to protection' and be subject to removal from Australia.[564] Although only 71 persons failed to meet this deadline,[565] the sudden policy shift created anxiety and pressure for both asylum seekers and not for profit agencies tasked with assisting in the preparation of claims.

Most importantly, even where the Minister lifts the s 46A bar, Legacy Caseload applicants cannot apply for a permanent protection visa. They are limited to seeking either a three year Temporary Protection visa (TPV) or a five year Safe Haven Enterprise Visa (SHEV).[566] All persons who hold a TPV or SHEV and are re-applying for protection are Fast Track applicants.[567] Other specified classes include:

- unauthorised maritime arrivals who were taken to regional processing centres or were born there and brought back to Australia;[568]

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[561] *Migration Act 1958* (Cth) s 5 'fast track applicant', s 5AA. Note that in *DBB16 v Minister for Immigration and Border Protection* [2018] FCAFC 178, the Full Federal Court determined that certain people who arrived by boat at Ashmore Reef were incorrectly treated as 'unauthorised maritime arrivals' and were not fast track applicants.

[562] Prescribed time frames are shorter. See *Migration Act 1958* (Cth) s 58; *Migration Regulations 1994* (Cth) r 2.15.

[563] Appeals are on paper, with a limit of 5 pages and a ban on submitting any new information exception in special circumstances.

[564] Peter Dutton, 'Lodge or leave – Deadline for illegal maritime arrivals to claim protection' (Media Release, 21 May 2017). At http://minister.homeaffairs.gov.au/peterdutton/2017/Pages/deadline-for-illegal-maritime-arrivals-to-claim-protection.aspx (viewed 23 March 2018).

[565] Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Estimates, Parliament of Australia, Canberra, 23 October 2017, 195 (Malisa Golightly, Deputy Secretary, Visa and Citizenship Services, Department of Immigration and Border Protection).

[566] See Kaldor Centre *Fact Sheet: Temporary Protection Visas and Safe Haven Enterprise Visa*, available at: https://www.kaldorcentre.unsw.edu.au/publication/temporary-protection-visas.

[567] Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visa Holders) Instrument 2019, LIN19/007 (26 March 2019).

[568] Class of Persons Defined as Fast Track Applicants 2016/008, IMMI 16/008 (F2016L00456).

- children born in Australia to parents who had been taken to Nauru;[569]
- some persons who were affected by the Department of Immigration's 'data breach';[570] and
- persons who had their protection claims assessed through various previous 'non-statutory processes' and successfully applied to the court for judicial review, as well as their children;[571]

Children born in Australia to a parent who is a Fast Track applicant are deemed to be UMAs, apparently even if the other parent is a permanent resident or citizen.[572]

B PERSONS WITH DISABILITIES IN THE LEGACY CASELOAD

1. Data on disability is extremely inadequate

The first and most important point to make about the approximately 30,000 people in the Legacy Caseload is that remarkably little information is available on the incidence and nature of disabilities within the cohort. Research has and is being conducted in to the mental health impacts of the inordinate delays that have occurred in processing refugee claims; the 'lethal' uncertainty of living on temporary protection visas; and the effect of family separation and relationship breakdowns.573 Overall, however, the information on disabilities is extremely poor.

For this submission, we can identify a number of 'proxy' indicators for disability in Australia's asylum seeker and refugee populations. For extreme examples of mental disability, there is the data on the number of persons recorded as committing suicide and statistics on those engaging in acts of self-harm. In relation to asylum seekers applying for protection, limited data is also available on the number of persons offered special assistance on the ground of vulnerability. None of these data sources provide anything like a clear picture of the incidence and nature of disabilities. Absent further, focused, research, we are unable to provide any sensible estimations for the Commission.

Indeed, it is not immediately apparent that the Department has collected disaggregated data on disabilities in the Legacy Caseload.

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[569] Class of Persons Defined as Fast Track Applicants 2016/010, IMMI 16/010 ((F2016L00377);
[570] Migration (IMMI 17/015: Person who is a Fast Track Applicant) Instrument 2017.
[571] Migration (IMMI 18/019: Fast Track Applicant Class) Instrument 2018.
[572] *Migration Act 1958* (Cth) s 5AA(1A) and (1AC). See *Plaintiff B15a v MIBP* [2015] HCA 24. If one parent arrived before 13 August 2012 and the other parent is a fast track applicant, the child will be a fast track applicant unless the child made a valid application with the non-fast track parent before 5 May 2016. See Class of Persons Defined as Fast Track Applicants 2016/049, IMMI 16/049 (F2016L00679).

[573] Nicolas Procter et al, 'Lethal hopelessness: Understanding and responding to asylum seeker distress and mental deterioration' (2018) 27 *International Journal of Mental Health Nursing* 448; See Australian Human Rights Commission (AHRC) *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (2019), available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy,.

Recommendation 8.1

The Commission should issue a notice to the Department of Home Affairs to see what information they have on the incidence and nature of disabilities amongst the Legacy Caseload refugees and asylum seekers.

Recommendation 8.2

The Department of Home Affairs should collect and publish data on the incidence and nature of disabilities in all populations of asylum seekers and persons from refugee backgrounds in its care or under its control including Legacy Caseload refugees and asylum seekers.

2. Results of the surveys and research that have been conducted

(a) Mental health impacts of prolonged uncertainty

The prevalence of evident mental health issues amongst asylum seekers and refugees caught in the political merry-go-round of processing delays, Fast Track processing and temporary protection is a strong indicator that Australia's laws and policies in this area are causing disabilities. As the Australian Human Rights Commission has noted, pre-arrival trauma can leave individual asylum seekers pre-disposed to mental illness. Stress experienced after arrival - including from the asylum process – can exacerbate the problem(s).[574] Researchers have identified a specific syndrome to describe the debilitating affect or not knowing when they will achieve anything approximating freedom and a new future. 'Protracted asylum seeker syndrome', is described as a condition that 'stems from the stressors associated with prolonged waiting times for the finalisation of refugee status determination'.[575] The researchers write:

> The characteristics of the syndrome share many features of current mental disorders such as major depression, post-traumatic stress disorder, generalised anxiety disorder and adjustment disorders. These include:
> - fluctuating mood,
> - poor concentration and attention,
> - irritability, and
> - recurrent intrusive thoughts about the refugee determination process and
> - overwhelming feelings of hopelessness and powerlessness.
>
> Some people may also develop dissociative and psychotic symptoms.
> Other symptoms found in those with protracted asylum seeker syndrome aren't usually associated with the disorders above. These include becoming obsessed with the asylum application and not being able to think about anything else outside of this process.[576]

[574] See AHRC *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (2019), available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy, 40.
[575] See ibid.
[576] See Suresh Sundram and Samantha Loi, 'Long waits for refugee status lead to new mental health syndrome', *The Conversation* (online) 23 May 2012. At https://theconversation.com/long-waits-for-refugee-status-lead-to-new-mental-health-syndrome-7165 (viewed 20/01/21).

This syndrome offers a good descriptor of individuals interviewed or described by researchers.

(b) Incidents of suicide

Self-harm is a specific marker of stress and poor mental health. Since the beginning of 2014, at **least eleven people** in the Legacy Caseload have committed suicide while living in the Australian community.[577] Researchers studying this phenomenon have described the situation of people in the Legacy Caseload as one of *lethal hopelessness*.[578] The AHRC writes:[579]

> Another mental health expert who had worked with people in the Legacy Caseload stated that 'this type of despair … has a quality about it that's unlike any other population I've seen'. This expert went on to highlight the specific mental health impacts on children in the Legacy Caseload:
>
> > Suicidal ideation in children is generally quite rare as a phenomenon. Many people would not encounter a suicidal child under the age of ten or 11. But there are children under ten or 11 who are in suicide-related distress. It is remarkable that they have developed a vocabulary for that. That is a distinctive marker.
>
> Several other consultation participants who worked directly with people in the Legacy Caseload indicated that they had encountered suicidality among their clients on a regular basis. One support worker, for example, reported that 'The suicide threats have been a consistent thing … for the last five years'. A mental health worker stated that a significant proportion of their clients were experiencing 'ongoing chronic suicidal ideation'.

Although the Commonwealth Ombudsman has produced reports on suicide and self-harm in the immigration detention network,[580] there is little evidence that the government has responded to the findings in any meaningful way.

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[577] Border Crossing Observatory, *Australian Border Deaths Database* (March 2018) Monash University. At http://artsonline.monash.edu.au/thebordercrossingobservatory/researchoutputs/australian-border-deaths-database (viewed 20/01/21). See Also Appendix D to Part 6 of this submission. For a personalised description of 9 of these suicides, see AHRC *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (2019), available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy, 41.

[578] Nicolas Procter et al, 'Lethal hopelessness: Understanding and responding to asylum seeker distress and mental deterioration' (2018) 27 *International Journal of Mental Health Nursing* 448, 451.

[579] See AHRC *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (2019), available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy, 41.

[580] See Commonwealth Immigration Ombudsman. Final report. Suicide and self-harm in the immigration detention network. 2013. Available at http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/30298/December-2013-Suicide-and-self-harm-in-the-Immigration-Detention-Network.pdf.

(c) Other incidents of self-harm

Clinical psychologist Kyli Hedrick and others have undertaken detailed research on self-harm incidents reported among asylum seekers in Australia's care and control, examining the factors associated with self-harming behaviours.581 Between 1 August 2014 and 31 July 2015 the team identified 949 episodes of self-harm across a total population of 28,981 asylum seekers spread between community and detention based group in Australia, Nauru and Manus Island. This study showed that rates of self-harm amongst Australia's asylum seekers were exceptionally high relative to the general community and that rates were highest in detention and lowest in community based settings.582

As we explore in Part 10, the worst outcomes have been seen in offshore processing, particularly on Manus Island where single men (including men with disabilities) were held for processing and resettlement over many years.583 The highest rates of self-harm - 260 incidents per 1,000 people on Nauru and 54 incidents per 1,000 people on Manus Island – were reported in relation to offshore processing. Female asylum seekers on Nauru were significantly more likely to self-harm than males. In contrast, persons in community detention self-harmed at rates of 27 incidents per 1,000 people, while those in community detention did so at a rate of 5 per 1,000 people. This compares with reports of 1.2 incidents of self-harm per 1000 in the general Australian population.584

The same researchers have also evaluated the quality of self-harm incident reporting across the Australian asylum seeker population and found it wanting.585 Their study

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581 See Kyli Hendrick 'Getting out of (self-) harm's way: A study of factors associated with self-harm among asylum seekers in Australian immigration detention' (2017) 49 *Journal of Forensic Legal Medicine* 89-93.

582 See Kyli Hedrick, Gregory Armstrong, Guy Coffey and Rohan Borschmann 'Self-harm in the Australian asylum seeker population: A national records-based study.' (2019) 8 SSM—Population Health 100452.;

583 See for example Medecin Sans Frontieres. Indefinite Despair. The Tragic Mental Health Consequences of Offshore Processing on Nauru; 2018. Available at: https://www.msf.org.au/sites/default/files/attachments/indefinite_despair_4.pdf; Legal and Constitutional Affairs Reference Committee. Serious Allegations of Abuse, Self-harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and any Like Allegations in Relation to the Manus Regional Processing Centre; 2017. Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report; and Amnesty International. This is Still Breaking People. Update on Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea; 2014. Available at: https://www.amnesty.org.au/wp-content/uploads/2016/09/This_is_still_breaking_people_update_from_Manus_Island.pdf

584 See Kyli Hedrick, Gregory Armstrong, Guy Coffey and Rohan Borschmann 'Self-harm in the Australian asylum seeker population: A national records-based study.' (2019) 8 SSM—Population Health 100452.

585 See Kyli Hendrick, Gregory Armstrong, Guy Coffey and Rohan Borschmann, 'An evaluation of the quality of self-harm incident reporting across Australian asylum seeker population according to World Health Organization (WHO) Guidelines' (2020) 20 *BMC Psychiatry* 301.

shows that monitoring and reporting is limited and lacking in transparency. The team conclude that the available data is sub-standard and inconsistent with World Health Organisation self-harm reporting guidelines.586

Recommendation 8.3

> The Department of Home Affairs improve the collection and publication of data on the incidence of self-harm in all populations of asylum seekers and persons from refugee backgrounds in its care or under its control including Legacy Caseload refugees and asylum seekers so as to comply with WHO reporting guidelines.

3. Other markers of disabilities in the Legacy Caseload cohort

One of the problems facing asylum seekers in the Legacy Caseload has been that they have not been eligible for a range of supports from the federal government. The AHRC notes, however, that the Primary Application and Information Service (PAIS) is available to a small percentage of asylum seekers who are assessed by the Department to be exceptionally vulnerable. It writes:

> As at mid-2017, out of the total Legacy Caseload of around 30,000 people, only 3,224 had received PAIS assistance.[587] As with (Immigration Advice and Application Assistance Scheme) IAAAS, PAIS is available at the primary stage of decision-making only (with an exception for unaccompanied children).[588]

We are unable to advise the commission of the extent to which this reference to 'particularly vulnerable' asylum seekers included persons with disabilities.

Recommendation 8.4

> The Commission should urge the government to provide more certainty for refugees and asylum seeker in the Legacy Caseload by increasing the avenues available to permanent residence in Australia as a mechanism for improving mental health and reducing the incidence of debilitating mental illness.

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586 See World Health Organisation [WHO]. Practice manual for establishing and maintaining surveillance systems for suicide attempts and self-harm. Geneva: World Health Organisation (2016).

587 Answer to question taken on notice BE17/120, evidence to Senate Standing Legal and Constitutional Affairs, Budget Estimates, Canberra, 23 May 2017 (provided 7 July 2017). At https://www.aph.gov.au/~/media/Committees/legcon_ctte/estimates/bud_1718/DIBP/QoNs/BE17120.pdf (viewed 9 April 2018).

588 Answer to question taken on notice BE15/062, evidence to Senate Standing Legal and Constitutional Affairs, Budget Estimates, Canberra, 26 May 2015 (provided 14 July 2015). At https://www.aph.gov.au/~/media/Committees/legcon_ctte/estimates/bud_1516/DIBP/BE15062.pdf (viewed 9 April 2018).

PART IX: DISABILITY, OFFSHORE PROCESSING AND THE 'MEDEVAC' REFUGEES

Part 9 of the submission addresses the harms caused by the 'offshore processing' system. As we explain in Part 9.1, this involves the interdiction and transfer of unauthorised maritime asylum seekers to Regional Processing Centres (RPC) in Nauru and Papua New Guinea (PNG)'s Manus Island. The Centres have operated as detention facilities where protection claims are determined and refugees have waited long years in the hope of securing resettlement in yet another country.

An obvious aim in establishing offshore processing was to deny asylum seekers access to the protections of Australian law. The Australian Government asserts that the scheme shifts responsibility for actions taken by authorities in Nauru and on Manus Island to Nauru and PNG. In Part 9.2 we show that the Australian Government carries legal responsibility for asylum seekers and refugees transferred offshore under both international and domestic law. That responsibility is beyond dispute when individuals are returned to Australia for medical treatment or other purposes.

In Part 9.3 we explain that deliberate decisions have been made to include persons with obvious disabilities in a scheme that has been opaque in its operation. Vulnerable asylum seekers were sent into situations where it was plain that appropriate disability supports did not exist and could not be provided. It is a scheme that has resulted in the creation and exacerbation of physical and mental disabilities.

Since 2000, 18 refugees and asylum seekers have died in or en route to offshore immigration detention centres with six deaths due to suicide or possible suicide. Many more have expressed suicidal ideation, engaged in self-harm or attempted suicidal acts. In 2016, the UN High Commissioner for Refugees (UNHCR) described the prevalence and severity of mental disorders within the RPCs in PNG's Manus Island as 'extreme'.

Yet, accurate data on the incidence and nature of disabilities amongst refugees detained at RPCs or transferred back to Australia does not appear to exist. There is no transparency in the mechanisms used to identify disabilities or in the measures taken to accommodate disabilities.

We will argue that Australia's offshore processing policy and practice amounts to torturing people in ways that cause disabilities. Although processing facilities on Nauru and in PNG are being moth-balled, current laws and policies would allow the resumption of the program. The scheme is a clear and cruel breach of Australia's international obligations and has been the subject of repeated criticisms from

international human rights mechanism, including the Universal Periodic Review undertaken of Australia in January 2021.589

We urge the Commission to include consideration of offshore processing in its deliberations for two reasons.

First, although the majority of asylum seekers sent offshore have been brought to Australia, approximately 300 individuals remained on Nauru and Manus Island in early February 2021. Moreover, 'transitory persons' in Australia remain liable to return offshore without notice. There is no legislative or policy impediment to Australia resuming its offshore processing activities.

Second, the offshore processing regime is having an on-going effect on persons with disabilities caught up in the scheme - both overseas and in Australia. Many of those brought back to Australia have been placed in hotel detention, with the result that some have been in closed detention for eight years or more. In January 2021 transferees from Nauru and PNG were released from hotel detention, but on visas that envision the return of the holders overseas.

Of the over 2000 persons who are no longer in offshore detention, 33 have died after being transferred from a RPC. Those returned to Australia continue to live in marginal conditions, without work rights or social security support. The Australian Human Rights Commission has found that transferees to Australia (who include persons with disabilities) have been denied access to timely and appropriate medical treatment and to other social security supports. In spite of transferees being brought to Australia because of their need for medical treatment, many have faced long delays even after their arrival in obtaining the attention they need.

As we explore in Part 7, refugee children caught by the system continue to be in situations of heightened risk. As we explore in Part 8, the temporary protection regime means that those irregular maritime arrivals who escaped transfer to a RPC continue to be at risk of developing disabilities and/or having existing disabilities exacerbated. This group is known as the 'Legacy caseload'.

A LEGAL FRAMEWORKS

1. A Brief History of Offshore Processing and the 'Medevac' Saga

Australia first instituted interdiction and offshore processing arrangements known as the 'Pacific Solution'[590] in 2001 in response to asylum seekers without visas traveling

[589] The Report of the Human Rights Council was not available at time of writing. However, questions submitted in advance included issues relating to offshore processing. See generally https://www.ohchr.org/EN/HRBodies/UPR/Pages/AUindex.aspx.

[590] See, for example, Jane McAdam and Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum' (2009) 27 *The Australian Yearbook of International Law* 87 – 113; Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised" Territory' (2011) 23 *International Journal of Refugee Law* 583; and

to Australia by boat. The scheme put in place in 2001 deemed certain landing points to be outside of Australia's migration zone (excised offshore places). Unlawful maritime arrivals ('offshore entry persons') were both barred from applying for any visa to enter Australia[591] and (supposedly) precluded from bringing judicial proceedings against the Commonwealth.[592]

The rather complex matrix of statutory provisions was amended in 2002 to allow for persons transferred to regional processing centres (RPCs) on Nauru and Manus Island in Papua New Guinea (PNG) to be brought back to Australia for temporary purposes such as medical treatment.[593] Returnees are termed 'transitory persons'. While in Australia, they are barred from making valid visa applications.[594] In theory, a transitory person must be removed from Australia as soon as reasonably practicable after their reason for being in Australia is spent.[595] In practice, once in Australia it has often become very difficult to return these people to offshore processing places or to send them anywhere else – setting up a perfect storm of insecurity and uncertainty and a breeding ground for psycho-social illness and other disabilities.

The first regime for offshore processing was mothballed in 2007 upon the election of a Labor government. By this stage, most of those transferred to Nauru and PNG between 2001 – 2003 had been recognised as Convention refugees. Any who were not accepted for resettlement in third countries were quietly allowed to come and settle in Australia.[596]

Beset by an increase in boat arrivals, it was a Labor government that revived the strategy in 2012.[597]

The number of asylum seekers quickly outstripped the capacity of processing centres on Nauru and Manus Island: both facilities were full within three months. In response, the Government began releasing some of the new arrivals into Australia on bridging

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Tania Penovic and Azadeh Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime' (2007) *Australian Journal of Human Rights* 33.

[591] See *Migration Act* 1958, s 46A.

[592] *Migration Act* 1958, s 494AA(1). See, however, *Minister for Home Affairs v DMA18 as Litigation Guardian for DZL18 and others* [2020] HCA 43, discussed below.

[593] See *Migration Legislation Amendment (Transitional Movement) Act* 2002 (Cth).

[594] *Migration Act* 1958, s 46B

[595] *Migration Act* 1958 s 198A. The bars on judicial actions in s 494AA were mirrored in a new s 494AB.

[596] For an account of this period, see for example Michael Gordon, *Freeing Ali: The Human Face of the Pacific Solution* (Sydney: UNSW Press, 2005).

[597] The first group of asylum seekers were transferred from Australia to Nauru on the 14 September 2012 and to Manus Island on the 20 November 2012. See Paige Taylor and Lanai Vasek, 'First Asylum Flight Arrives in Nauru', *The Australian* (online), 14 September 2012 www.theaustralian.com.au/national-affairs/first-asylum-flight-departs-for-nauru/news-story/dc7f9df2348934cf943f3b9933e3b664; and Simon Cullen, 'First Asylum Seekers arrive on Manus Island', *ABC News* (online), 21 November 2012 www.abc.net.au/news/2012-11-21/first-asylum-seekers-arrive-on-manus-island/4383876. For a very detailed account of this period, see Madeline Gleeson *Offshore: Behind the Wire on Manus and Nauru* (Sydney: NewSouth Books, 2016).

visas.[598] However, these asylum seekers remained subject to the so-called 'no advantage' policy. They would experience significant delays in the processing of their protection claims and the vast majority recognised as Convention refugees would be issued temporary protection only.[599] Labor Prime Minister Kevin Rudd announced on 19 July 2013 that anyone transferred to Nauru or Manus Island would never be allowed to settle in Australia.[600] All future arrivals would remain in Nauru or PNG, or wait for settlement in a third country as a result of new agreements negotiated between the Australian government and both PNG and Nauru.[601]

The only change brought by the election of the Conservative Coalition government in 2013 was the re-institution of interdiction and push-back operations. These ensured an immediate halt to new boat arrivals. The second iteration of the scheme became more and more punitive over time notwithstanding an agreement with the United States to resettle a number of those recognised as Convention refugees.[602]

By April 2014, 2450 refugees and asylum seekers were being held in Nauru and Manus Island RPCs. Conditions at the centres became increasingly challenging. More and more detainees began presenting with medical emergencies that could not be dealt with at the RPCs. It was at this point that lawyers in Australia began instituting tort actions on behalf of sick asylum seekers, seeking orders to compel the Minister to bring the refugees to Australia under the transitory persons provisions outlined earlier. Success in one Federal Court action[603] saw an avalanche of actions resulting in judicially mandated transfers.[604] The election to Federal Parliament of independent Dr Kerryn Phelps saw the introduction and passage in early 2019 of the Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019 (Cth). This Act created a statutory mechanism outside of the bare power conferred on the Minister to allow refugees to be brought to Australia from Nauru and PNG for urgent medical or psychiatric treatment or assessment. The legislation created what became known as the 'medevac system'. The legislation also established the Independent Health Advice Panel (IHAP) which was tasked with monitoring and overseeing healthcare in and medical transfers from the RPCs.

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[598] *Migration Regulations 1994* (Cth) sch 2 sc 050 (Bridging Visa E).
[599] Daniel Ghezelbash *Refuge Lost: Asylum in an Interdependent World* (London: Cambridge University Press, 2018), 121.
[600] Interview with Kevin Rudd, Prime Minister of Australia, and Peter O'Neill, Prime Minister of PNG (Joint Press Conference, Brisbane, 19 July 2013).
[601] *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, signed 3 August 2013
[602] See Daniel Ghezelbash *Refuge Lost: Asylum in an Interdependent World* (London: Cambridge University Press, 2018), Ch 5 and 6.
[603] See *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483.
[604] See Kaldor Centre 'Medical Transfer Proceedings', available at: https://www.kaldorcentre.unsw.edu.au/medical-transfer-proceedings. See also Gabrielle Holly. 'Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation' (2020) 21 *German Law Journal* 549-570.

Although the medevac system worked quite efficiently, reducing the need for judicial intervention, the legislation rankled the Federal government.[605] After regaining control of the Senate in July 2019, the scheme was abolished.[606]

2. Australia's responsibility for Offshore Processing

An obvious aim in establishing offshore processing was to deny asylum seekers access to the protections of Australian law. The Australian Government asserts that the scheme shifts responsibility for actions taken by authorities in Nauru and on Manus Island to Nauru and PNG. [607] In fact, the Australian Government carries legal responsibility for asylum seekers and refugees transferred offshore under both international and domestic law.[608]

(a) Responsibility under international law

It is well established in international jurisprudence that a state can owe human rights obligations to persons situated outside their territory where the state has 'effective control' over a person[609] and engages in conduct that is attributable to the state.[610] In

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[605] Ben Doherty wrote: '[This] is the way Australia's offshore detention regime is being undone, not by some dramatic policy shift, but one by one, refugee by refugee.' See 'A Long Flight to Freedom: How Refugee Behrouz Boochani Finally Left his Island Jail Behind', The Guardian (Nov. 14, 2019), https://www.theguardian.com/australia-news/2019/nov/14/a-long-flight-to-freedom-how-refugee-behrouzboochani-finally-left-his-island-jail-behind?CMP=share_btn_tw. See also Gabrielle Holly. 'Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation' (2020) 21 *German Law Journal* 549-570.

[606] See *Migration Amendment (Repairing Medical Transfers) Act* 2019 (Cth).

[607] See Select Committee, Parliament of Australia, *Taking Responsibility: Conditions and circumstances at Australia's Regional Processing Centre in Nauru'* (Senate Inquiry Final Report, 31 August 2015), 11 (statement by Secretary to the Department of Immigration):

> The Australian government does not run the Nauru Regional Processing Centre, or RPC. It is managed by the government of Nauru, under Nauruan law, with support from the Australian government. The government of Nauru operates the RPC, assesses asylum claims and, where persons are found to be in need of protection, arranges settlement. The government of Nauru is specifically responsible for security and good order and the care and welfare of persons residing in the centre. On behalf of the Commonwealth, my department provides support services and advice, pursuant to an agreement between our two governments.

[608] Madeline Gleeson *Research Brief: Australia's responsibility for offshore processing on Nauru and Manus Island* Kaldor Centre, available at: https://www.kaldorcentre.unsw.edu.au/sites/default/files/Research%20brief_responsibility_Aug2018.pdf, 1.

[609] See UN Human Rights Committee 'General Comment No 31' UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10: a State party to the ICCPR 'must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.'

[610] The UN Committee against Torture has affirmed that the provisions of its treaty that apply to 'territory under the jurisdiction' of a State party are not 'geographically limited to its own de jure territory', but rather include 'all areas under the de facto effective control of the State party' and 'situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention': UN Committee against Torture, Conclusions and Recommendations of the Committee against Torture: United States of America, UN Doc CAT/C/USA/CO/2 (July 25, 2006), para 15. See also: UN Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties (24 January 2008), para 16. She continues at FN 26: 6 The UN Human Rights Committee has

practice, the Australian government operates effective control in both Nauru and Manus Island that speak to 'effective control' over offshore processing with many indicators of state responsibility.[611] Perhaps the most obvious are that the centres are funded solely by the Australian government; there are significant numbers of Australian staff at the centres; and resettlement of the detainees is determined ultimately by Australian authorities.[612]

Even if Australia were found not exercise effective control. at least it must hold joint responsibility with Nauru and PNG for any breaches of international human rights law which occur at a RPC. A state may be responsible for extra-territorial violations of the International Covenant on Civil and Political Rights (ICCPR) if it has exposed a person to a reasonably foreseeable 'real risk' that the person's rights would be violated.[613]

(b) Duty of care under Australian law

In addition to the obligations that Australian has under international law, the Australian government owes a duty of care to asylum seekers and refugees transferred to Nauru and PNG under its domestic law. While recognising that the High Court had not then resolved the question whether the Commonwealth's duty of care to asylum seekers was non-delegable, the Senate Select Committee tasked with reviewing the situation on Nauru accepted in 2015 that Australia had a non-delegable responsibility for the wellbeing of those transferred to Nauru and PNG.[614]

Minister for Home Affairs v DMA18 as Litigation Guardian for DZL18 and ors[615] is the latest action that confirms the justiciability of Australia's treatment of 'transitory persons'.[616]

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stated that 'it would be unconscionable to so interpret the responsibility [of a State] as to permit a State party to perpetrate violations of the [ICCPR] on the territory of another State, which violations it could not perpetrate on its own territory': Sergio Euben Lopez Burgos v. Uruguay, UN Human Rights Committee, UN Doc CCPR/C/13/D/52/1979 (29 July 1981), para 12.3; Lilian Celiberti de Casariego v. Uruguay, UN Human Rights Committee, UN Doc CCPR/C/13/D/56/1979 (29 July 1981), para 10.3. In the more recent case of Issa, the European Court of Human Rights agreed that a State can be held accountable for extraterritorial human rights violations of persons under its authority or control because '[a]ccountability in such situations stems from the fact that [the European Convention on Human Rights] cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory': Issa v. Turkey, European Court of Human Rights, Application no. 31821/96, para 71.

[611] See Madeline Gleeson *Research Brief: Australia's responsibility for offshore processing on Nauru and Manus Island* Kaldor Centre, available at: https://www.kaldorcentre.unsw.edu.au/sites/default/files/Research%20brief_responsibility_Aug2018.pdf, 3-4.

[612] See Select Committee, Parliament of Australia, *Taking Responsibility: Conditions and circumstances at Australia's Regional Processing Centre in Nauru'* (Senate Inquiry Final Report, 31 August 2015), 13.

[613] See Select Committee, Parliament of Australia, *Taking Responsibility: Conditions and circumstances at Australia's Regional Processing Centre in Nauru'* (Senate Inquiry Final Report, 31 August 2015), 15.

[614] See Select Committee, Parliament of Australia, *Taking Responsibility: Conditions and circumstances at Australia's Regional Processing Centre in Nauru'* (Senate Inquiry Final Report, 31 August 2015), 16.

[615] [2020] HCA 46.

[616] See https://www.kaldorcentre.unsw.edu.au/medical-transfer-proceedings which lists over 50 cases.

The four litigants brought actions in the Federal Court arguing that the Minister for Home Affairs and the Commonwealth of Australia breached a duty of care to provide them with adequate medical treatment on Nauru. Part of the relief sought was an order to compel the Commonwealth to provide treatment. The four were flown to Australia as transitory persons. The High Court were not concerned with the tort claims, but rather with the construction of s 494AB of the Act which on its faces 'bars' legal proceedings being brought by transitory persons. In a joint judgment, the bench of five dismissed arguments to the effect that the provision constrained all courts save the High Court of Australia from entertaining litigation brought by or on behalf of a transitory person. The Court acknowledged that the Commonwealth may invoke s 494AB to bar actions in inferior courts but suggested that forcing transitory persons to seek redress in the High Court would be in breach of the Commonwealth's 'model litigant' obligations.[617]

After the ruling in Minister for Home Affairs v DMA18 as Litigation Guardian for DZL18 and others618 and earlier cases starting with Plaintiff S99/2016 v Minister for Immigration and Border Protection[619] it should be accepted that the Australian Government does owe a duty of care towards asylum seekers transferred offshore.[620]

B HARMS ASSOCIATED WITH THE FRONT-END STAGE OF OFFSHORE PROCESSING

1. Disability and the Selection of Candidates for Transfer or return to RPCs

The process for selecting individuals for transfer to RPCs is opaque, with no oversight mechanism and no system of redress for asylum seekers once an assessment is made. Departmental officers are charged with making a pre-transfer assessment (PTA), relying on medical advice from health assessments carried out by the Detention Health Services Provider, currently the International Health and Medical Service (IHMS).[621]

The Pre-Transfer Assessment Guidelines contain a non-exhaustive list of physical, psychological and logistical factors which officers should consider. [622] In theory, the

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[617] The Court held at 2020] HCA 46, [35] that the Commonwealth:

> may plead to a claim of a kind identified in s 494AB, when and if pleading the answer would be consistent with its model litigant obligations[52]. If, however, the only consequence of the plea were to be that fresh proceedings would be instituted in this Court (and then remitted), then it seems improbable that pleading the section would be consistent with the obligations of a model litigant[53]. Similarly, if a consequence of the plea were that fresh proceedings in this Court would be time barred, that would be a matter that would affect the Commonwealth's model litigant obligations in pleading s 494AB[54].

[618] [2020] HCA 46.

[619] [2016] FCA 483.

[620] See, Anna Talbot and Adjunct Professor George Newhouse 'Strategic litigation, offshore detention and the Medevac Bill' (2019) 13 *Court of Conscience* 85-90.

[621] PTA Form p.2

[622] *Departmental Guidelines for Assessment of Persons Prior to Transfer Pursuant to Section 198AD(1) of the Migration Act 1958* (Recovered from www.trove.nla.gov.au, 9 October 2020. See

PTA provides an opportunity to screen for disabilities and assess whether a person's needs can be met at the offshore processing locations.[623] However, even if an asylum seeker fails the PTA and is deemed unfit for transfer, they may still be transferred as the PTA Officer can only make a recommendation to the Minister (who retains final discretion whether to transfer asylum seekers offshore). [624]

We know that deliberate decisions were made to transfer particularly vulnerable asylum seekers to both Nauru and Manus Island. Transferees included families with very young children; unaccompanied children; a man of short stature with disabilities that included a painful genetic eye condition that threatened him with blindness when left untreated; pregnant women; persons with pre-existing psycho-social injuries and disorders; and LGTBI asylum seekers with genuine fears that the discovery of their sexual orientation in PNG would have life threatening consequences.

What is less apparent is the extent to which records have been kept on issues relating to disabilities among persons chosen for transfer to RPCs. We have been unable to identify reliable data on these matters.

Recommendation 9.1

Offshore processing is inherently abusive of the human rights of participants. It should be abandoned by the Federal government because it has caused so much death, disability, abuse and neglect.

Recommendation 9.2

Persons with disabilities should never be included in offshore processing schemes because there is no way that the needs of people with disabilities can be met. There is no way that such schemes can comply with Australia's international human rights obligations.

Recommendation 9.3

The Department of Home Affairs should publish data on the incidence of disabilities in offshore processing, including disabilities in the cohort of 'transferees' from RPCs. The Department of Home Affairs should make public the mechanisms used to identify

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https://webarchive.nla.gov.au/awa/20121014052452/http://pandora.nla.gov.au/pan/140883/20130528-1047/www.immi.gov.au/visas/humanitarian/_pdf/s198ad-2-guidelines.pdf)

[623] Factors that the officers should consider under these guidelines include:

(a) The physical or mental health of the person to be taken
(b) Special needs that are identified including torture and trauma history
(c) Their fitness to travel assessment
(d) Vulnerabilities the person may have, including their age
(e) The resources and facilities available in the RPC to receive the person and to respond to any health issues, vulnerabilities or special needs they may present (now and in the future)
(f) Capacity to accommodate additional persons at any centre in an RPC;
(g) Whether the person has family members in Australia who need to be contacted for the purposes of possible application of section 199.

[624] *Migration Act 1958* (Cth) s 198AE. Minister's Determination Power Under Section 198AE of the *Migration Act 1958* to Determine that Section 198AD Does Not Apply p.3

disabilities in RPC populations and the measures taken to accommodate the disabilities identified.

Case Study 9.1 – 'Mehdi Savari' – by Behrouz Boochani[625]

Mehdi Savari [was] thirty-one years old [in 2016], approximately one-metre tall, and weighs about thirty kilos. He is an actor who has worked with numerous theatre troupes in many cities and villages in Iran, and performed for audiences in open public places. For a time he was the host of the most popular children's television show in Iran's Khuzestan Province.

On the 23rd of July 2013, Mehdi undertook a difficult journey by boat to Christmas Island, four days after the introduction, on 19th July, of a new Australian government policy, whereby asylum seekers were to be transferred to Manus Island within a month. Mehdi told me that he pleaded with immigration officials not to send him to Manus Island; the officials replied that 'laws are laws'. However, at the same time, many of Mehdi's friends, who had arrived with him on the same boat, were allowed to remain on Christmas Island and were granted Australian visas after one year and released.

Upon entering Manus, Mehdi became entangled in the Australian Government's inhumane games, along with nine-hundred fellow asylum seekers. However, due to his physical make-up, his experiences differed significantly. He has told me that while the conditions on Manus Prison have been difficult for everyone, they have been even more difficult for him. He has met with severe discrimination over the last three years. The extent of the discrimination can only be understood when one puts oneself in his shoes, and considers his daily struggles.

The prisoners must wait in line to use the toilets, and the humiliation associated with this takes place several times a day. However, for Mehdi the main challenge is not the waiting in line, but what he experiences once he gets there. He says: "When I have to use the toilet I feel like I am confronting and battling a giant – sitting on the toilet seat is one of the most difficult things for me and I have fallen off on a number of occasions, resulting in filthy situations. I imagine that the most painful memory that I'll take with me from this prison is my encounters with the toilet seat. They made me feel like a worthless human being."

I think that Mehdi will require a lot of time to come to terms with this trauma. He has had to endure this gross indignity for three years.

Prejudice against Mehdi manifests itself in the inappropriate clothes he has been forced to wear – the prison management provided him with ridiculous, ill-fitting clothes. Imagine the indignity of a grown man having to wear heavy, baggy clothes

[625] An extract from Behrouz Boochani, translated by Omid Tofigian, 'Mehdi Savari: Actor, Prisoner and Improbable star of Manus Island' *New Matilda*, 23 June 2016, available at Mehdi Savari: Actor, Prisoner, And Improbable Star Of Manus Island - New Matilda.

that obstruct the movement of his arms and legs, as he waited in line for food or the toilet. Mehdi says:

"They even withheld scissors or cutting utensils so that I couldn't shorten the sleeves. I had to endure this humiliation for two years. I would have preferred to be naked rather than wear those clothes."

His anguish intensified when he began to experience excruciating pain in his eyes. After constant requests Mehdi was transferred to Port Moresby Hospital. The authorities kept him behind closed doors in a hotel for twenty-one days. He was forbidden from leaving and finally returned to Manus Prison without undergoing an eye operation. A year later he was taken to Port Moresby again and after fifty days returned to Manus Prison without treatment.

"The doctor first told me that I had a cancer of the eyes, and then a few days later he said I'm fine and that it's not cancer," Mehdi explains. "Because my father turned blind due to the same illness, I fear I too will become blind."

Like many other sick people held in Manus Prison, Mehdi has had to endure his condition without treatment, adding to his sense of humiliation and suffering.

In contrast to these painful experiences, Mehdi maintains a different outlook to prison life, and has developed his own survival strategy.

"After the events of February, when I was deeply affected by the death of Reza Barati, I felt that the people here needed at least something that would bring joy and beauty into their lives," he said. "Therefore, I decided to heal their wounds with the language of theatre and art. I was able to make them happy, on various occasions, using this medium."

Performing theatre in Manus Prison was not easy. Mehdi says that his requests for microphones, props and other requirements, were rejected. In one instance, a Salvation Army manager responded by reminding him that he was in prison and not in an art space.

Despite these restrictions Mehdi was able to perform on a number of occasions and soon became the most loved person in the centre. He is even known to the locals outside the prison. The affection that they have for him guaranteed him protection during the attacks by some of the locals. Mehdi says the aggressors recognised him, and let him be.

2. The Return to RPCs of Transitory Persons Brought to Australia for Medical Treatment

Evidence given to the Parliamentary Select Committee suggests that the *return* process for transitory persons flown to Australia for medical procedures has also been very stressful and distressing, carrying risks of long-term psychological damage to asylum seekers. According to DASSAN (Darwin Asylum Seeker Support and Advocacy Network), movements from Wickham Point in Darwin to the RPC on Nauru were shrouded in secrecy and inherently traumatic for transferees. Individuals slated for return would be taken to the property office or summoned to a meeting with immigration, detained incommunicado in a confined area and then have their possessions collected from their living quarters by Serco guards. They were given no opportunity to communicate with legal or community representatives, and no opportunity to argue about the transfer decision. They were typically returned offshore within hours, commonly on a flight leaving Darwin at 3am on Friday mornings. Furthermore, asylum seekers often report that people are transferred back to Nauru while they have outstanding medical appointments in Darwin.[626]

C HARMS ASSOCIATED WITH OFFSHORE PROCESSING

1. Isolation, Environmental Challenges and Corrosive Uncertainty in RPCs

Since the re-opening of the regional processing centres in Nauru and on Manus Island in 2012, there have been 17 deaths by suicide, murder, negligence or neglect.[627] Women and children have been subjected to sexual and other assaults resulting in unwanted pregnancies and both disabilities and the exacerbation of disabilities.

The suffering caused to the men, women and children transferred to Nauru and Manus Island is rightly described as Australia's shame. [628]

Case Study 9.2 - '*Navid v Australia's border regime*'[629]

I met him for the first time in Christmas Island. A young man with an athletic build. He still could not grow a full beard during the temporary period we were held there. He would practice sports while inside the detention centre, you could see the spirit of life in his eyes. A Kurdish youth who due to his nationality had no decent

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[626] See Select Committee, Parliament of Australia, *Taking Responsibility: Conditions and circumstances at Australia's Regional Processing Centre in Nauru'* (Senate Inquiry Final Report, 31 August 2015),) ch 2.147-8. See also Ch 2.149.

[627] See Australian Border Deaths Database, Border Crossing Research Brief No 16, May 2020, available at https://www.monash.edu/__data/assets/pdf_file/0012/2221410/BOB-Research-Brief-16-Border-Death-Annual-Report-2019.pdf.

[628] See for example, JM Coetzee 'Australia's Shame', review of Behrouz Boochani *No Friend But the Mountains, New York Review of Books* 26 September 2019, available at: https://www.nybooks.com/articles/2019/09/26/australias-shame/.

[629] Extract from Mardin Arvin, translated by Omid Tofighian 'Navid vs Australia's border regime: wrestling against indefinite detention' (2020) *Overland* 23 December 2020, available at: https://overland.org.au/2020/12/navid/ (Real name withheld).

opportunities to work and live life well. Then the situation became totally un-livable, he had to leave using a counterfeit passport – this in itself ends any possibility of return. In order to capture his dreams he had to leave his home and family. But in Christmas Island he still had a passion for sports competitions and training.

He was not even eighteen-years old yet, he was confined to the prison camp for families. I almost forgot about him after that. We see a lot of people here who look like Navid. What distinguishes him from the others is his passion for sport and his jubilant spirit. I hoped with all my heart and soul that he would acquire what he deserved, and that this prison camp would not kill his dreams, that displacement and exile would not bury his hopes.

But, alas, things do not always work out as we plan. Eight months later I saw him by chance in the medical clinic inside the Manus Island detention centre. He looked a bit pale; he was sick, maybe depressed. He had been brought to Manus Island, I tried my very best to talk to him so he could share his problems and ease the pain, so he does not feel alone.

I was there, a lot of others were there from all over the world, people in a situation probably no one has heard of. We felt that no one knew of the attempted suicides that occurred in this small part of the world, a place where we were being punished. For what?

The only thing Navid could say was that he had been there for two weeks because he had just turned eighteen. I remember him saying this, I saw sorrow and joy in him simultaneously. He was suffering. For sure, he never ever imagined he would end up here. Living here caged in by high fences and watched by a guards like a captive.

At one point during his time in the Manus prison camp Navid began to self-harm and was then held in a separate room alone. Every thirty minutes the guards would come into his room to check on him while he was in that extremely sensitive state. During one of these visits a guard found Navid unconscious on the floor in convulsions – he had tried to take his own life by overdosing on pills. He was taken to the Port Moresby hospital and hospitalized for more than one month in the psychiatric ward.

What did Navid endure for him to reach this point? He was an athlete and was only twenty-four years old then? How hard did his life become, how was a young man with grand hopes and dreams driven to suicide?

Case Study 9.3 – Disabilities caused by injuries sustained in RPC detention

In *EHW18 v Minister for Home Affairs*[630] a 46 year old Iraqi asylum seeker was intercepted in late 2013 after travelling to Australia by boat in search of asylum. Transferred to Manus Island, PNG, the man suffered a serious injury to his eyes

[630] [2018] FCA 1350

during a riot at the RPC. He was rendered permanently blind in his right eye from traumatic optic neuropathy and has subsequently lost most vision in his left eye.

The loss of eyesight in one eye, and deterioration in the other triggered a major decline in the man's mental health. Diagnosed with Major Depressive Disorder, Post-traumatic Stress Disorder, he attempted suicide on the 24th of July 2018. Following this incident, the plaintiff was hospitalised for 3 days, then discharged to a hotel where he collapsed and became completely blind for a period of time. The Lorengau hospital on Manus Island was ill-equipped to deal with any form of medical emergencies. In October 2017 a man hanged himself outside of the hospital after being taken there for acute psychiatric needs.[631] The court ruled that no reasonable medical treatment was available for Ali on PNG and that he must be transferred to a location in Australia where he can receive proper treatment.

While there is no clear link between the physical injuries suffered and the manifestation of psychological disabilities, it is very clear that the situation in offshore detention centres, that are ultimately controlled by the Australian Government, has led to the permanent physical disabilities suffered by this man.

2. Health Care Services in RPCs Have Been Inadequate

A substantial amount of evidence has been compiled of abuse, lack of health care, and unsafe facilities.[632]

The medical care in offshore detention sites has been inadequate to meet the needs of seriously ill asylum seekers and refugees.[633] IHMS provides health care services on Nauru. It also provided health care services on Manus Island (PNG) until 2017, when this service was transferred to Pacific International Hospital (a local provider) and torture and trauma counselling ceased. The provision of health care in Nauru and PNG has been scrutinised in several reports by national and international human rights organisations and has been the subject of a series of parliamentary inquiries. The consistent findings are that the prolonged detention, conditions of detention and substandard health care all contributed to the significant decline in mental and physical health of asylum seekers.[634]

The physical health of asylum seekers has been found to have deteriorated rapidly in offshore detention centres as a result of inadequate health care. Asylum seekers have

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631 [2018] FCA 1350 at [17].

632 See, for example, Kaldor Centre, 'Human Breakdown in 28 Notes', available at https://www.kaldorcentre.unsw.edu.au/news/human-breakdown-28-notes.

633 See "Implementation of OPCAT in Australia" report, available at: https://www.kaldorcentre.unsw.edu.au/sites/default/files/Implementation_of_OPCAT_in_Australia.pdf.
For a brief overview of this report, see: https://www.kaldorcentre.unsw.edu.au/news/australian-opcat-network-reports-immigration-issues.

634 Ibid p58.

reportedly developed physical disabilities due to the disease infestations within the centres, significant amount of sexual and physical abuse, or the difficulty to access proper medication and health care.

The climatic and environmental conditions in Nauru and PNG also create particular vulnerabilities for refugees who are unaccustomed to the heat and humidity, including skin conditions such as boils which require ongoing treatment that refugees are often unable to access. Those detained offshore are susceptible to tropical illnesses such as malaria, as well as to gastro-intestinal disorders due to contaminated food and water and poor tolerance to microbial presence in food and water. In 2014, reports emerged of an outbreak of dengue fever in Nauru, and in April 2019, there were reports of an outbreak of typhoid amongst refugees on Manus Island. Many refugees have compromised immune systems as a result of prolonged detention and their journeys to Australia[635]. Their vulnerabilities, along with the heightened inadequacy of cleanliness within the camps has been found to increase the susceptibility to illnesses, resulting in ill physical long-term as well as short-term health.

Case Study 9.3 – 'Kalifa's' story

In *Plaintiff S99/2016 v Minister for Immigration and Border Protection*,[636] the plaintiff, Kalifa[637], a young African woman who had suffered from epilepsy from a young age (possibly as a result of trauma experienced after witnessing her sister being murdered). She experienced forced marriage to an abusive man. She fled to Australia by boat when charged with adultery and threatened with death by stoning. She was transferred to Nauru in spite of her significant physical disabilities. Her refugee claim was accepted but she was not offered adequate health care or protection

While suffering an epileptic seizure, Kalifa was raped. This not only caused her psychological trauma. It also led to pregnancy.

Kalifa requested an abortion. The Australian authorities sent her to PNG for this to occur when it became evident that a procedure could not be performed safely on Nauru. However, given the woman's disability and medical conditions, it became evident that procuring a safe abortion in PNG would be impossible. For example, there were no specialist doctors in PNG who could prevent or control any seizure that may have occurred during an abortion procedure. The Minister ignored IHMS recommendations that Kalifa be transferred to Australia. It took an application to the Federal Court for the matter to be settled. In a judgment that extended across 529 carefully reasoned paragraphs, Bromberg J issued an injunction to prevent the abortion being performed in PNG, finding that the Minister was failing to discharge his duty of care. Although his Honour declined to order the Minister to return Kalifa

[635] Ibid p 59.
[636] [2016] FCA 483.
[637] Not her real name.

to Australia, the effect of his ruling was that the Minister was ultimately left with no other option.

D HARMS EXPERIENCED BY TRANSITORY PERSONS RETURNED TO AUSTRALIA

1. Ongoing uncertainty: The Situation of Transitory Persons in Australia

Journalists from the Guardian have constructed an interactive timeline to track the movements of every one of the 3,127 people who travelled to Australia by boat in search of asylum between July 2013 and December 2014. In February 2021, 146 adults remained on Nauru and 145 adults remained on PNG and 933 adults and 271 children were living in Australia. [638]

In the absence of research that is beyond our present capacity, we are unable to provide any reliable data on the nature and extent of disabilities within this cohort of transitory persons. We urge the Commission to issue a notice to seek this information from the Department of Home Affairs.

Although the last of the children detained on Nauru was flown to Australia in February 2019, 'transitory persons' in Australia remain at risk because there has been no change to the government's resolve that this cohort 'should never be allowed to reside permanently in Australia'. This policy has been manifest in a default position that returnees should not be released into the community. Families with children and others classed as vulnerable have been placed in community settings, but most of the single men have found themselves in 'Hotel Alternative Places of Detention' (Hotel APODs) or other forms of effective closed detention for extended periods. On 26 January 2020 at least 26 'Medevac' returnees were released from the Mantra Hotel in Melbourne.[639] This left over 100 in Hotel APODS around Australia. Conditions placed on persons released into the community include constraints where individuals are required to sleep at night.[640]

According to Monash University's Border Deaths Database, of the over 2000 persons who are no longer in offshore detention, 33 have died after being transferred from a RPC.[641] Those returned to Australia continue to live in marginal conditions, without work rights or social security support. The Australian Human Rights Commission (AHRC) has found that transferees to Australia (including persons with disabilities)

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638 See https://www.theguardian.com/australia-news/ng-interactive/2020/dec/10/timeline-australia-offshore-immigration-detention-system-program-census-of-asylum-seekers-refugees.

639 See https://www.abc.net.au/news/2021-01-20/victoria-medevac-detainees-released-from-melbourne-park-hotel/13074722

640 See generally the data collected by the Refugee Council of Australia (RCOA), available at: https://www.refugeecouncil.org.au/detention-australia-statistics/3/.

641 See https://www.monash.edu/arts/border-crossing-observatory/research-agenda/australian-border-deaths-database and Attachment 6D to this submission.

have been denied access to timely and appropriate medical treatment and to other social security supports.

In its 2019 inspection of immigration detention facilities in Australia, the Commission reported:

> IHMS staff informed the Commission that they provide health services in immigration detention to a standard of care broadly comparable to that available to the Australian community in the public health system.

It noted, however, that detainees faced long waiting periods before obtaining treatment. Although it was possible to seek approval to arrange an appointment with a specialist in the private health system, such approval was rarely sought.[642]

The AHRC noted that the reluctance to push for expedited treatment was a particular concern for medical transferees from Nauru and PNG. It wrote:

> ***IHMS clinic, Brisbane hotel APOD***
>
> The Commission interviewed 69 people in this cohort and most reported delays in accessing the medical treatment and/or assessment for which they were transferred. This issue applied across all relevant facilities.
>
> These people had been in immigration detention in Australia for varying periods following their transfer from Nauru or PNG. However, a significant number, in particular at BITA and the hotel APOD in Brisbane, reported that they had been in Australia for 6 months or more, and in a few cases for one year.
>
> People in this group reported various physical and mental health issues, and in many cases multiple health issues. Most said they had not yet seen the relevant specialist or received treatment (often surgery or other significant treatment); some were waiting for radiology, medical imaging or similar treatment before they could have an appointment with a specialist; and some were on a waiting list for treatment. Some people appeared confused about what health care they could access, and how long they would need to wait to access this.
>
> Most people said they had been waiting long periods in Nauru and PNG for proper assessment and treatment of their health conditions prior to their transfer to Australia. For example, one person reported that he developed a hernia four years ago in PNG where he was unable to access the required treatment. The hernia had limited his ability to eat and drink adequately and he had lost a lot of weight. He was transferred to Australia for surgery to repair the hernia, as well as an assessment of his kidneys by a specialist, and he reported that he was on a waiting list for surgery and had not yet seen a specialist. In other words, no allowance appeared to have been made for the fact that he had already been waiting for four years in PNG.

[642] See AHRC *Inspection of Australia's immigration detention facilities 2019 Report,* 3 December 2020, at 144, available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention, 38.

> Many people also reported difficulty managing symptoms while waiting for treatment and were concerned that their health conditions would deteriorate further. For example, one person reported experiencing instability and lack of sensation in his legs as a result of a lower back issue that had developed four years previously in Nauru. He reported that he was on a waiting list for surgery and had been advised by IHMS that this could take one year or more.[643]

The Commission concluded:

> Where a person in this group cannot access the medical treatment and/or assessment they require through the public health system within a month of arrival in Australia, alternative arrangements should be made to ensure timely access to the required health care. In these circumstances, the Commission considers that Home Affairs should ensure immediate access to health care through the private health system and provide funding for this.[644]

We submit that the treatment of persons with disabilities within this cohort suggests that these people have been denied their basic right to health. Of particular concern are the ongoing effects of failing to provide for the mental health of the so-called 'transitory persons'. After more than eight years it is time that Australia declared this game over.[645]

Recommendation 9.4

> For transferees brought to Australia for medical treatment, the Department of Home Affairs should ensure immediate access to medical treatment and care through the public health system or, if required, through the private health system. Funding should be provided to ensure that this occurs, as required by Art 12 of the International Covenant on Economic, Cultural and Social Rights. Articles 25 and 26 of the CRPD are also obviously applicable in this context.

Recommendation 9.5

> The Department of Home Affairs should allocate additional resources to increase mental health services and support for persons with disabilities who are transferred to Australia from RPCs. As a gesture of compassion, the government should allow persons with disabilities who are transferred to Australia from RPCs to access permanent visas that resolve their immigration status.

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[643] See AHRC *Inspection of Australia's immigration detention facilities 2019 Report,* 3 December 2020, at 144, available at: https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention, 39-40.
[644] Ibid, 41.
[645] See the campaign being run by Amnesty International, available at: https://gameover.org.au/.

Case Study 9.5 A first hand account of life in Hotel APODs by Mardin Arvin[646]

[Although the author is not a person with disabilities, the following brief extract articulates the stress and harms engendered by extended incarceration in hotel detention for those brought to Australia after years in RPCs]

The sound of the TV is loud. It is announcing something about COVID-19 and explaining that many people in Australia are tired of quarantine. A cynical smile emerges on my face.

The little girl disappears from the footpath with her mother. I cannot see them any more.

I want to ask something of those people appearing on that small rectangle TV set and talking about how they are ailed by quarantine: "Until now have you ever been in a situation where you were confined to a hotel room for almost a year? A situation where you could only go for a walk in your room or a corridor? It is ridiculous! Perhaps they have never thought to themselves that even while they are quarantined their freedoms are what some person is dreaming of – someone like me. Someone like me cannot go out from this place I am confined in."

I have been in "quarantine" for almost eight years, not because of COVID-19 but because I asked for asylum.

To be able to live one's life is a natural right. Every human being deserves that. Freedom loses its meaning when you are denied it.

I am Mardin. I am a refugee; someone who is asking for protection. Just imagine you risked your life striving to cross the all-encompassing ocean in a boat; to journey here with all the multifarious difficulties that it involves. To arrive in Australian territory. However, you are not a "normal" human being. They incarcerate you. Why?

I have never received a reasonable answer to this question. We deserve to breathe, just like every other person, we deserve to live life.

Eight years is a long time. During an eight-year period of time one can see how a newborn has matured into a fully grown child. And we are almost eight years in detention, surrounded by fences. Now what is next?

I remember the day they told us we would be leaving that detention centre, I remember the last day on Manus Island, that place where we witnessed suicide, self-harm and other kinds of violence. We were so happy that day that we were bursting with joy.

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[646] Mardin Marvin, translated by Omid Tofighian, 'Australians complain about weeks in quarantine. I've been in immigration detention for almost eight years'. *The Guardian,* 14 September 2020, available at: https://www.theguardian.com/australia-news/commentisfree/2020/sep/14/australians-complain-about-weeks-in-quarantine-ive-been-in-immigration-detention-for-almost-eight-years.

No one knew where the flight was taking us, no one knew we would be taken to a hotel within a city, to more guards and surveillance, guards that never take their eyes off us, to level three of this hotel.

We cannot go beyond level three. I do not know if you can fathom it … can you? Imagine you are not even allowed to be by yourself for a moment or go for a walk. I cannot even stand looking in the mirror. I cannot bear to look into it, I do not recognise the person looking back at me. That face is not my face. My hair has turned grey, I have wrinkles around my eyes. I look totally exhausted. I no longer have the same enthusiasm I once did. I even doubt that when I leave this room I will be able to take pleasure in being free. More than anything else I want to close my eyes and never open them again. I want to enter a long dream in which I can walk as far as my legs can carry me, to go on a long trip, with snow or rain or sunshine. It does not matter. I just want to be alone in an open landscape without the guards.

PART X: AUSTRALIA'S RESPONSE TO MIGRANTS WITH DISABILITIES IN THE COVID 19 PANDEMIC

This submission addresses a critical area of concern in Australia's immigration and border control system: the regime for the detention of non-citizens subject to control measures. Given that we now understand that up to 15 percent of the world's population live with disabilities,[647] it is unsurprising that persons with disabilities are represented in Australia's immigration detention system.[648] In a separate submission we will examine shortcomings in systems for screening and identifying persons with disabilities in immigration detention contexts. We will also address elsewhere the adverse health consequences of detention and the extent to which Australian law and practices have created disabilities in detainees.

In this submission the immediate focus is on how specific types of immigration detention affect persons with disabilities in the immediate context of **COVID-19 pandemic lockdown measures**. The experiences of people with disabilities are not at all homogenous. In this document, we outline the experiences of detainees in closed Immigration Detention Centres and various Alternative Places of Detention (as defined). Our aim is to address the Commission's Terms of Reference as they relate to "the extent of violence, abuse, neglect and exploitation experienced by people with disability **in all settings and contexts**."

For immigration detainees with physical disabilities,[649] detention settings have fallen short because of barriers to accessibility and mobility that have resulted in neglect and loss of dignity. The use of elevated, demountable buildings accessible only by stairs in regional processing centres are examples in point.[650] Across Australia, detention sites are characterised by poor ventilation and

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[647]See World Health Organisation, 'World Report on Disability,' 2011 < https://apps.who.int/iris/bitstream/handle/10665/70670/WHO_NMH_VIP_11.01_eng.pdf;jsessionid=45EC19CD93BB259504383E64DBA92FD7?sequence=1>.

[648] Immigration Health and Medical Services, 'Immigration Detention Health Report Quarter 4 2016' (Released under FOI laws) https://www.homeaffairs.gov.au/foi/files/2018/2018-180701332-document-released.pdf

[649] See, eg, cases where the applicant required a wheelchair: *XTZM and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 2153 (7 July 2020); HLQV and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 685 (30 March 2020); 1709735 (Refugee) [2018] AATA 5172 (29 October 2018); EWR18 v Minister for Home Affairs [2018] FCA 1460 (21 September 2018); Ahmed and Minister for Immigration and Border Protection (Migration) [2017] AATA 1908 (25 October 2017); AUU15 v Minister for Immigration & Anor [2017] FCCA 2220 (13 September 2017); Nguyen v Minister for Immigration & Anor [2017] FCCA 339 (28 February 2017); N98/26275 [2000] RRTA 83 (20 January 2000); Pham, Anh Tuan [2001] MRTA 5406 (16 November 2001; He, Gui Zhu [2002] MRTA 391 (23 January 2002); SCAR v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1481 (28 November 2002); V03/15616 [2003] RRTA 1103 (18 November 2003); SZBAZ v Minister for Immigration [2004] FMCA 790 (24 November 2004); 96/04995 [1996] RRTA 3218 (11 November 1996); V94/01901 [1995] RRTA 438 (3 March 1995).

[650] This occurred at several locations. See, eg, Curtin Detention Centre (https://mobile.abc.net.au/news/2011-02-08/the_hidden_men/43698?pfmredir=sm&pfm=sm); Woomera Detention Centre (NEDA Report); Christmas Island (https://www.smh.com.au/politics/federal/un-asks-australia-to-release-tamil-family-20191002-p52wwy.html) Nauru (https://www.theguardian.com/world/2019/oct/01/former-teacher-sues-nauru-detention-centre-operator-for-devastating-black-mould-illness); includes more than living quarters e.g. demountable hospitals too (https://www.buzzfeed.com/hannahryan/nauru-coronavirus-no-cases-pacific-refugees); Pontville IDC (https://www.abc.net.au/news/rural/2016-05-23/farmer-buys-a-detention-centre/7436666)

cramped corridors. Prolonged, indefinite detention continues to cause and/or exacerbate psycho-social disabilities. As of 31 May 2020, the average period of time for people held in detention facilities was **553 days.** Self-harm and suicides are ongoing.[651]

The stigma of disability has been exploited by a system which has continued to discourage disclosure of disabilities and often directly discriminates against detainees with disabilities. Requests for accommodation of disabilities[652] have been met with lacklustre and unsatisfactory responses. In the result, detainees with disability have been unable to live with dignity, independence and autonomy.[653] An asylum seeker of short stature was deliberately selected for processing in Papua New Guinea where he was not even afforded the dignity of an accessible toilet despite multiple requests.[654] There are accounts of persons with a neuro-developmental disorders denied access to specialist psychiatric services.[655] Children with physical disabilities have fallen by the wayside.[656]

A INTRODUCTION: HOTEL DETENTION AND DISABILITY

The purpose of this submission is to identify the increased risks and challenges faced by people with disabilities in immigration detention during the COVID-19 public health crisis. Considering the impact of the COVID-19 pandemic on this particular subset of people with disability is important because of particular conditions in detention which exacerbate health risks: like other group living facilities, they are densely populated settings where physical distancing measures are hard to implement.657 The high incidence of physical and mental health conditions among asylum seekers also makes them highly vulnerable to the virus.658 We focus

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651 The Age, 'Man dies at Melbourne detention centre as court rules on COVID-19 risk', 10/08/20 < https://www.theage.com.au/national/victoria/man-s-death-at-melbourne-detention-centre-rocks-fellow-detainees-20200810-p55k9t.html>.

652 See Guideline 9.5 of the United Nations High Commissioner for Refugees, 'Detention Guidelines', 2012 p 38.

653 *Convention on the Rights of Persons with Disabilities* (CRPD), Art 19 < https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-19-living-independently-and-being-included-in-the-community.html>. See also: Articles 5(4) and 14(2).

654 Amnesty International, 'This is Breaking People – Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea', p 55 < https://www.amnesty.org.au/wp-content/uploads/2016/09/Amnesty_International_Manus_Island_report.pdf>.

655 *MZYYR v Secretary, Department of Immigration and Citizenship and Commonwealth of Australia* [2012] FCA 694.

656 Submission of the Multicultural Disability Advocacy Association of NSW, National Inquiry into Children in Immigration Detention' < https://humanrights.gov.au/our-work/commission-website-national-inquiry-children-immigration-detention-97>.

657 Department of Health, 'What you need to know about coronavirus – who is most at risk' (10 August 2020) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19#WH >. See also AMA (Australian Medical Association) Submission to the Senate Select Committee on COVID-19 (May 2020), 5.12 'Outbreaks in group living facilities', p19.

658 See ASRC (Asylum Seeker Resource Centre) Submission to the Senate Select Committee on COVID-19 (28 May 2020), p13.

specifically on detention in Alternative Places of Detention (APODs), where a high number of 'transitory persons' transferred from Nauru and Manus Island under the 'Medevac' legislation are detained. These individuals are particularly at risk.

In this Part we outline the concern for APOD detainees with disabilities and the short-lived statutory basis for their transfer and detention in mainland Australia. In Part III we examine the duty of care owed by the Commonwealth to those held in immigration detention, and concerns around their current circumstances. Appendices to this submission inform and support our analysis. In Appendix A we summarise the cases recognising the Commonwealth's duty of care to immigration detainees. Such case law suggests that conditions in APODs are a matter of ongoing concern and should be rectified immediately. In Appendix B we chronologise key events relating to immigration detention during COVID-19. Our aim is to assist the Commission in understanding how the crisis has affected detainees. We identify two urgent areas of concern: the inadequacy of current COVID-19 safety measures (including the impossibility of physical distancing and insufficient access to protective equipment), and the proposed prohibition on mobile phone devices. Not only are people with disabilities particularly vulnerable, but these conditions risk further exacerbating existing disabilities and mental health conditions.

1. APODs and Medevac

Alternative Places of Detention (APODs) are places that have been specifically authorised for immigration detention. They are to be distinguished from Immigration Detention Centres (IDC), Immigration Residential Housing (IRH community detention) and Immigration Transit Accommodation (ITA). APODS generally accommodate "people who present a minimal risk to the Australian community" and may include hospital accommodation in cases of necessary medical treatment, schools for facilitating education to school-aged children and rented accommodation in the community including **hotel and motel rooms and apartments**.[659] The use of hotels as APODs and ITAs – such as Kangaroo Point Central Hotel in Queensland and Mantra Hotel in Victoria – is of most concern in the context of COVID-19. In February 2020, before the full impact of COVID-19 was felt in Australia, the Commonwealth Ombudsman noted its concern about "non-medical APODs" including hotels, due to "shortfalls in daily access to outdoor recreation areas, dining areas also being used as multi-purpose rooms, and medical and mental health clinics that do not support the detainees' right to private consultations".[660] In the context of COVID-19, cramped

[659] Joint Select Committee on Australia's Immigration Detention Network: Final Report (March 2012), Chapter 2 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/immigrationdetention/report/c02>.

[660] Commonwealth Ombudsman, 'Immigration Detention Oversight - Report into the current state of immigration detention facilities' (17 February 2020), <https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2020/report-into-the-current-state-of-immigration-detention-facilities>.

spaces in APODs have led to detainees self-describing as "sitting ducks" for the virus.[661]

The substantial bulk of those in mainland hotel detention were first transferred to Australia from offshore processing centres under the now repealed Medevac legislation.[662] The *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) passed on 2 March 2019, providing critically sick refugees and asylum seekers held in offshore detention a pathway to be transferred to Australia for urgent medical treatment. The law was repealed in December 2019. In that time, 192 people were brought to Australia from Manus Island or Nauru for urgent medical treatment.[663] Between December 2019 and March 2020, an additional 45 'transitory persons' were temporarily transferred to Australia under s198B of the Migration Act.[664] Some of those detainees (like 'Moz', see Appendix B) were transferred to receive treatment for certain conditions like asthma[665] or psychiatric reasons.[666] The very basis for a Medevac transfer thus makes many of those persons particularly vulnerable to COVID-19.

Mapping the number of 'transitory persons' against the total number of those in APODs is complicated by what seem to be different classifications of APODs. The Department of Home Affairs in May 2020 reported that only 16 people remain in mainland APODs and <5 on Christmas Island, with a further 575 in ITAs and 863 in IDCs, adding to a total of 1,458 across all detention facilities.[667] By contrast, the Refugee Council identified hundreds of Medevac/s198B transfers in APODs.[668] The latter number presumably includes some of the ITA population, as hotels are used as both APODs and ITAs; the former statistic draws a distinction. Since the COVID-19 risks posed to people in all detention facilities are similar, our chronology and analysis

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661 Rebekah Holt and Saba Vasefi, 'We are sitting ducks for Covid 19', *The Guardian* (24 March 2020), < https://www.theguardian.com/australia-news/2020/mar/24/we-are-sitting-ducks-for-covid-19-asylum-seekers-write-to-pm-after-detainee-tested-in-immigration-detention>.

662 Refugee Council of Australia, 'Offshore Processing Statistics – Medical Transfers' (4 July 2020) <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/5/>.

663 Senate Standing Committee on Legal and Constitutional Affairs, Department of Home Affairs, 'Program 1.2: Border Management' (2 March 2020).

664 Senate Standing Committee on Legal and Constitutional Affairs, Department of Home Affairs, 'Program 1.4: IMA Offshore Management' (2 March 2020).

665 The Guardian, 'Asylum seekers transferred to Australia under medevac laws held in Melbourne hotel', 19/12/19 <https://www.theguardian.com/australia-news/2019/dec/19/asylum-seekers-transferred-to-australia-under-medevac-laws-held-in-melbourne-hotel>.

666 Medecins Sans Frontieres, 'Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru', December 2018 <https://msf.org.au/sites/default/files/attachments/indefinite_despair_3.pdf>.

667 Department of Home Affairs, Immigration Detention and Community Statistics: Summary (31 May 2020), p4.

668 Refugee Council of Australia, 'Offshore Processing Statistics – Medical Transfers' (4 July 2020) <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/5/>.

touches on all contexts, but with a particular focus on hotel detention (whether technically APOD or ITA).

2. Detainees and disability

Data about detainees with disabilities is notoriously hard to obtain. As the Refugee Council of Australia has noted, "statistics on the number of refugees with a disability are difficult to obtain, reflecting a general lack of awareness about the issues faced by this group."[669] According to the National Ethnic Disability Alliance, "data relating to people living with disability, their families and carers, in Australian run immigration detention facilities is practically non-existent."[670] It is nonetheless well known that a number of detainees do live with disabilities. From the numbers which *are* publicly available, the incidence of disability in offshore immigration detention has hovered between 5 and 10% across 2015 and 2016.[671] Detainees may live with a range of disabilities, including amputation; cognitive and developmental disabilities; and functional, visual and hearing impairment.[672] Despite the absence of data about disability and hotel detention specifically, we suggest it is possible to infer from existing data about disability and offshore detention that a not insignificant number of persons with disabilities are currently in hotel detention. This is bolstered by the strong possibility that the reason for detainees' transfer to mainland Australia under the Medevac legislation is connected to the necessity of treatment for chronic conditions which overlap with definitions of disability. These detainees are vulnerable and at risk of being disproportionately affected by COVID-19, as outlined in Part III.

B AUSTRALIA'S DUTY OF CARE TO ALL NON-CITIZENS SUBJECT TO IMMIGRATION CONTROL

The Commonwealth of Australia has been found to owe a non-delegable duty of care to persons held in immigration detention. This duty starts with a duty to take reasonable care for detainees' safety whilst they are in immigration detention.673 The Commonwealth is required to ensure that a level of medical care is available that is reasonably designed to meet detainee's health and psychiatric care needs.674 Detainees do not have to settle for a lesser standard of mental health care by virtue of

669 Refugee Council of Australia, 'Barriers and Exclusions: The Support Needs of Newly Arrived Refugees with a Disability', February 2019 <https://www.refugeecouncil.org.au/wp-content/uploads/2019/02/Disablity_report_WEB.pdf>.

670 National Ethnic Disability Alliance, 'The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned' (March 2015), p16.

671 Department of Immigration and Border Protection, Immigration Detention Health Report, January – March 2016 <https://www.homeaffairs.gov.au/foi/files/2017/FA160800237-documents-released.pdf>. [Released under FOI]

672 National Ethnic Disability Alliance, 'The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned' (March 2015), p17.

673 *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [218]; *Mastipour v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2003] FCA 952, [21].

674 *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [218].

being in immigration detention.675 This obligation remains even where the Commonwealth contracts out the provision of services.676 This duty of care stems from the nature of the relationship between the Commonwealth and detainees in immigration detention, which has been closely analogised to that between prisons and prisoners, based on the situation which places detainees in a position where they are unable to care for themselves.677

Appendix A to this submission contains summaries of a series of cases in which the Commonwealth's duty of care to immigration detainees has been recognised by Australian courts.

1. Implications for COVID-19

The relationship of dependence that forms the basis for the duty of care that is owed by the Commonwealth of Australia to detainees in immigration detention is heightened during the current COVID-19 public health crisis. This is because detainees rely on the Commonwealth to provide protective equipment and maintain a detention environment that enables physical distancing. Without adequate measures in place, it is unlikely that this duty to take reasonable care for detainees' safety is being met.

There are particular concerns that APODs and ITAs that are being used during COVID-19 are over-crowded and provide limited access to medical care.[678] Further, their restrictive nature, lacking facilities for exercise, recreation, and open space, is likely to cause further deterioration in the mental health of detainees.[679] This suggests that the Commonwealth may be falling short in their duty to ensure safety of detainees and that a level of medical care is available that is reasonably designed to meet detainee's health care needs.

Any failure to take reasonable care could have a disproportionate effect on detainees who have a disability. People with disabilities are particularly vulnerable to COVID-19. The conditions of their detention in ADOPs have the potential to cause increased deterioration in all aspects of their wellbeing, including their mental health.

As the chronology at Appendix B demonstrates, COVID-19 has several unique consequences for non-citizen detainees in immigration detention. However limited, available data about detainees with disabilities, and the very reasons for Medevac

675 Ibid [263].
676 Ibid [218].
677 *Mastipour v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2003] FCA 952, [25]; *MZYYR v Secretary, Department of Immigration and Citizenship* [2012] FCA 694, [55].
678 Royal Australian and New Zealand College of Psychiatrists, 'COVID-19 compounds poor mental health of people in immigration detention', 30/06/20 <https://www.ranzcp.org/news-policy/news/covid-19-compounds-poor-mental-health-of-people-in>.
679 Ibid.

transfers (e.g., to receive treatment for conditions like asthma[680] or psychiatric care[681]), suggest a significant number of persons with disabilities currently reside in hotel detention. These people are vulnerable and at risk of being disproportionately affected by COVID-19.

Below, we address two key concerns for detainees with disabilities. The first relates to risk factors in the detention environment itself. The second concerns proposals to limit the ability of detainees to communicate with the outside world by banning the use of mobile phones.

(a) COVID-19 risk factors

The existing conditions in immigration detention facilities present a public health risk which disproportionately burdens detainees with disabilities and more widely risks infection for the centre staff and their wider communities. An outbreak in a detention facility would endanger, and potentially undermine, Australia's national public health efforts by straining local hospital and healthcare resources, develop into a rapid cluster and cause fatalities.

Detention centres are dangerously ideal incubators for COVID-19. Following is a non-exhaustive list of risk factors.

- Social distancing with fellow detainees and staff is challenging in the cramped living conditions, if not impossible in some facilities. For example, at the Mantra Hotel, detainees are all held on one floor of the hotel. They must all move along a common corridor and use communal dining and bathroom facilities. There is more than one detainee in a room,[682] as is the case in Maribyrnong IDC[683] and Villawood IDC.[684] The Mantra Hotel is also reportedly being used by airline staff[685] and remains accessible to the general public, factors that raise the chances of communal cross-infection.
- A number of detainees have underlying medical conditions, especially those brought to Australia from Nauru and Manus Island for urgent medical treatment;

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[680] The Guardian, 'Asylum seekers transferred to Australia under medevac laws held in Melbourne hotel', 19/12/19 <https://www.theguardian.com/australia-news/2019/dec/19/asylum-seekers-transferred-to-australia-under-medevac-laws-held-in-melbourne-hotel>.

[681] Medecins Sans Frontieres, 'Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru', December 2018 <https://msf.org.au/sites/default/files/attachments/indefinite_despair_3.pdf>.

[682] Al Jazeera, 'Australia's detained medical-evacuation refugees fear coronavirus', 17/04/20 <https://www.aljazeera.com/news/2020/04/australia-detained-medical-evacuation-refugees-fear-coronavirus-200417010359139.html>.

[683] Australian Human Rights Commission, Inspection of Maribyrnong Immigration Detention Centre, 7-8 March 2017 < https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-maribyrnong-immigration-detention >

[684] Australian Human Rights Commission, Inspection of Villawood Immigration Detention Centre Report, 10-12 April 2017 < https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-villawood-immigration-detentioncentre>.

[685] The Age, 'Doctors warn of refugee risks', 01/04/20 < https://www.smh.com.au/national/doctors-warn-of-deadly-coronavirus-risks-for-refugees-guests-at-melbourne-hotel-20200401-p54g1t.html>.

- Access to ventilated and open-air environments such as balcony spaces are limited.[686] Open-air spaces reportedly carry lower infection risks.[687]
- The alcohol-based sanitiser provided in some immigration detention centres contains an ineffective amount of alcohol to eliminate COVID-19.[688] According to the United States' Centre for Disease Control, consumers should use sanitisers with at least 60% alcohol;[689]
- The immigration detention visitor program was suspended in March 2020 which has reduced but not eliminated interactions with the broader community;[690]
- Masks and gloves have been provided to some detainees and staff, but it is unclear how much personal protective equipment (PPE) is available;[691]
- Fear of infection is leading detainees to confine themselves to their room for up to 23 hours a day, a fact that undermines their mental health;[692] and
- Detainees have continued to be transferred to the United States during the COVID-19 pandemic, increasing the risks of infection upon arrival,[693] with consequent resettlement hardships.[694] This has occurred despite Australia placing bans on the departure of Australian citizens[695] and the UN pausing its refugee resettlement program because of concerns that international travel could increase the risk of exposure to the virus.[696]

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[686] SBS News, n 120.

[687] Nishiura, Oshitani, Kobayashi, Saito, Sunagawa, Closed environments facilitate secondary transmission of coronavirus disease 2019 <https://www.medrxiv.org/content/10.1101/2020.02.28.20029272v2>

[688] ABC News, 'Fears not enough is being done to protect asylum seekers in Melbourne detention from coronavirus', 02/08/20 < https://www.abc.net.au/news/2020-08-02/not-enough-being-done-to-protect-asylum-seekers-from-coronavirus/12503618>.

[689] Centre for Disease Control and Prevention, 'Hand Hygiene: Guidance for Healthcare Providers about Hand Hygiene and COVID-19', 17/05/20. See also Gold, Mirza and Avva, 2020, Alcohol Sanitizer in StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2020 Jan-. Available from: https://www.ncbi.nlm.nih.gov/books/NBK513254/. See also: Reynolds, Levy and Walker, 2006. Hand sanitizer alert. *Emerging infectious diseases*, *12*(3), 527–529. https://doi.org/10.3201/eid1203.050955

[690] Department of Home Affairs, Immigration Detention, 17 April 2020 <https://covid19.homeaffairs.gov.au/immigration-detention>.

[691] SBS News, 'For a detainee inside an Australian immigration detention centre, COVID-19 is terrifying;', 25/03/20 < https://www.sbs.com.au/news/for-a-detainee-inside-an-australian-immigration-detention-centre-covid-19-is-terrifying >.

[692] The Age, 'Doctors warn of refugee risks', 01/04/20 < https://www.smh.com.au/national/doctors-warn-of-deadly-coronavirus-risks-for-refugees-guests-at-melbourne-hotel-20200401-p54g1t.html>.

[693] SBS News, 'Dozens of refugees flown from Australia and PNG to US despite coronavirus travel bans', 21/05/20 < https://www.sbs.com.au/news/dozens-of-refugees-flown-from-australia-and-png-to-us-despite-coronavirus-travel-bans>.

[694] Kaldor Centre for International Refugee Law, 'A Brutal Welcome: Riots and a pandemic greet Manus and Nauru refugees landing in the United States', 04/06/20 <https://www.kaldorcentre.unsw.edu.au/publication/brutal-welcome-riots-and-pandemic-greet-manus-and-nauru-refugees-landing-united-states>.

[695] See Caitlyn Fitzsimmons, 'On par with North Korea: Three out of four requests to leave Australia refused'. *Sydney Morning Herald* 15 August 2020, 1.

[696] United Nations High Commissioner for Refugees, 'IOM, UNHCR announce temporary suspension of resettlement travel for refugees', 17/03/20 <https://www.unhcr.org/en-

The continued detention of detainees in immigration detention facilities is unnecessary, inhumane and out of line with the practice of similar countries and guidance from the United Nations.[697] In the United Kingdom, the British Home Office released people in immigration detention into the community.[698] In Canada, around half of detainees in immigration detention were released.[699] In Belgium, 300 people were released because detention conditions prevented safe social distancing measures.[700]

In the United States, several courts ordered the release of a number of immigration detainees,[701] with many joining family or friends in the community. In each jurisdiction, the released detainees suffered from chronic medical conditions. In New York, the conditions ranged between diabetes, asthma and heart disease.[702] In Pennsylvania, the detainees had diabetes, Hepatitis and psycho-social conditions like Post-Traumatic Stress Disorder and Depression.[703]

The US District Court in the District of California summarised the risks posed to detainees in April 2020:

> The risk of infectious disease in prisons and jails are significantly higher than outside for several reasons. First, social distancing to prevent the spread of disease by respiratory droplets is often impossible in congregate settings, due to poor ventilation and inadequate space, and jails and prisons often lack access to personal protective equipment like masks, gowns and eye shields. Second, jails and prisons often lack resources for diagnosing and treating infectious disease. Simple segregation or solitary confinement measures as an outbreak management technique tend to backfire; they result in less medical attention and increased chances of death. Isolated detainees quickly experience increased psychological distress that manifests in self-harm and suicidality which requires rapid response and intensive care outside the facility. Unless an individual is held in a negative pressure room, his or her respiratory droplets may still flow outwards to the rest of the facility. Third, people held in jails and prisons are more likely than others to have chronic underlying health conditions that make them susceptible to infectious disease. Finally, new information about

au/news/press/2020/3/5e7103034/iom-unhcr-announce-temporary-suspension-resettlement-travel-refugees.html>.

[697] UN Subcommittee on Prevention of Torture, n 13.

[698] The Guardian, 'Home Office releases 300 from detention centres amid COVID-19 pandemic', 22/03/20.

[699] Global News, 'Canada is releasing immigration detainees at "unprecedented" rates amid COVID-19 fears' 25/04/20 <https://globalnews.ca/news/6861756/canada-releasing-immigration-detainees-coronavirus-covid-19/>.

[700] DeMorgen, '300 mensen zonder papieren vrijgelaten coronavirus zet dvz onder druk', 19/03/20.

[701] CBS News, 'Courts order ICE to free some immigrants but lawmakers call for more action amid pandemic', 31/03/20 <https://www.cbsnews.com/news/coronavirus-ice-releases-immigrants-lawmakers-federal-courts/>. See also: *Castillo v Barr* (United States District Court, Central District of California).

[702] *Basank v Decker* (United States District Court, Southern District of New York).

[703] *Thakker v Doll* (United States District Court, Middle District of Pennsylvania).

COVID-19 suggests it may be transmissible through shared bathrooms and cell toilets without lids.[704]

Causation and exacerbation of disability

The risk factors for contagion are well-known. The CDNA National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Correctional and Detention Facilities ("CDNA National Guidelines") accepts these facilities "are higher risk environments for outbreaks…because it is difficult to practice physical distancing."[705] These higher risks not only contribute to marginalisation of persons with disabilities in detention but also risk causing and/or exacerbating further disabilities. The adverse health consequences of extended isolation and remoteness on detainees' physical and mental health is consistently recognised across the literature[706] and detention facilities are physically difficult spaces.[707] COVID-19 elevates uncertainty about the future, further decreases detainees' perception of autonomy and independence, increases concern about family members and may accentuate past trauma.[708] People living with disability are also recognised as being at higher risk of contracting COVID-19.[709]

As of 31 May 2020, the average period of time for people held in detention facilities was 553 days.[710] Given the 'significant relationship between detention duration and mental health deterioration',[711] it is possible to say immigration detention is a major factor behind the development of psycho-social disabilities in detainees, including common experiences with Depression and Post-Traumatic Stress Disorder,[712] and

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[704] *Fraihat v United States Immigration and Customs Enforcement* (United States District Court, Central District of California).

[705] CDNA Guidelines, n 18. See also Department of Health, 'What you need to know about coronavirus – who is most at risk', 10/08/20 <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19#WH >.

[706] von Werthern, M., Robjant, K., Chui, Z. *et al.* The impact of immigration detention on mental health: a systematic review. *BMC Psychiatry* **18,** 382 (2018). https://doi.org/10.1186/s12888-018-1945-y. See also: Coffey, Kaplan, Sampson and Tucci, 2010, The meaning and mental health consequences of long term immigration detention for people seeking asylum, *Journal of Social Science and Medicine* 70(12) 2070-2079; Young and Gordon, 2016, Mental health screening in immigration detention: a fresh look at Australian government data, *Australasian Psychiatry* 24(1) 19-22.

[707] Coddington and Mountz, 2014, Countering isolation with the use of technology: how asylum-seeking detainees on islands in the Indian Ocean use social media to transcend their confinement, *Journal of the Indian Ocean Region*, 10:1, 97-112, DOI: 10.1080/19480881.2014.896104.

[708] Refugee Council of Australia, 'Australia's Detention Policies – Mental Health and Conditions', 20/05/20 <https://www.refugeecouncil.org.au/detention-policies/3/>.

[709] Submission of the Australian Medical Association to the Senate Select Committee on COVID-19, p 19.

[710] Department of Home Affairs, 'Immigration Detention and Community Statistics Summary', 31/05/20 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-may-2020.pdf>.

[711] Werthern, Robjant and Chui, 2018, The impact of immigration detention on mental health: a systematic review. *BMC Psychiatry* **18,** 382. https://doi.org/10.1186/s12888-018-1945-y.

[712] See, eg, Newman, Dudley and Steel, 2008, Asylum, detention and mental health in Australia. *Refugee Survey Quarterly* 27: 110-127; Becker and Silove Psychological and psychosocial effects of prolonged

manifesting in self-harm, frustration and suicidal ideation.[713] The most recent incidence of death in detention occurred with the passing on 10 August of a New Zealand national awaiting removal.[714]

The problems associated with long term detention are unlikely to be helped by the re-location of detainees in the cohort of 'character concern' non-citizens to Christmas Island.[715]

The CDNA National Guidelines provide no measures to specifically protect people with disabilities or ensure that protective measures are not discriminatory or disproportionately burdensome. For example, facility staff are educated on "the appropriate use of PPE such as gloves, gowns, eye protection and masks" but it is unclear whether they are trained on possible communication barriers that may arise for detainees with hearing disabilities if masks are worn.[716]

(b) Mobile Phone Access

On 14 May 2020, the Acting Minister for Immigration The Hon. Alan Tudge MP introduced the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities)* Bill 2020 ("**The Bill**"). The Minister described the purpose of the Bill to respond to the "continuing incursion, distribution and use of illegal drugs and contraband items, and associated criminal activity."[717] To this end, the Bill would give the Minister discretionary powers under the *Migration Act* to define, by disallowable motion, 'prohibited things,' including 'illegal things, specifically controlled drugs and things that present a risk within immigration detention facilities including mobile phones, SIM cards and internet-capable devices.' The Minister would also be able to direct authorised officers to search for and seize prohibited things. The Bill's ultimate ends are to further "support the provision of a safe and secure environment for people

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detention. In: Crock, M (ed) Protection or punishment? Detention of asylum seekers. Sydney: The Federation Press, 1993, pp. 81-91.

[713] Newman, Proctor and Dudley, 2013. Seeking asylum in Australia: immigration detention, human rights and mental health care. *Australasian Psychiatry*, *21*(4), 315–320. https://doi.org/10.1177/1039856213491991

[714] See Michael McGowan, 'New Zealand man dies while detained in Melbourne immigration detention centre', *Guardian Australia* 10 August 2020. https://www.theguardian.com/australia-news/2020/aug/10/new-zealand-man-dies-while-detained-in-melbourne-immigration-detention-centre

[715] See Hannah Ryan, 'Australian government to reopen Christmas Island detention centre during COVID-19 crisis' *Guardian Australia,* 5 August 2020 https://www.theguardian.com/australia-news/2020/aug/04/australian-government-to-reopen-christmas-island-detention-centre-during-covid-19-crisis

[716] ABC News, 'Coronavirus masks create communication barriers for deaf Australians. This woman wants to help', 24/07/20. See also United Nations, 'Transparent masks aid communication for hard of hearing' <https://www.un.org/en/coronavirus/transparent-masks-aid-communication-hard-hearing>.

[717] Second reading speech, Prohibiting Items Amendment (Alan Tudge, LNP, Acting Minister for Immigration), 14/05/20 <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fdf9bb27b-ec32-4383-84c6-058df197388f%2F0017%22>.

accommodated in, visiting or working in an immigration detention facility." To date, more than 90,000 people have signed a petition demanding the Bill be withdrawn.[718]

> *The bill seeks to strike a balance between the individual rights of detainees and the protection of the community, facility staff, visitors and other detainees.*[719]

It is our view that the current iteration of the Bill fails to strike the balance it sets out to achieve. In its current state, the timing of the Bill places an unnecessary and disproportionate burden on detainees with disabilities who already face significant limitations in their ability to communicate with friends and support systems.

The Bill and opposition to it[720] is not particularly novel. Most of its contents are substantially echoed in the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities)* Bill 2017[721] (**"The 2017 Bill"**) which never progressed past the second reading stage and lapsed at the end of the 45th Parliament. In its report, the Senate Committee on Legal and Constitutional Affairs Legislation Committee noted that the Bill incorporates amendments suggested for the 2017 Bill. However, it would appear the Bill has been selective in the amendments incorporated. In its submission to the Committee in 2017, Australian Lawyers for Human Rights argued that the Bill was a "clearly disproportionate response" and needed to be weighed against "the extreme isolation and mental stress that would result from deprivation of essential items such as mobile phones."[722] Both the 2017 Bill and its current iteration provide a mechanism for mobile phones to be seized from detainees.

This has several negative consequences. Eliminating existing and minimal avenues for contact between detainees and family, legal representatives, case workers and other support systems will affect the wellbeing of detainees[723] and risks gagging detainees and weakening the overall transparency and accountability of immigration detention processes. For example, a detainee suffering from diabetes lost 27 kilograms and was advised by an IHMS manager that such weight loss was "normal." The detainee

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[718] Petition on Change.org, '#DialitDownDutton. Don't take away asylum seekers' phones', June 2020.
[719] Department of Home Affairs, Committee Hansard, p 23.
[720] SBS News, 'Legal battle to stop "cruel" mobile phone ban in detention centres', 20/06/17 <https://www.sbs.com.au/news/legal-battle-to-stop-cruel-mobile-phone-ban-in-detention-centres>.
[721] Parliament of Australia, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017,* homepage.
[722] Submission of the Australian Lawyers for Human Rights to Senate Constitutional and Legal Affairs Legislation Committee.
[723] See, for example, Ms Sahar Okhovat, Committee Hansard, p. 12; Federation of Ethnic Communities' Councils of Australia (FECCA), Submission 17, p. 1; Blue Mountains Refugee Support Group Inc, Submission 18, pp. 3-4; Brigidine Asylum Seekers Project, Submission 19, p. 4; Hunter Asylum Seeker Advocacy, Submission 20, p. 1; Combined Refugee Action Group, Submission 21, p. 1; Kaldor Centre for International Refugee Law, Submission 23, p. 2; Refugee Council of Australia, Submission 27, pp. 4-6; National Council of Churches in Australia, Submission 30, p. 2; Rural Australians for Refugees, Submission 36, p. 2; Immigration Advice and Rights Centre (IARC), Submission 55, p. 3.

recorded the conversation on a mobile phone and provided a copy to researchers.[724] In addition, mobile phones have provided options to detainees to avoid reliance on inadequate and unreliable fixed phone quality in detention centres[725] and maintain the Department's compliance with its obligation under section 256 to ensure access to all reasonable facilities for obtaining legal advice.[726] Research by the United Nations High Commissioner for Refugees (UNHCR) and Accenture has found that access to a mobile phone was as critical to a refugee's safety and security as water, food and shelter.[727] For detainees, the mobile phone is not a technology of choice, but a technology of necessity and survival which sustains connections to support networks and provides a medium for meaningful communication. This can minimise feelings of marginalisation and isolation.[728]

Furthermore, even if a prohibition on mobile phones is imposed at a level less than a blanket ban[729] but solely directed towards detainees posing risks which reflect the Government's concerns,[730] we reiterate the concerns of the Australian Human Rights Commission (AHRC) and Commonwealth Ombudsman and query how risk will be defined and whether the extent of oversight of risk assessments by the AHRC and Commonwealth Ombudsman will be sufficient to ensure that the removal of mobile phones does not have a consequentially detrimental effect on a detainee's wellbeing and remains proportionate to risk.[731] Even detainees deemed high risk still need to have the means of readily accessing legal information, contacting legal assistance and maintaining support networks. As one example, an asylum seeker in Melbourne used his mobile phone to research similar cases online after being accepted as a refugee but

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[724] Amnesty International, 'Australia: Appalling abuse, neglect of refugees on Nauru', 02/08/16 <https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/>.

[725] See, eg, Amnesty International, 'New bill to ban mobile phones in immigration detention may breach Mandela rules', 19/05/20 <https://www.amnesty.org.au/new-bill-to-ban-mobile-phones-in-immigration-detention-may-breach-mandela-rules/>. See also: Fleay and Briskman, 2013, Hidden men: Bearing witness to mandatory detention in Australia. *Refugee Survey Quarterly*, *32*, 112–129. doi:10.1093/rsq/hdt010; Coddington and Mountz, 2014, Countering isolation with the use of technology: how asylum-seeking detainees on islands in the Indian Ocean use social media to transcend their confinement, *Journal of the Indian Ocean Region*, 10:1, 97-112, DOI: 10.1080/19480881.2014.896104

[726] *Migration Act* 1958 (Cth) s 256.

[727] United Nations High Commissioner for Refugees, 'Connecting Refugees: How internet and mobile connectivity can improve refugee well-being and transform humanitarian action', September 2016 <https://www.unhcr.org/5770d43c4>.

[728] Leung, 2007, Mobility and Displacement: Refugees' Mobile Media Practices in Immigration Detention, *M/C Journal,* 10(1) <http://journal.media-culture.org.au/0703/10-leung.php>.

[729] SBS News, 'Federal government insists bid to confiscate mobile phones in immigration detention is not a "blanket ban"', 06/07/20 < https://www.sbs.com.au/news/federal-government-insists-bid-to-confiscate-mobile-phones-in-immigration-detention-is-not-a-blanket-ban>.

[730] For example, Serco's submission to the Senate Committee specifically identified detainees with criminal histories include convictions relating to outlaw motorcycle gangs, organised crime groups and child paedophilia.

[731] *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98.

failing his security clearance.[732] As Coddington and Mountz argue, "the transmission of information, even rumours, in part lessens the dearth of information about countries of origin, family, advocacy, legal possibilities and asylum case outcomes that otherwise keep asylum seekers detained in the dark."[733] The seizure of mobile phones penalises detainee's efforts at education and gaining awareness of their rights, particularly where mobile phones and internet access do not pose any inherent risks to health, safety and security. Managing risks from internet access can take less restrictive forms such as restrictions on website access, without trespassing on basic human rights.

Persons with disabilities in immigration detention can use mobile phones to independently access important mental health services and other forms of information, consistent with Article 21 of the Convention on the Rights of Persons with Disabilities.[734] Mobile phones provide detainees with the capacity to overcome limitations in their environment and navigate the physical and social environment in detention through access to apps which help accommodate particular needs and provide 'information, tracking, assistance with mental health, fitness, food and nutrition, addiction, trauma, meditation and mindfulness.'[735] The UN's 2011 World Report on Disability stated that the use of mobile technologies for rehabilitation and managing disabilities is an emerging resource.[736] As an example of apps available to detainees, 'Choiceworks' assists persons with cognitive disabilities like Autism to develop a healthy outlet for their feelings and help build routines. 'Avaz' provides a picture-based communication option to assist persons with non-verbal communication needs. 'HearYouNow' provides a sound amplifier to assist persons with hearing needs to follow and understand conversations where there is background noise, such as during recreational periods. Beyond apps, the basic functions of mobile phones, including translation, text-to-speech and alarm functions, help detainees with disabilities access culturally and linguistically diverse sources of public information, including government guidelines for minimising the risk of COVID-19 infection. We note it is particularly counterproductive to cut off detainees from public information on COVID-19 at a time when the rest of Australia is being urged to follow public health guidelines. Seizing mobile phones, particularly during the current health climate, is unduly restrictive and does not do anything to reduce the risk of a COVID-19 cluster in immigration detention. It fails detainees with

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[732] Coddington and Mountz, 2014, Countering isolation with the use of technology: how asylum-seeking detainees on islands in the Indian Ocean use social media to transcend their confinement, *Journal of the Indian Ocean Region*, 10:1, 97-112, DOI: 10.1080/19480881.2014.896104.

[733] Ibid.

[734] Convention on the Rights of Persons with Disabilities (CRPD), Art 21 <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-21-freedom-of-expression-and-opinion-and-access-to-information.html>.

[735] Submission of the Australian Medical Association to the Senate Legal and Constitutional Affairs Legislation Committee.

[736] World Bank and World Health Organisation, World Report on Disability, 2011, p 118 <https://www.who.int/disabilities/world_report/2011/report.pdf>.

disabilities who may find it difficult to otherwise obtain public health information from fellow detainees or staff.

Mobile phones also provide persons with disabilities a means of expression, to improve the frequency and quality of social interaction[737] and serve as a medium to participate in and enjoy cultural life.[738] By way of example, Mantra Hotel detainee Mostafa 'Moz' Azimitabar used his mobile phone to record and share songs he wrote and played on guitar,[739] Manus Island detainee Behrouz Boochani could not have written his book, 'No Friend But the Mountains' without using WhatsApp[740] and the Biloela family would have been unable to capture footage of the government's attempt to deport them before an injunction was sought.[741] Furthermore, mobile phones are a key way for detainees to counter the effects of isolation with access to an 'imagined mobility.'[742] Detainees with disabilities which are observable are particularly likely to already feel isolated from other detainees because of internalised stigma. Access to mobile devices and social media provides an important, if not essential, means of re-connecting with family or friends over social media, helping detainees communicate with support networks, stay connected with their community and access legal representation consistent with the UN Standard Minimum Rules for the Treatment of Prisoners ("***Mandela Rules***").[743]

[737] Institute of Development Studies, 'Mobile Technology and Inclusion of Persons with Disabilities', May 2018 < https://assets.publishing.service.gov.uk/media/5b43205a40f0b678b369e262/Mobile_tech_and_inclusion_of_persons_with_disability.pdf>.

[738] CRPD, Art 30 < https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-30-participation-in-cultural-life-recreation-leisure-and-sport.html>.

[739] RNZ, 'Detained refugee records song with Midnight Oil's Moginie', 30/05/20 < https://www.rnz.co.nz/international/pacific-news/417912/detained-refugee-records-song-with-midnight-oil-s-moginie>.

[740] SBS News, '"A victory for humanity": Manus Island refugee Behrouz Boochani wins major literary prize', 01/02/19 < https://www.sbs.com.au/news/a-victory-for-humanity-manus-island-refugee-behrouz-boochani-wins-major-literary-prize>.

[741] ABC News, 'Deportation of Tamil asylum seeker family interrupted midair by last-minute injunction', 29/08/19 < https://www.abc.net.au/news/2019-08-29/tamil-asylum-seeker-family-from-biloela-facing-deportation/11463176>.

[742] Leung, 2007, Mobility and Displacement: Refugees' Mobile Media Practices in Immigration Detention, *M/C Journal,* 10(1) <http://journal.media-culture.org.au/0703/10-leung.php>.

[743] See Mandela Rules 61, 43(3) and 58 < https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf>.

APPENDICES

2-A: PIC 4005 AND PIC 4007

4005 (1) The applicant:

(aa) if the applicant is in a class of persons specified by the Minister in an instrument in writing for this paragraph:

(i) must undertake any medical assessment specified in the instrument; and

(ii) must be assessed by the person specified in the instrument;

unless a Medical Officer of the Commonwealth decides otherwise; and

(ab) must comply with any request by a Medical Officer of the Commonwealth to undertake a medical assessment; and

(a) is free from tuberculosis; and

(b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and

(c) is free from a disease or condition in relation to which:

(i) a person who has it would be likely to:

(A) require health care or community services; or

(B) meet the medical criteria for the provision of a community service;

during the period described in subclause (2); and

(ii) the provision of the health care or community services would be likely to:

(A) result in a significant cost to the Australian community in the areas of health care and community services; or

(B) prejudice the access of an Australian citizen or permanent resident to health care or community services;

regardless of whether the health care or community services will actually be used in connection with the applicant; and

(d) if the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment—has provided the undertaking.

(2) For subparagraph (1)(c)(i), the period is:

(a) for an application for a permanent visa—the period commencing when the application is made; or

(b) for an application for a temporary visa:

(i) the period for which the Minister intends to grant the visa; or

(ii) if the visa is of a subclass specified by the Minister in an instrument in writing for this subparagraph—the period commencing when the application is made.

(3) If:

(a) the applicant applies for a temporary visa; and

(b) the subclass being applied for is not specified by the Minister in an instrument in writing made for subparagraph (2)(b)(ii);

the reference in sub-subparagraph (1)(c)(ii)(A) to health care and community services does not include the health care and community services specified by the Minister in an instrument in writing made for this subclause.

4007 (1) The applicant:

(aa) if the applicant is in a class of persons specified by the Minister in an instrument in writing for this paragraph:

(i) must undertake any medical assessment specified in the instrument; and

(ii) must be assessed by the person specified in the instrument;

unless a Medical Officer of the Commonwealth decides otherwise; and

(ab) must comply with any request by a Medical Officer of the Commonwealth to undertake a medical assessment; and

(a) is free from tuberculosis; and

(b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and

(c) subject to subclause (2)—is free from a disease or condition in relation to which:

(i) a person who has it would be likely to:

(A) require health care or community services; or

(B) meet the medical criteria for the provision of a community service;

during the period described in subclause (1A); and

(ii) the provision of the health care or community services would be likely to:

(A) result in a significant cost to the Australian community in the areas of health care and community services; or

(B) prejudice the access of an Australian citizen or permanent resident to health care or community services;

regardless of whether the health care or community services will actually be used in connection with the applicant; and

(d) if the applicant is a person from whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment—has provided the undertaking.

(1A) For subparagraph (1)(c)(i), the period is:

(a) for an application for a permanent visa—the period commencing when the application is made; or

(b) for an application for a temporary visa:

(i) the period for which the Minister intends to grant the visa; or

(ii) if the visa is of a subclass specified by the Minister in an instrument in writing for this subparagraph—the period commencing when the application is made.

(1B) If:

(a) the applicant applies for a temporary visa; and

(b) the subclass being applied for is not specified by the Minister in an instrument in writing made for subparagraph (1A)(b)(ii);

the reference in sub-subparagraph (1)(c)(ii)(A) to health care and community services does not include the health care and community services specified by the Minister in an instrument in writing made for this subclause.

(2) The Minister may waive the requirements of paragraph (1)(c) if:

(a) the applicant satisfies all other criteria for the grant of the visa applied for; and

(b) the Minister is satisfied that the granting of the visa would be unlikely to result in:

(i) undue cost to the Australian community; or

(ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

2-B: TABLE OF HEALTH CRITERIA FOR CURRENT VISA SUBCLASSES

Subclass	Title	Health criteria
010	**Bridging A** Temporary Visa	None
020	**Bridging B** Temporary Visa	None
030	**Bridging C** Temporary Visa	None
040	**Bridging (Prospective Applicant)** Temporary Visa	None
041	**Bridging (Non-Applicant)** Temporary Visa	None
050	**Bridging (General)** Temporary Visa	None
051	**Bridging (Protection Visa Applicant)** Temporary Visa	None
060	**Bridging F** Temporary Visa	None
070	**Bridging (Removal Pending)** Temporary Visa	None
100	**Partner** Permanent Visa	PIC 4007
101	**Child** Permanent Visa	PIC 4007
102	**Adoption** Permanent Visa	PIC 4007
103	**Parent** Permanent Visa	**PIC 4005**
114	**Aged Dependent Relative** Permanent Visa	**PIC 4005**
115	**Remaining Relative**	**PIC 4005**

	Permanent Visa	
116	**Carer** Permanent Visa	**PIC 4005**
117	**Orphan Relative** Permanent Visa	**PIC 4005**
124	**Distinguished Talent** Permanent Visa	**PIC 4005**
132	**Business Talent** Permanent Visa	**PIC 4005**
143	**Contributory Parent** Permanent Visa	**PIC 4005**
150	**Ex-Citizen** Permanent Visa	None
151	**Former Resident** Permanent Visa	**PIC 4005** (if outside Australia), PIC 4007 (if inside Australia)
155	**Five Year Resident Return** Permanent Visa	None
157	**Three Month Resident Return** Permanent Visa	None
159	**Provisional Resident Return** Temporary Visa	PIC 4007
160	**Business Owner (Provisional)** Temporary Visa	**PIC 4005**
161	**Senior Executive (Provisional)** Temporary Visa	**PIC 4005**
162	**Investor (Provisional)** Temporary Visa	**PIC 4005**
163	**State/Territory Sponsored Business Owner (Provisional)** Temporary Visa	**PIC 4005**
164	**State/Territory Sponsored Senior Executive (Provisional)** Temporary Visa	**PIC 4005**

165	**State/Territory Sponsored Investor (Provisional)** Temporary Visa	**PIC 4005**
173	**Contributory Parent (Temporary)** Temporary Visa	**PIC 4005**
186	**Employer Nomination Scheme** Permanent Visa	**PIC 4005** or PIC 4007 (depending on stream)
187	**Regional Sponsored Migration Scheme** Permanent Visa	**PIC 4005** or PIC 4007 (depending on stream)
188	**Business Innovation and Investment (Provisional)** Temporary Visa	**PIC 4005** or PIC 4007 (depending on stream)
189	**Skilled – Independent** Permanent Visa	**PIC 4005** (for Points-tested stream), PIC 4007 (for NZ stream)
190	**Skilled – Nominated** Permanent Visa	**PIC 4005**
200	**Refugee** Permanent Visa	PIC 4007
201	**In-country Special Humanitarian** Permanent Visa	PIC 4007
202	**Global Special Humanitarian** Permanent Visa	PIC 4007
203	**Emergency Rescue** Permanent Visa	PIC 4007
204	**Woman at Risk** Permanent Visa	PIC 4007
300	**Prospective Marriage** Temporary Visa	PIC 4007
309	**Partner (Provisional)** Temporary Visa	PIC 4007
400	**Temporary Work (Short Stay Specialist)** Temporary Visa	**PIC 4005**

403	**Temporary Work (International Relations)** Temporary Visa	**PIC 4005**
405	**Investor Retirement** Temporary Visa	**PIC 4005**
407	**Training** Temporary Visa	**PIC 4005**
408	**Temporary Activity** Temporary Visa	**PIC 4005**
410	**Retirement** Temporary Visa	Other
417	**Working Holiday** Temporary Visa	**PIC 4005**
444	**Special Category** Temporary Visa	None
445	**Dependent Child** Temporary Visa	PIC 4007
449	**Humanitarian Stay (Temporary)** Temporary Visa	PIC 4007
461	**New Zealand Citizen Family Relationship (Temporary)** Temporary Visa	PIC 4007
462	**Work and Holiday** Temporary Visa	**PIC 4005**
476	**Skilled – Recognised Graduate** Temporary Visa	**PIC 4005**
482	**Temporary Skill Shortage** Temporary Visa	PIC 4007
485	**Temporary Graduate** Temporary Visa	**PIC 4005**
489	**Skilled – Regional (Provisional)** Temporary Visa	**PIC 4005** or PIC 4007 (depending on stream)
491	**Subclass 491—Skilled Work Regional (Provisional)** Temporary Visa	**PIC 4005**

494	**Subclass 494—Skilled Employer Sponsored Regional (Provisional)** Temporary Visa	**PIC 4005** or PIC 4007 (depending on stream)
500	**Student** Temporary Visa	**PIC 4005** or PIC 4007 (for Foreign Affairs and Defence students)
590	**Student Guardian** Temporary Visa	**PIC 4005**
600	**Visitor** Temporary Visa	**PIC 4005**
601	**Electronic Travel Authority** Temporary Visa	**PIC 4005**
602	**Medical Treatment** Temporary Visa	Depends on sub-category
651	**eVisitor** Temporary Visa	**PIC 4005**
676	**Tourist** Temporary Visa	**PIC 4005**
771	**Transit** Temporary Visa	**PIC 4005**
773	**Border** Temporary Visa	**PIC 4005**
785	**Temporary Protection** Temporary Visa	Medical examination required
786	**Temporary (Humanitarian Concern)** Temporary Visa	Medical examination required
790	**Safe Haven Enterprise** Temporary Visa	Medical examination required
800	**Territorial Asylum** Permanent Visa	**PIC 4005**
801	**Partner** Permanent Visa	PIC 4007
802	**Child** Permanent Visa	PIC 4007

804	**Aged Parent** Permanent Visa	**PIC 4005** or PIC 4007 (depending on whether the applicant was a holder of a substituted Subclass 600 visa at the time of the application)
808	**Confirmatory (Residence)** Permanent Visa	PIC 4007
820	**Partner** Temporary Visa	PIC 4007
835	**Remaining Relative** Permanent Visa	**PIC 4005**
836	**Carer** Permanent Visa	**PIC 4005**
837	**Orphan Relative** Permanent Visa	**PIC 4005**
838	**Aged Dependent Relative** Permanent Visa	**PIC 4005**
851	**Resolution of Status** Permanent Visa	Medical examination required
852	**Referred Stay (Permanent)** Permanent Visa	PIC 4007
858	**Distinguished Talent** Permanent Visa	**PIC 4005**
864	**Contributory Aged Parent** Permanent Visa	**PIC 4005** or PIC 4007 (depending on whether the applicant was a holder of a substituted Subclass 600 visa at the time of the application)
866	**Protection** Permanent Visa	Medical examination required
870	**Sponsored Parent (Temporary)** Temporary Visa	**PIC 4005** or PIC 4007 (depending on whether the applicant was inside or outside Australia at the time of the application)
884	**Contributory Aged Parent (Temporary)** Temporary Visa	**PIC 4005** or PIC 4007 (depending on whether the applicant was a holder of a substituted Subclass 600 visa at the time of the application)

887	**Skilled – Regional** Permanent Visa	PIC 4007
888	**Business Innovation and Investment (Permanent)** Permanent Visa	PIC 4007
890	**Business Owner** Permanent Visa	**PIC 4005** or PIC 4007 (depending on whether the applicant held a visa of a certain subclass)
891	**Investor** Permanent Visa	**PIC 4005** or PIC 4007 (depending on whether the applicant held a visa of a certain subclass)
892	**State/Territory Sponsored Business Owner** Permanent Visa	**PIC 4005** or PIC 4007 (depending on whether the applicant held a visa of a certain subclass)
893	**State/Territory Sponsored Investor** Permanent Visa	**PIC 4005** or PIC 4007 (depending on whether the applicant held a visa of a certain subclass)
988	**Maritime Crew** Temporary Visa	None
995	**Diplomatic (Temporary)** Temporary Visa	None

2-C: CHANGES IN THE "SIGNIFICANT COST" THRESHOLD

PAM3 (1 July 2006)
111.2 Costs
Assessing costs

In general, "costs" will be assessed:

- for the visa period for temporary visa applicants or
- over a 5 year period for permanent visa applicants (3 years for those over 70 years old, phased in from age 68), with the inclusion of costs that can be identified with reasonable certainty as occurring beyond that 5 year period.

Significant costs

The MOC decides whether the health condition would attract a level of public funding regarded as "significant". There is no absolute definition of the level of costs regarded as significant, but the MOC may be guided by a multiple of average annual per capita health and welfare expenditure for Australians.

PAM3 (1 July 2008)
56.2 Costs
The MOC decides whether the health condition would attract a level of public funding regarded as 'significant'. The policy threshold for the level of costs regarded as significant is $21,000 and the MOC is guided by a multiple of average annual per capita health and welfare expenditure for Australians. In general, 'costs' will be assessed:

- for the visa period for temporary visa applicants or
- over a 5 year period for permanent visa applicants (3 years for those over 70 years old, phased in from age 68), with the inclusion of costs that can be identified with reasonable certainty as occurring beyond that 5 year period.

PAM3 (1 July 2009)
60.2 Significant costs
MOCs must provide an opinion as to whether an applicant's condition or disease would be likely to result in "significant" health care and community service costs if a visa were to be granted.

The policy threshold for the level of costs regarded as significant is currently AUD 35 000. The calculation of this figure incorporates data on health and welfare costs plus a 20% loading to take into account rapid increases in average expenditure on health and community services.

'Costs' are assessed:

- for the visa period for temporary visa applicants or

- over a 5 year period for permanent visa applicants (3 years for those aged 75 years and older, phased in from age 68), with the inclusion of costs that can be identified with reasonable certainty as occurring beyond that 5 year period.

Note: in the first instance (unless other information is provided by the visa processing officer) MOCs will assess temporary visa applicants against the maximum period of stay for the temporary visa that they are applying for - for policy and procedure, see section 74.3 Temporary visa applicants not assessed against the correct period of stay.

PAM3 (1 July 2018)
MOCs must provide an opinion as to whether an applicant's condition or disease would be likely to result in 'significant' health care and *community service* costs if a visa were to be granted.

Under its regulation 1.03 definition, *community services* includes the provision of an Australian social security benefit, allowance or pension. Under policy, it is also taken to include services such as supported accommodation, special education, home and community care.

The policy threshold for the level of costs regarded as significant is currently AUD 40 000.

For **temporary** visa applicants (other than applicants for provisional visas), the estimated costs for their proposed stay in Australia is assessed over the period of stay that the visa officer intends to grant the visa. For example, a student visa applicant with health care costs of AUD 16 000 who will be granted a one year visa should be found to meet the health requirement. On the other hand, a student visa applicant with costs of AUD 16 000 a year who will be granted a four year visa would not meet the health requirement.

For temporary visas, certain health care and community services are excluded from the cost assessment - refer to the legislative instrument made under 4005 and 4007(1B).

For permanent and provisional visa applicants , the time period for estimating significant health care and community service costs against the significant cost threshold ($40,000), the time period for estimating costs is calculated as follows:

- if the applicant is aged less than 75 years: a five year period ; or,
- if the applicant is aged 75 years or older : a three year period ;

unless:

- the applicant has a condition that is permanent and the course of the disease is inevitable or reasonably predictable (65% likelihood) beyond the five year period - in these circumstances, the applicant would be assessed for 'lifelong' costs. When assessing 'lifelong' costs, the MOC should include estimated costs

over the applicant's estimated remaining life expectancy . Life expectancy by age, sex and disability can be found on the website of the Australian Bureau of Statistics
- the applicant has an inevitable or reasonably predictable (65% likelihood) reduced life expectancy due to their health condition or disease - in this case, the applicant should be assessed for the reduced life expectancy.

When assessing 'significant costs', an applicant is assessed against the health requirement for:
- a period for which the Minister (or delegate of the Minister) *intends to grant the visa* if the visa applicant has applied for a *temporary* visa
- a *permanent stay* (i.e. a period commencing when the application is made) in Australia if the visa applicant has applied for a *permanent* or *provisional* visa.

PAM3 (1 July 2019)
Significant costs

MOCs must provide an opinion as to whether an applicant's condition or disease would be likely to result in 'significant' health care and ***community service*** costs if a visa were to be granted.

Under its regulation 1.03 definition, ***community services*** includes the provision of an Australian social security benefit, allowance or pension. Under policy, it is also taken to include services such as supported accommodation, special education, home and community care.

The policy threshold for the level of costs regarded as significant is currently AUD 49 000.

When assessing 'significant costs', an applicant is assessed against the health requirement for:

- a period for which the Minister (or delegate of the Minister) *intends to grant the visa* if the visa applicant has applied for a *temporary* visa
- a *permanent stay* (i.e. a period commencing when the application is made) in Australia if the visa applicant has applied for a *permanent* or *provisional* visa.
- -see PIC4005(2), and PIC4007(1A)

For **temporary** visa applicants (other than applicants for provisional visas), the estimated costs for their proposed stay in Australia is assessed over the period of stay that the visa officer intends to grant the visa. For example, a student visa applicant with health care costs of AUD 16 000 who will be granted a one year visa should be found to meet the health requirement. On the other hand, a student visa applicant with costs of AUD 16 000 a year who will be granted a four year visa would not meet the health requirement.

For temporary visas, certain health care and community services are excluded from the cost assessment - refer to the legislative instrument made under 4005, and 4007(1B).

For **permanent and provisional** visa applicants, the time period for estimating significant health care and community service costs against the significant cost threshold (AUD 49 000) is calculated as follows:

- if *the applicant is aged less than 75 years:* a five year period; or,
- if *the applicant is aged 75 years or older:* a three year period;

unless:

- *the applicant has a condition that is permanent and the course of the disease is inevitable or reasonably predictable (65% likelihood) beyond the five year period* - in these circumstances, the applicant would be assessed for a maximum of 10 years. When assessing costs, the MOC should estimate costs for a period up to a maximum of 10 years.
- *the applicant has an inevitable or reasonably predictable (65% likelihood) reduced life expectancy due to their health condition or disease* - in this case, the applicant should be assessed for a time period up to a maximum of 10 years.

Table 11 - Visa type and MOC cost assessment consideration

Visa Type	**MOC Cost Assessment Period**	
Temporary	Maximum period of stay allowed on the visa and/or the period of stay the visa delegate intends to grant the visa for	
Permanent and Provisional	• Applicants over 75 years of age	Three years
	• Applicants with reasonably predictable (beyond a five year period) permanent condition	A maximum of 10 years
	• Applicants with reasonably predictable (>65% likelihood) reduced life expectancy	A maximum of 10 years if greater than 5 years
	• All other permanent and provisional applicants	Five years

2-D: MINISTER'S GUIDELINES ON MINISTERIAL POWERS

Cases that have one or more unique or exceptional circumstances, such as those described below, may be referred to me for possible consideration of the use of my intervention powers:

- strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit, where at least one member of the family is an Australian citizen or Australian permanent resident
- compassionate circumstances regarding the age and/or health and/or psychological state of the person that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the person
- exceptional economic, scientific, cultural or other benefit would result from the person being permitted to remain in Australia
- circumstances not anticipated by relevant legislation; or clearly unintended consequences of legislation; or the application of relevant legislation leads to unfair or unreasonable results in a particular case
- the Department has determined that the person cannot be returned to their country/countries of citizenship or usual residence due to circumstances outside the person's control
- a person's particular circumstances or personal characteristics provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity if they return to their country of origin, but the mistreatment does not meet the criteria for the grant of any type of protection visa. For example, systematic harassment or denial of basic rights available to others in their country, or the person has experienced torture or trauma in their country of origin and is likely to experience further trauma if returned to that country
- the person is excluded from the grant of a protection visa or has had a protection visa cancelled or refused on character grounds and their circumstances have been assessed as engaging Australia's non-refoulement obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm as provided in section 36(2A) of the Act.

3: SUMMARY OF HEALTHCARE ENTITLEMENTS

Refugees

Subclass	Medicare	NDIS
200-217	Yes, permanent resident	Yes, permanent visa holder
866 – Protection	Yes, permanent resident	Yes, permanent visa holder
785 – TPV	Yes, under Ministerial Order[744]	No
786	Yes, under Ministerial Order	No
787	Yes, under Ministerial Order	No
790 – SHEV	Yes, under Ministerial Order	No
Illegal maritime arrivals holding a Humanitarian Stay visa (subclass 449)	Yes, under Ministerial Order	No
Secondary Movement Offshore Entry visa XB (subclass 447)	Yes, under Ministerial Order	No

Bridging Visas

Subclass	Medicare	NDIS
Bridging Visa A (Subclass 010)	Applicants for permanent residency Yes, if: • on a visa allowing you to work • able to prove your parent, spouse or child is an Australian citizen • able to prove your parent, spouse or child is a permanent resident • able to prove your parent, spouse or child is a New Zealand citizen living in Australia.[745]	No
	Appeals lodged after permanent residency application refused:	No

744 https://www.servicesaustralia.gov.au/individuals/subjects/how-enrol-and-get-started-medicare/enrolling-medicare/how-enrol-medicare-if-youre-temporary-resident-covered-ministerial-order

745 https://www.servicesaustralia.gov.au/individuals/subjects/how-enrol-and-get-started-medicare/enrolling-medicare/how-enrol-medicare-if-youre-australian-permanent-resident

	• Yes, if appealing, can stay enrolled in Medicare	
Bridging Visa C (Subclass 030)	Visa holders are eligible for Medicare if they are: • Applying for/ have appealed a permanent residency visa application, as above; AND • Are on a visa allowing them to work, as above, if they: o Applied for certain SkillSelect visas: 132, 188, 888, 186, 187, 189, 190, 489; OR o Have been granted a BVC that allows the applicant to work, generally because of demonstrated financial hardship[746]	No
Removal Pending Bridging visa (subclass 070)	Yes, under Ministerial Order	No
Illegal maritime arrivals holding a Bridging E (Class WE) visa	Yes, under Ministerial Order	No

Social Security

Special Category Visa Holders

Entitlement	444 Special Category (Protected)	444 Special Category (Not Protected)
Disability Support Pension	Ten year waiting period applies	Generally not entitled – need to be granted a permanent visa
	EXEMPTION: lived/worked in NZ • Persons with previous residence in New Zealand who lodge a claim DSP (and are severely disabled) may be eligible for an Australian benefit under the social security agreement with New Zealand, irrespective of whether they are protected or non-protected SCV holders residing in Australia.[747]	
Special Benefit	Yes (waiting period currently waived due to COVID-19)	Generally not entitled – need to be granted a permanent visa

746 https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/bridging-visa-c-030#About

747 https://guides.dss.gov.au/guide-social-security-law/9/1/2/40

Bridging Visas

Subclass	Disability Support Pension	Special Benefit
060 Bridging F	Not residentially entitled	Yes, under Ministerial Determination[748]
070 Bridging (Removal Pending)	Not residentially entitled	Yes, under Ministerial Determination[749]
All other Bridging Visa subclasses	Not residentially entitled	Not residentially entitled[750]

Refugee & Humanitarian Visa Holders

Subclass	Entitlement to Disability Support Pension	Entitlement to Special Benefit
200-217	Yes, PR with exemption to 10 years of Qualifying Residence (holders and former holders)	Not applicable – only if not eligible for any other payments
852	Yes, PR with exemption to 10 years of Qualifying Residence (holders and former holders)[751]	
866	Yes, PR with exemption to 10 years of Qualifying Residence (holders and former holders)	
785 – TPV	Not residentially entitled	Yes, with exemption from waiting period[752]
786 – Temporary (Humanitarian Concern)	Not residentially entitled	Yes, with exemption from waiting period
790 – SHEV	Not residentially entitled	Yes, with exemption from waiting period

Covid-19 Payments

Source: Refugee Council of Australia

Entitlement	JobSeeker	JobKeeper	Coronavirus Supplement	Economic Support Payment
	Varies	$1500 per employee a fortnight	$550 per fortnight	$750 one-off payment
200-204	Yes – two-year wait period	Yes, through eligible employer	Yes, if receiving one of these payments:	Yes

748 https://guides.dss.gov.au/guide-social-security-law/9/1/2/100
749 Ibid.
750 Ibid
751 https://www.legislation.gov.au/Details/F2016L01858
752 https://guides.dss.gov.au/guide-social-security-law/9/2/10#notea

	currently waived		JobSeeker Payment, Partner Allowance, Widow Allowance, Sickness Allowance and Wife Pension Youth Allowance for job seekers Youth Allowance for students and apprentices Austudy for students and apprentices ABSTUDY for students getting Living Allowance Parenting Payment partnered and single Farm Household Allowance	
866	Yes – two-year wait period currently waived	Yes, through eligible employer		Yes
Permanent Residents – Other	Yes – two-year wait period currently waived	Yes, through eligible employer		Yes
SCV – Protected	Eligible – two-year wait period currently waived	Yes		No
SCV – Non Protected	Not eligible	If residing continually in Australia for 10 years or more	Not eligible	
TPV	Not eligible	Not eligible	Yes, if on Special Benefit (see above)	Yes, if on Special Benefit
SHEV	Not eligible	Not eligible	Yes, if on Special Benefit (see above)	Yes, if on Special Benefit

6-A: INCIDENCE OF DISABILITY IN IMMIGRATION DETENTION

Year	Number of asylum seekers identified with a disability	Limitations
April 2018 - June 2018 (Q2 2018)	**53** (1.79% of total onshore immigration detention facility population)[753]	Percentage is expressed out of the total *onshore* immigration detention population (~2500-3000). The number of people detained in offshore detention during this period is smaller, around 647 people in August 2019)
January 2018 - March 2018 (Q1 2018)	**56** (2.06% of total onshore immigration detention facility population)	
October 2017 - December 2017 (Q4 2017)	**26** (0.85% of total onshore immigration detention facility population)	
July 2017 - September 2017 (Q3 2017)	**43** (1.47% of total onshore immigration detention facility population	
April 2017 - June 2017 (Q2 2017)	**33** (1% of total onshore immigration detention facility population).	
January 2017 - March 2017 (Q1 2017)	**44** (2% of total onshore immigration detention facility population).	
October 2016 - December 2016 (Q4 2016)	**58** (2% of total onshore immigration detention facility population).	
July 2016 - September 2016 (Q3 2016)	**86** (2% of total onshore immigration detention facility population)	

[753] Between Q2 2015 and Q2 2018, we used the following sources: Department of Immigration and Border Protection, *Immigration Detention Health Reports* (Report) <https://www.homeaffairs.gov.au/foi/files/2018/2018-180701332-document-released.pdf>. See also <https://www.homeaffairs.gov.au/foi/files/2017/FA160800237-documents-released.pdf>.

April 2016 - June 2016 (Q2 2016)	**We could not locate any relevant data**	N/A
January 2016 - March 2016 (Q1 2016)	**124** (4% of total onshore immigration detention facility population) **124** (9.7% of total offshore regional processing centre population)	N/A
October 2015 - December 2015 (Q4 2015)	**129** (3.8% of total onshore immigration detention facility population) **121** (7.8% of total offshore regional processing centre population)	N/A
July 2015 - September 2015 (Q3 2015)	**137** (3.8% of total onshore immigration detention facility population) **118** (7.3% of total offshore regional processing centre population)	N/A
April 2015 - June 2015 (Q2 2015)	**147** (4.3% of total onshore immigration detention facility population) **122** (7% of total offshore regional processing centre population)	N/A
"As at 30 September 2014"	**268** (Onshore), **114** (Offshore)[754]	NEDA attributed these statistics to the "Department of Immigration and Border Protection, February 2015." However, the root source could not be identified.
"At March 2014"	**28** children[755]	It is unclear whether this figure overlaps with the numbers

[754] National Ethnic Disability Alliance (NEDA), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (Report, March 2015) 17.
[755] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014) 83

		above. It is also unclear whether this figure includes or precludes children in offshore detention.
2005-2006	248 cases of people found to be wrongfully detained. Of that figure, **13** had a disability.[756]	Data drawn from the pool of people wrongfully detained by reference to an Ombudsman's Report.
2002	16 children (of a total of 278)[757]	

<https://humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>.

[756] Karen Soldatic and Lucy Fiske, 'Bodies "locked up": Intersections of disability and race in Australian immigration' (2009) 24(3) *Disability and Society* 289-301, 291.

[757] National Ethnic Disability Alliance (NEDA), Submission No 210 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002).

6-B: OVERVIEW OF CASE STUDIES

The purpose of this appendix is to provide a high-level overview of some publicised instances where asylum seekers with cognitive, physical, sensory, intellectual and psycho-social disabilities sought reasonable accommodation and the shortcomings of the accommodation provided.

Name	Immigration detention centre	Type of disability [758]	Description of disability	Accommodation	Source
Muslim Qais Nacr	Manus Island RPC	Physical disability	Diabetic for 15 years. In Iraq, he self-administered insulin three times a day (20 – 25mg)	On Manus, he must present at the gate to his compound with a medical note at 6am, 11am and 6pm to visit the clinic. His blood sugar levels have been high in Manus, it is unclear whether these concerns have been addressed.	Amnesty International [759]
P.K.	Manus Island RPC	Physical disability	Severe Asthma since birth. He relies on Seretide and Ventolin inhalers and cortisone tablets to treat his asthma. He regularly visited hospital in Lebanon for medical assistance	On Manus, there are delays in the delivery of the Ventolin treatment. Conditions on Manus such as dust, humidity and heat agitate his condition. Fumigation of local pests worsens these conditions. Access to the medical clinic has been uncertain.	Amnesty International [760]
Mahdi Sawari	Manus Island RPC	Physical disability	Serious coughing at night, hair loss, skin condition,	On Manus there are no accessible toilets. He and Amnesty International have put in multiple requests for accessible bathrooms, but	Amnesty International [761]

[758] To classify the type of disability where it was not indicated by the source, we consulted the Department of Social Services, 'Disability and Carers', *Guide to the List of Recognised Disabilities* (Webpage, Date unknown) <https://www.dss.gov.au/our-responsibilities/disability-and-carers/benefits-payments/carer-allowance/guide-to-the-list-of-recognised-disabilities>. We have opted to include case studies even where they may not be recognised disabilities in Australia.

[759] Amnesty International, *This is breaking people: Human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea'* (Report, December 2013) 52 <https://www.amnesty.org.au/wp-content/uploads/2016/09/Amnesty_International_Manus_Island_report.pdf>.

[760] Ibid 55.

[761] Ibid.

			losing eyesight, and is a person of short stature	no further action has been taken.	
35-year-old Tamil refugee	Villawood IDC	Sensory disability and Psychosocial disability	Legally blind, a previous acquired brain injury and mental illness	Continual visa applications and security assessments have worsened his physical and mental conditions. There have been requests by the UN Working Group on Arbitrary Detention for his release given his disabilities which was being reviewed by DOHA. It has now been referred to the UN Special Rapporteur on the Human Rights of Migrants.	SBS News[762]
Marco	Transferred between hospitals and detention facilities on Christmas Island, in Darwin, Brisbane, Perth and Sydney, as well as several psychiatric facilities	Physical disability and Psychosocial disability	Experienced symptoms depression, adjustment disorder, post-traumatic stress disorder and anxiety. Attempted suicide and self-harm. Also has protruding disc in his neck with nerve root compression and required surgery. He suffers from chronic neck pain	He was recommended neck surgery, but this was never provided. He was transferred to hospitals and detention facilities, but this worsened his mental health conditions due to discontinuity of care and delays in medical assistance.	Public Interest Advocacy Centre (PIAC)[763]

[762] Nick Baker, 'A blind refugee has been held in Australian detention for nine years', *SBS News* (online, 5 June 2019) <https://www.sbs.com.au/news/a-blind-refugee-has-been-held-in-australian-detention-for-nine-years>.
[763] Public Interest Advocacy Centre, *In poor health: Health care in Australian Immigration detention* (Report, 13 June 2018) 4 <https://piac.asn.au/wp-content/uploads/2018/06/18.06.14-Asylum-Seeker-Health-Rights-Report.pdf>.

MZYYR	Melbourne Immigration Transit Accommodation	Intellectual disability and Psychological disability	Neuro-developmental disorder with associated intellectual impairment	While in detention, specialist psychiatric services were not always accessible to provide treatment for his intellectual disability. Notes of IHMS indicated "ongoing incarceration is almost certainly going to lead to further problems…community management should be considered a priority to remove him from the detention centre environment which seems to be driving his behaviour."	*MZYYR v Secretary, Department of Immigration and Citizenship* [2012] FCA 694.
Hozan	Christmas Island IDC and several transfers.	Psychosocial disability and Physical disability	Complex post-traumatic stress disorder, chronic stress and experiencing grief. Attempted self-harm Hepatitis C, respiratory problems and chronic knee pain	Hozan had been detained in a refugee camp overseas and was sexually abused. Australian immigration detention was re-triggering. Regular handcuffing by immigration detention guards during transfers led Hozan to have a seizure on one occasion. Hozan refused to attend medical appointments because he would need to be handcuffed during transfer. He reported to the detention facility that being cuffed was not good for his mental health and caused physical injuries. Detention officers continued to use handcuffs notwithstanding these reports.	PIAC[764]
Nadim	He arrived in Australia in 2013 and was detained at the Christmas Island IDC.	Physical disability	Liver cirrhosis	He had medical advice to undertake hepatitis C antiviral therapy but did not receive the therapy. Following diagnosis of liver cirrhosis access to hepatitis C medication was	PIAC[765]

[764] Ibid 24.
[765] Ibid 27.

	He was transferred between an offshore processing centre and back to an onshore immigration detention centre.			recommended by several authorities, but this was not provided. After PIAC commenced litigation in the Federal Court seeking access to the antiviral therapy he was provided with the medication.	
Anas	He has been held in immigration detention facilities since arrival to Australia in 2013.	Physical disability	Chronic liver damage, and persisting elevations of liver enzymes	IHMS referred him for antiviral treatment but he did not receive the treatment. PIAC subsequently submitted a request to DIBP for the antiviral medication. After PIAC commenced litigation in the Federal Court seeking access to the antiviral therapy he was provided with the medication.	PIAC[766]
Unspecified	Christmas Island IDC	Intellectual disability	Significant developmental delay and diagnosed with a serious neurological condition in infancy Previously treated in her country of origin with oral medication	On Christmas Island, she had inconsistent access to her medication and no access to allied health services, leading to deterioration in her condition.	National Ethnic Disability Alliance (NEDA), attributed to a Health Professional working within the detention system[767]
Unspecified	Christmas Island IDC	Sensory disability	Profound hearing loss affecting speech development	On Christmas Island, his cochlear implant stopped working, and repair was delayed despite this being a simple issue. In the 18 months of detention, the family had a dozen speech	NEDA, unattributed [768]

[766] Ibid 28.
[767] National Ethnic Disability Alliance (NEDA), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (Report, March 2015) 21.
[768] Ibid 22.

				and language therapy sessions. However, speech pathologists that were available, had no experience with hearing impaired children. No other early intervention support was provided.	
Unspecified	Christmas Island IDC	Physical disability	Requires a wheelchair due to four limb spasticity or severe developmental delay	No formal diagnostic assessments or tests had been undertaken to assess her full conditions. A specialist diet following an early misdiagnosis was commenced as treatment and medical visit arranged, but this was then cancelled, following delays to x-ray reports.	NEDA, attributed to a Health Professional working within the Detention System[769]
Unspecified	Christmas Island IDC	Sensory disability	Hearing impaired	The child's parents were also profoundly deaf and were anxious that they were unable to hear if their baby was distressed. The child outgrew their hearing aids on arrival to Christmas Island. The child had no access to a hearing test or replacement aids whilst on Christmas Island. There was significant delay in transferring the family to more appropriate detention facilities following request by health practitioners. Neither the child nor parents received access to appropriate sign language interpreters. Six months into detention, they had not received any hearing aids. They could not communicate with anyone in detention without extreme difficulty. This	NEDA, attributed to a Health Practitioner working in the detention system[770]

[769] Ibid 24.
[770] Ibid 26.

				made them feel socially isolated. The parents expressed concerns about their child's language development without a hearing aid. The delay in assessment and specialist intervention occurred at a critical time in the child's development and may lead to long term communication and developmental challenges.	
Felix	Unspecified	Physical disability	Requires a wheelchair	He has access to an old hospital wheelchair but it was too heavy for him to push himself around and he relies on adults to push him, isolating him from his peers. Many of the facilities in the detention centre, including dining rooms and bathrooms, are not wheelchair accessible, causing him to be dependent on adults carrying him.	Submission to National Inquiry into Children in Immigration Detention from the Multicultural Disability Advocacy Association of NSW[771]
Declan	Unspecified	Physical disability	Cerebral Palsy	He requires modified spoon to eat, but they are not available in the detention centre. He relies on being fed by his sister. The speed in which meals are served has meant his sister and him are unable to get enough food during mealtimes.	Submission to National Inquiry into Children in Immigration Detention from the Multicultural Disability Advocacy Association of NSW[772]
Ita	Unspecified	Physical disability	Spina bifida Requires a daily supply	Ita's dad must queue – sometimes for three hours - daily to obtain continence aid. There has also been limited supply of	Submission to National Inquiry into Children in Immigration

[771] Multicultural Disability Advocacy Association of NSW, Submission No 122 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* (February 2002).
[772] Ibid.

			of continence aid	continence aid. This has led him to use alternatives, such as babies' nappies. This has led to the development of sores.	Detention from the Multicultural Disability Advocacy Association of NSW[773]
Leo	Unspecified	N/A	HIV positive	Other detainees have avoided Leo and Leo's family because they fear they will catch AIDS. No public health education about HIV/AIDS or disabilities generally is available to detainees.	Submission to National Inquiry into Children in Immigration Detention from the Multicultural Disability Advocacy Association of NSW[774]
Marian	Unspecified	Cognitive disability	Epilepsy	Parents have not been educated on the nature of epileptic seizures and this has affected their trust of the centre's doctor.	Submission to National Inquiry into Children in Immigration Detention from the Multicultural Disability Advocacy Association of NSW[775]
Neot	Unspecified	Sensory disability	Hearing-impaired	Neot rarely spoke to other children and people except his parents. It took three months until a mental health nurse discovered Neot had a hearing impairment and required hearing aids. Neot and his family were released into the community but could not access hearing services whilst holding a TPV. Neot used an ill-fitting second-hand hearing aid instead.	Submission to National Inquiry into Children in Immigration Detention from the Multicultural Disability Advocacy Association of NSW[776]

[773] Ibid.
[774] Ibid.
[775] Ibid.
[776] Ibid.

Rose	Unspecified	Physical disability	Diabetes	Rose requires access to food and drinks several times a day and night. However, the detention centre only serves three meals a day and no food or drink is available outside these times except water.	Submission to National Inquiry into Children in Immigration Detention from the Multicultural Disability Advocacy Association of NSW[777]
Unspecified	Woomera IRPC	Physical disability	Requires a wheelchair	The child (a young boy) was forced to go into the women's bathroom because there was nobody other than his mother to help him, even though this broke cultural customs.	Australian Human Rights Commission (AHRC)[778]
Unspecified	Curtin IDC	Physical disability and sensory disability	Cerebral Palsy Also requires a wheelchair	It was not until 3 months after arriving at Curtin IDC that the child was assessed by an occupational therapist regarding his wheelchair needs. The mother was forced to use a broken pram which the child had already outgrown for seven months. Delays in providing a wheelchair led to the temporary provision of a Baby Jogger which was subsequently deemed inappropriate for the child by an occupational therapist because of its size. The mother requested a modified bedrail, tilting bed and mobile shower commode. It took 18 months for these modifications to be made. Furthermore, no special curriculum catering to the child's individual	AHRC[779]

[777] Ibid.
[778] Australian Human Rights Commission (AHRC), *A last resort? National Inquiry into Children in Immigration Detention* (Report, 1 April 2004) 548.
[779] Ibid 549-551, 557.

				educational needs was provided.	
Unspecified	Port Hedland IRPC	N/A	Lysosomal storage disease	The disease was not diagnosed until two years after arrival in Australia and the diagnostic process did not commence until 7 months after the family's arrival in Australia. When the children arrived in August 2000, initial assessments identified one child has having delayed development and the other child as having an intellectual impairment. A final diagnosis was not provided until November 2002. Delays could be attributed to the attendance of one of the children at a hospital appointment without an interpreter. A further assessment assessed that the intellectual disability problems were beyond the Centre's capacity and required intellectual disability specialists.	AHRC[780]

[780] Ibid 535-537.

6-C: HEALTH CARE ENTITLEMENTS FOR DETAINEES WITH A DISABILITY UNDER INTERNATIONAL LAW

Australia's international law obligations and domestic common law require immigration detainees to be afforded basic entitlements. One such entitlement of relevance to the experience of detainees with a disability is the right to medical care.

Australia's International Law Obligations

Australia has ratified several international treaties that provide for immigration detainees entitlement to medical care.[781] *The Convention on the Rights of Persons with Disabilities (CRPD), International Covenant on Economic, Social and Cultural Rights,* and the *Convention on the Rights of the Child* all provide for the right to the highest attainable standard of health, in varying forms, as is detailed in the relevant articles of the conventions below. The *Convention Relating to the Status of Refugees* states that refugees should be accorded the same treatment with respect to public relief and assistance as nationals. Collectively these conventions affirm the basic entitlement of detainees to medical care.

The fact that regional processing centres in Nauru and Papua New Guinea operate under Nauruan and PNG jurisdiction does not mean Australia can outsource its international legal obligations.[782] The United Nations High Commissioner for Refugees has indicated that Australia remains responsible for people forcibly transferred off the mainland under its offshore arrangements.[783]

Article 18 of the *CRPD* guarantees persons with disabilities the liberty of movement. Australia has issued a declaration interpreting this provision as having no impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia where these requirements are based on legitimate, objective and reasonable criteria.[784]

Domestic Common Law[785]

The courts have found that the Commonwealth of Australia owes a duty of care to detainees in immigration detention to take reasonable care for their safety whilst they are in immigration detention.[786] This requires the Commonwealth to ensure that a level of medical care is available that is reasonably designed to meet detainee's health

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[781] Alana Bonenfant, 'The Right to Health and Immigration Detention: What are Australia's International Obligations?', *ILA Reporter* (Blog Post, 23 April 2020) < http://ilareporter.org.au/2020/05/the-right-to-health-and-immigration-detention-what-are-australias-international-obligations-alana-bonenfant/>.

[782] Andrew and Renata Kaldor Centre for International Refugee Law, "Who is Legally Responsible for Offshore Processing on Manus and Nauru," October 1, 2018, https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-australia%E2%80%99s-responsibility-asylum-seekers-and-refugees-nauru-and

[783] See, eg, UNHCR, 'UNHCR Statement on Australia's repeal of Medevac legislation' (Media Release, 5 December 2019) <https://www.unhcr.org/en-au/news/press/2019/12/5de8e3574/unhcr-statement-australias-repeal-medevac-legislation.html>.

[784] *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth) s 5.

[785] For case notes on the relevant domestic common law, please see the Sydney Centre for International Law Submission on the impact of COVID-19 on persons with disabilities in hotel detention (17 August 2020).

[786] *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [218]; *Mastipour v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2003] FCA 952, [21].

and psychiatric care needs.[787] Detainees do not have to settle for a lesser standard of mental health care by virtue of being in immigration detention.[788] This obligation remains even where the Commonwealth contracts out the provision of services.[789]

This duty of care stems from the nature of the relationship between the Commonwealth and detainees in immigration detention, which has been closely analogised to that between prisons and prisoners, based on the situation which places detainees in a position where they are unable to care for themselves.[790]

Australia's domestic common law provides another basis upon which immigration detainees can claim assert their entitlement to an adequate level of medical care.

[787] *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549, [218].
[788] Ibid [263].
[789] Ibid [218].
[790] *Mastipour v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2003] FCA 952, [25]; *MZYYR v Secretary, Department of Immigration and Citizenship* [2012] FCA 694, [55].

6-D: AUSTRALIAN BORDER DEATHS ANNUAL REPORT 2019

AUSTRALIAN BORDER DEATHS DATABASE

Annual report on border-related deaths, 2019

Border Crossing Research Brief No. 16
May, 2020

BORDER CROSSING OBSERVATORY
BORDERS, CRIME, JUSTICE

https://www.monash.edu/arts/border-crossing-observatory/home

Year of death by border location

Year	En-route	Australian waters	Offshore detention	Onshore detention	Death in community	During arrest/dep	After deportation	TOTAL
2000	370	3	0	1	0	0	0	374
2001	358	3	0	4	1	0	0	366
2002	0	0	1	2	0	0	6	9
2003	0	0	1	2	1	0	0	4
2004	0	0	0	1	0	1	0	2
2005	0	0	0	2	1	0	0	3
2006	0	0	0	0	0	1	12	13
2007	0	0	0	0	0	0	0	
2008	0	0	0	2	0	0	2	4
2009	114	17	0	0	0	0	1	132
2010	109	55	0	4	0	0	0	168
2011	231	0	0	4	0	0	0	235
2012	417	1	0	3	0	0	0	421
2013	121	110	2	5	1	1	0	240
2014	0	0	3	2	2	0	0	7
2015	0	0	1	4	5	0	0	10
2016	0	0	4	1	6	0	0	11
2017	0	0	3	0	1	0	1	5
2018	0	0	2	1	1	0	0	4
2019	0	0	0	3	3	0	1	7
2020	0	0	0	1	2	0	0	3
Unknown	0	0	0	0	0	0	11	11
TOTAL	1720	189	17	41	22	3	34	2026

Note that slight changes in some figures published in the 2018 report are due to additions and corrections being made to the source data as new information comes to light.

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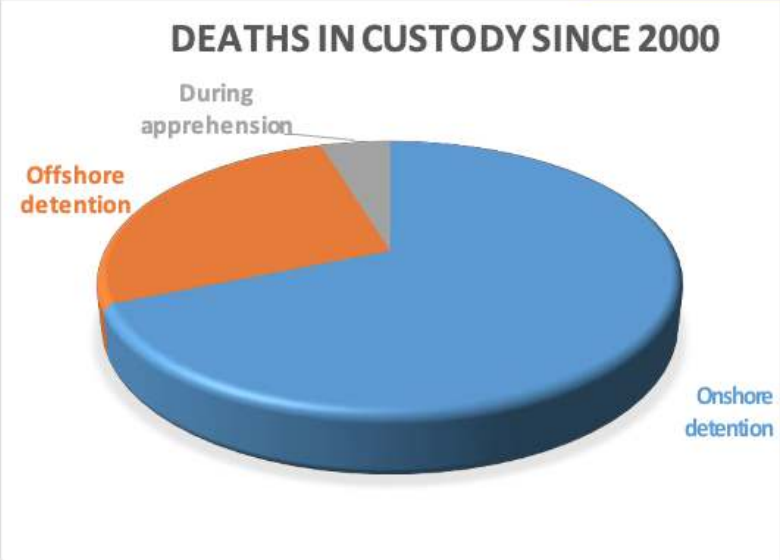
Overview of border-related deaths in 2019

The number of deaths recorded on the Australian Border Deaths Database increased from 4 in 2018, to 7 in 2019. All but one of these deaths occurred on Australian territory, three of them in custody and three in the community. While there were no deaths in offshore detention, one overseas death was identified as a result of a stabbing attack following deportation to Vietnam. Of the three deaths in immigration detention, two were considered to be cases of suicide. The three deaths in the community were all suspected suicides of asylum seekers who had been living in the community on bridging visas for extended periods of time, at least one of whom was facing removal to his country of origin (Sri Lanka). For information on all recorded deaths related to Australian border controls since 2000 visit The Australian Border Deaths Database.

Special Analysis: Deaths in custody

Excluding deaths during interception at sea, sixty four deaths in custody have been recorded on the Australian Border Deaths database since 2000. The majority of these (44) occurred in onshore detention, 17 occurred in offshore detention, and the remaining three happened during apprehension by police or immigration authorities. In line with the definition of 'in custody' adopted by the National Deaths in Custody (NDIC) monitoring program administered by the Australian Institute of Criminology, deaths that occur outside of closed detention may also be counted as 'in custody' where individuals are under the control of law enforcement officials. At present the NDIC only covers deaths in prison and police custody. The Border Crossing Observatory has long advocated that deaths in immigration custody should be included in this national count, as a matter of equity and completeness, to ensure that *all* deaths in custody are maintained within one comprehensive system. While *counting* is important as an act of recognition, it is only the first step towards achieving greater *accountability* in the immigration detention system. A secondary benefit of including deaths in immigration detention within the same monitoring system as deaths in criminal justice contexts, is that recognition of a death as being 'in custody' should normally trigger a coronial inquest. Coronial procedures are complex and vary state by state. Of the 41 deaths in custody that occurred on the Australian mainland, 24 resulted in a coronial investigation. Deaths that occur in places of offshore detention fall outside the jurisdiction of state coroners. The only exceptions have been deaths that occurred in Australia following medical transfer from offshore detention. Examples include Omid Masoumali, who died in a Brisbane hospital from burns he inflicted while detained on Nauru, and Hamid Khazaei, who was belatedly transferred to Brisbane from Manus Island while suffering from sepsis. In Hamid Khazaei's case, State Coroner Terry Ryan found the death to have been preventable, and identified aspects of offshore detention that had contributed to the deaths. In contrast, when Reza Berati was killed during an outbreak of violence at Manus Island, no Australian coroner had jurisdiction to investigate, an issue addressed by State Coroner Terry Ryan in his recommendations following Hamid Khazaei's death. While two local guards were eventually convicted of the death, and an Australian Senate Inquiry was conducted, Australian personnel who were suspected of involvement escaped prosecution, leaving commentators with a sense that justice had not been served.



Further reading:

Powell, R, Weber, L and Pickering, S (2015) 'Every death counts: An argument for counting deaths in immigration custody in the national deaths in custody collection' *Current Issues in Criminal Justice* 27(1), pp. 113-121.
Powell, R, Weber, L and S Pickering (2013) 'Counting and Accounting for Deaths in Australian Immigration Custody' *Homicide Studies* 17(4) pp. 391 – 417, Special Issue on Fatality and Death Reviews

The Australian Border Deaths Database Interpretive Notes

- There is no official count of border-related deaths in Australia. The Australian Border Deaths Database was established as part of the research for Globalization and Borders: Death at the Global Frontier (Weber and Pickering, Palgrave, 2011) in order to fill this gap. The database is hosted at the Border Crossing Observatory at Monash University. The Observatory receives no external funds for this purpose, and the data is maintained voluntarily as part of our ongoing research effort.
- The database records all reported deaths associated with Australian border controls since 1 January 2000. The information is obtained primarily from media reports, which are cross-referenced where possible with official reports from governments, verified information from non-governmental organizations and coronial inquiries. The data is updated as fatalities are reported, and other data sources are used from time to time to cross-check the list.
- We adopt a broad definition of 'border-related death' that includes deaths while en route to Australia (both inside and outside Australia's border surveillance zone), while in onshore or offshore detention, during border enforcement operations, in community contexts where there is direct evidence of a link to border control (for example, suicides following receipt of rejection letters or in protest against border policies) and following return to countries of origin or transit (in the rare cases where this is reported).
- Categorisation of the fatalities sometimes requires inferences to be made from scant information. It is often difficult to discern from reports whether fatalities at sea occurred within or beyond Australia's border surveillance zone. Information on age, nationality and gender is often missing from reports, but can sometimes be pieced together from general narratives. Names are often missing, particularly for deaths at sea where no body has been recovered and no coronial inquiry conducted.
- Deaths are classified by us as 'in custody' where they occur in custodial detention settings, during apprehension by police or immigration authorities on the mainland, or during interdiction at sea where border protection personnel have taken control of a vessel. This classification is for statistical purposes only and does not necessarily correspond to the official handling of these deaths as deaths in custody.
- Every effort has been made to make the data as accurate as possible. However, the process of counting border-related deaths is greatly complicated by the circumstances of unregulated travel and the climate of secrecy which surrounds it. Historically, most deaths have occurred at sea under circumstances where verification of information is extremely difficult. Other deaths that occur in countries of origin following removal or deportation from Australia may be equally difficult to trace, and deaths in countries of transit amongst those whose onward travel has been prevented by Australia's offshore border controls remain completely invisible. The data should therefore be considered to capture only known deaths, rather than all deaths that could be related in some way to Australian border controls.

Report prepared for the Border Crossing Observatory by Leanne Weber and Meg Randolph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