



Refugee Council
of Australia

ROYAL COMMISSION INTO VIOLENCE, ABUSE, NEGLECT AND EXPLOITATION OF PEOPLE WITH DISABILITY

PEOPLE WITH DISABILITY IN IMMIGRATION DETENTION

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, people seeking asylum and the organisations and individuals who work with them. RCOA consults regularly with its members, community leaders and people from refugee backgrounds, and this submission is informed by their views.

This submission focuses on the experiences of people with disability in immigration detention and the main issues and concerns they face. RCOA believes the experiences of people with disability in immigration detention have not been adequately explored so far and hopes the Royal Commission pays particular attention to this group.

We intend to provide the Royal Commission with further information about the experiences of refugees settling in Australia.

In line with [Article 1 of the Convention on the Rights of Persons with Disabilities](#), we consider people with disability as those “who have 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”.

For this submission, we will focus on *closed* detention facilities. They include onshore immigration detention facilities (Immigration Detention Centres (IDC), Immigration Transit Accommodation (ITA) and Alternative Places of Detention (APOD)) and offshore processing centres in Nauru and Manus Island. We will not focus on the experiences of people with disability in residence determination arrangements (community detention). We aim to present the experiences of a diverse range of people in closed detention: men and women, children, young people, refugees, people seeking asylum, and people whose visas have been cancelled.

To better understand the reality of the situation in immigration detention for people with disability, RCOA sought to speak to people with disability who experienced onshore and/or offshore detention. As our access to this group proved to be limited, we also spoke to a number of people who had clients or friends with disability in detention. Further, we analysed and utilised a range of publicly available information and case studies.

Some of the issues of concern we will highlight in this submission need to be reviewed **urgently** because of their significantly adverse impacts on people with disability. They include current detention practices like the use of restraints. As the final reporting date for this Royal Commission has been extended to 29 September 2023, we hope that the Royal Commission will publish an interim report focusing on the experiences of people with disability in detention and highlight some of the most pressing issues.

Recommendation 1 Interim report on people in detention with disability

RCOA recommends that the Royal Commission publish an interim report focusing on the experiences of people with disability in immigration detention (or other places where people are deprived of their liberty) and highlight some of the most pressing issues.

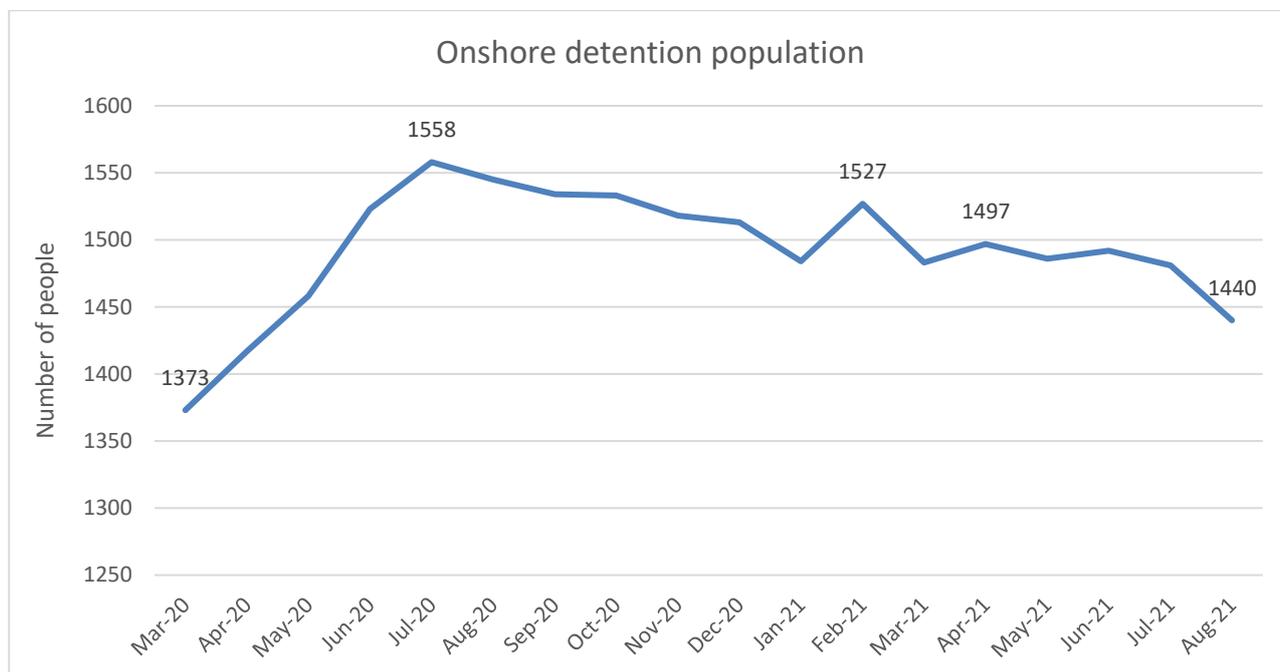
1 Australia's immigration detention system

- 1.1 Australian law requires that anyone who is not an Australian citizen and does not have a valid visa is detained until they are granted a visa or removed from the country.¹ This includes people seeking asylum who enter Australia without a valid visa and those who have had their visas cancelled for a variety of reasons.
- 1.2 The legal framework for immigration detention does not require consideration of necessity, reasonableness and proportionality, and therefore is liable to produce cases of arbitrary detention.
- 1.3 There is no time limit for detaining a person under Australian law. Mandatory detention applies to every non-citizen without a valid visa, therefore a person's vulnerabilities or personal attributes do not exempt them from detention. Children, pregnant women, elderly, survivors of torture and trauma and people with disability can be (and are) detained, unless the Minister for Home Affairs uses their non-compellable, non-delegable and non-reviewable power to allow that person to live in the community until the resolution of their immigration status. There is no independent review or judicial review of the need to detain a person.
- 1.4 There are no regulations in relation to the conditions of immigration detention, for example in relation to the provision of healthcare. The level of oversight of detention facilities, in our opinion, is inadequate.
- 1.5 Since the formation of Australian Border Force in 2015, the detention environment has become more securitised and the conditions of detention become more prison-like. Use of restrictive measures have become more commonplace and a risk management lens is applied to effectively all of the decisions around placement and management of people in detention.
- 1.6 The Australian Government refers to the change in detention cohort to justify this securitisation. It is true that subsequent to legislative changes in December 2014, an increasing number of non-citizens, including refugees, have been detained after their visas were cancelled because of criminal charges. However, RCOA does not agree that this change in detention population justifies the current overly restrictive measures and practices, especially as immigration detention centres still hold a significant number of people seeking asylum and vulnerable people who pose no risk to the community.
- 1.7 The latest available official detention statistics is from 31 August 2021.² As of that date, 1440 people (1393 men and 47 women) were detained across four IDCs, three ITAs and unknown number of APODs. Australia continues to use remote detention facilities. Two of the IDCs, Yongah Hill IDC in the town of Northam in regional Western Australia and North West Point IDC on Christmas Island, are remote. 56% of the detention population were detained after the cancellation of their visas under section 501 of the Migration Act, 20% were irregular maritime arrivals and the rest were detained for 'other' reasons; this could include overstaying one's visa or non-compliance with visa requirements.
- 1.8 As the Australian Human Rights Commission observed, many countries like Canada, the United Kingdom and the United States responded to heightened risk of COVID-19 transmission in crowded settings like immigration detention and reduced their population size (by around 66%, 39%, and 69% respectively). However, the detention population in Australia increased by 12% in the first six months since the COVID-19 pandemic was declared in March

¹ *Migration Act 1958* (Cth), ss 189, 196 & 198.

² Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (31 August 2021), <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-august-2021.pdf>

2020.³ This was despite the clear and persistent calls from public health experts about the risks of COVID-19 transmission in our detention facilities and dire consequences for people with health issues.⁴ It is of significant concern that, as illustrated in the graph below, while the risk of COVID-19 transmission remains a reality in Australia, the detention population never went back to its pre-pandemic level.



2 Long-term detention

2.1 One of the issues of significant concern in relation to immigration detention in Australia is the increasing length of detention. It is well-documented that detention, particularly long-term detention, can exacerbate existing disability and increase the likelihood of developing disability, especially psychosocial disability. As mentioned, there is no time limit associated with immigration detention and there are no special considerations to limit the use of or the length of detention for people with disability.

2.2 It is in light of this information that we are gravely concerned to see the average length of detention in Australia continue to rise. The average length of detention was at a record high of 696 days in August 2021.⁵ This is in stark contrast to countries like Canada, the United States and the United Kingdom. The average length of detention from April to September 2020 in Canada was 25 days⁶ and the average length of detention in the United States from October 2020 to July 2021 was 61 days.⁷ In the United Kingdom, in March 2021, 85% of all people in immigration detention had been there for under 6 months and 38% for fewer than 28 days.⁸

³ Australian Human Rights Commission (2021), *Management of COVID-19 risks in immigration detention*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/management-covid-19-risks-immigration-detention>, p.5.

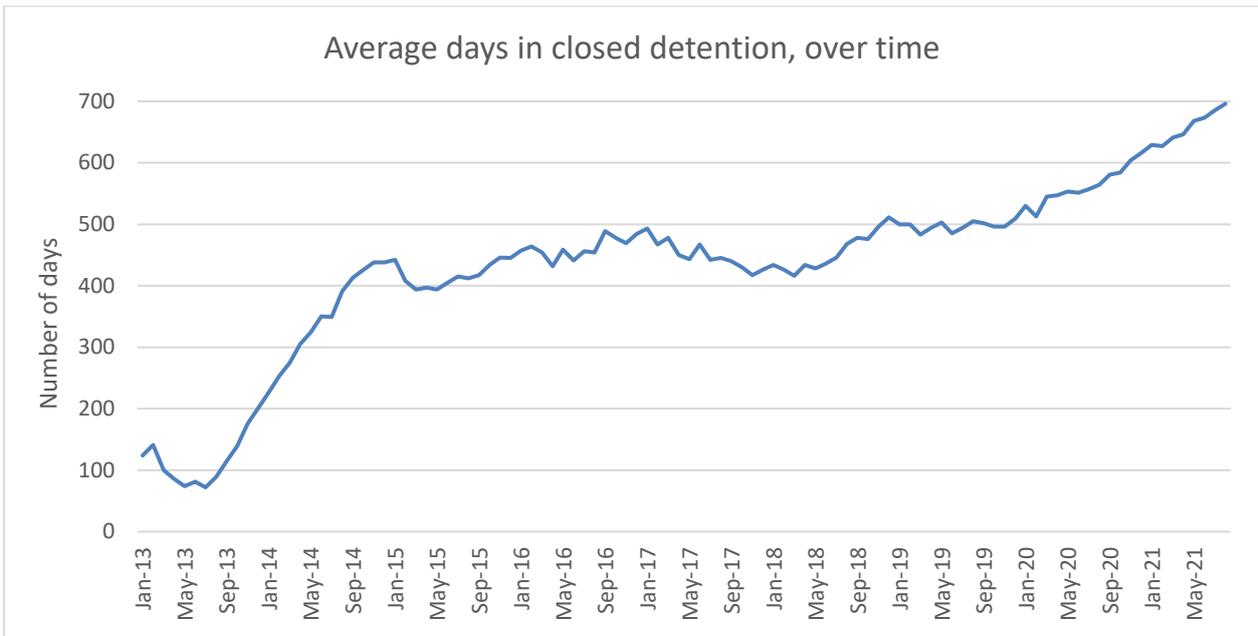
⁴ See the March 2020 joint statement by Australasian Society for Infectious Diseases and the Australian College of Infection Prevention and Control on COVID-19 and detainees, here: <https://www.asid.net.au/documents/item/1868>

⁵ Data from monthly detention statistics released by the Department of Home Affairs and its predecessors, available here: <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention>

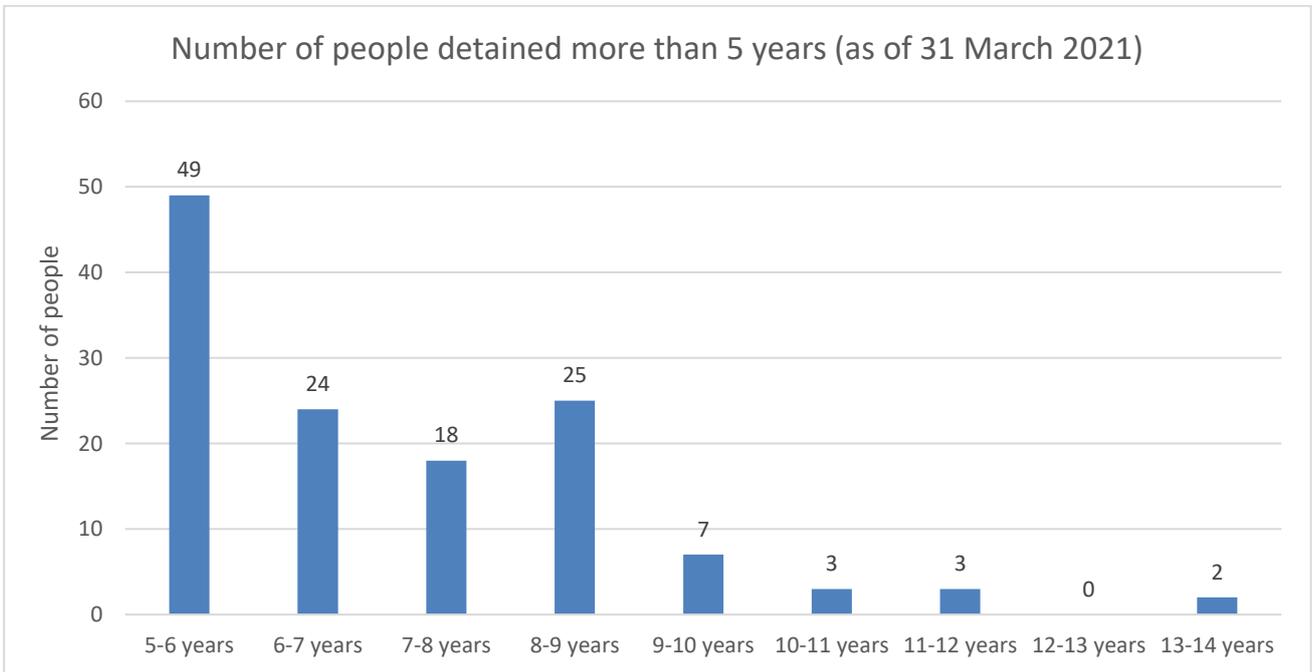
⁶ Canada Border Services Agency, *Quarterly detention statistics: First and second quarter (Q1-Q2), fiscal year 2020 to 2021*, <https://www.cbsa-asfc.gc.ca/security-securite/detent/qstat-2020-2021-eng.html>

⁷ US Immigration and Customs Enforcement, ICE Detention Data, FY21 YTD, downloaded from: <https://www.ice.gov/detain/detention-management>

⁸ UK Home Office, *Immigration statistics data tables, year ending March 2021*, <https://www.gov.uk/government/statistical-data-sets/immigration-statistics-data-tables-year-ending-march-2021#detention>



2.3 In Australia and over time, the percentage of people who have been detained for over two years has increased. As of August 2021, 35% of people had been detained more than 2 years and the length of detention for almost a quarter of that group was recorded as ‘greater than 1825 days’.⁹ At the end of March 2021 and in response to a Senate question on notice,¹⁰ the Department of Home Affairs provided further breakdown of prolonged detention (as shown in the chart below) and revealed that there are people who have been in immigration detention for more than 13 years.



(NB: The Department of Home Affairs usually reports numbers less than five as estimates for privacy reasons. Here, the number of people who have been detained for 10-11, 11-12 and 13-14 years, have been provided as ‘fewer than five’. They have been rendered exact in this graph for display purposes)

⁹ Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (31 August 2021), <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-august-2021.pdf>

¹⁰ Senator Nick McKim, Answer to Question on Notice BE21-391 (16 July 2021), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld11-Portfoliold20-QuestionNumber391>

- 2.4 During our consultations, many people raised significant concerns that the passage of a new Bill in May 2021 would result in increasing the average length of detention even further. In May 2021, the Australian Parliament passed the Migration Amendment (Clarifying International Obligations for Removal) Act 2021 without any public inquiry or formal consultation. While on the face of it, the Act appears to be about preventing the return of people with well-founded fear of prosecution to places where they would be at risk of serious harm, in effect it increases the likelihood of indefinite detention. In cases where refugees cannot be removed from Australia to the country of origin due to a well-founded fear of persecution, the Act gives the Government the power to keep refugees in detention indefinitely, potentially for the rest of their lives.¹¹

3 Impact of prolonged detention on mental health

- 3.1 There is an abundance of evidence that indefinite detention severely and negatively impacts the physical and mental health of adults and children in detention. Prolonged detention contributes to and exacerbates health problems, especially debilitating and life-long mental health issues. Many refugees and people seeking asylum have had traumatic experiences in their home countries and in transit and are therefore more vulnerable to developing mental health issues. Indefinite detention and inadequate healthcare in detention can only further contribute to this.
- 3.2 Many of the mental health experts RCOA spoke to highlighted that effective treatment is not possible for survivors of torture and trauma while they are detained. They considered it counterproductive that the therapy sessions occur in the detention environment or that people return to detention after the conclusion of the sessions. They commented that the ongoing limbo people face and the securitisation of detention not only hinder the recovery from trauma, they can also be instigators for it.
- 3.3 Some of the lawyers we spoke to reported that an increasing number of their clients had mental health diagnoses and psychosocial disability, notably schizophrenia. Psychosocial disability was especially prevalent among refugees whose visas were cancelled. The lawyers reflected that in some instances untreated mental health impairments were one of the reasons for the offending and the subsequent criminal charge which resulted in visa cancellation. Psychosocial disability is further exacerbated by the inferior quality of mental health care in closed settings and the disruption in treatments after a person is transferred to immigration detention from prison.
- 3.4 There are numerous academic and medical articles about the correlation between prolonged detention and mental health issues.¹² One of the more recent reports published by University of Melbourne highlighted that the rate of self-harm among people seeking asylum was exceptionally high when compared to the general Australian population. Amongst the asylum seeker group the highest rate of self-harm was observed in people in offshore and onshore detention and the lowest rate was among asylum seekers in community-based arrangements. The report finds that the rate of self-harm among people seeking asylum (including those in onshore and offshore detention) is more than 200 times the Australian community hospital-

¹¹ For more on the Bill, see: Sangeetha Pillai, *The Migration Amendment (Clarifying International Obligations for Removal) Act 2021: A case study in the importance of proper legislative process* (10 June 2021), <https://www.kaldorcentre.unsw.edu.au/publication/migration-amendment-clarifying-international-obligations-removal-act-2021-case-study>

¹² See for example: Zachary Steel, Derrick Silove, Robert Brooks, Shakeh Momartin, Bushra Alzuhairi, and Ina Susljik, 'impact of immigration detention and temporary protection on the mental health of refugees' (2006) 188(1) *The British Journal of Psychiatry* 58-64; Louise K. Newman, Michael Dudley, Zachary Steel, 'Asylum, Detention, Mental Health in Australia' (2008) 27(3) *Refugee Survey Quarterly* 110-127; Guy J. Coffey, Ida Kaplan, Robyn C. Sampson, Maria Montagna Tucci, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) 70(12) *Social Science & Medicine* 2070-2079.

treated rate. This finding clearly highlights the detrimental impact of indefinite detention on mental health.

- 3.5 Further, in 2016, UNHCR found that 88% of refugees and people seeking asylum on Manus Island were suffering from depression, anxiety and/or post-traumatic stress disorder, which were “the highest recorded rates of any surveyed population”.¹³ The UNHCR medical experts who visited the island in that year, later published that

*...the lengthy, arbitrary, and indefinite nature of immigration detention on Manus Island, together with hopelessness in the absence of durable settlement options, had corroded the resilience of the detainees, and made them vulnerable to mental illness.*¹⁴

Recommendation 2 Limit the detention of people with disability

RCOA recommends that the Australian Government limit the detention of people with disability to the measure of absolute last resort and place this group in community alternatives to closed detention.

4 Limited data and statistics

- 4.1 RCOA believes that lack of reliable data relating to marginalised groups can make them invisible, creating an enabling environment for neglect and abuse. Having comprehensive, targeted and robust data is essential to ensuring people with disability in immigration detention are visible and their needs are considered in policy decisions that impact them. Reliable data is also needed to make sure the detention environment and detention practices are designed with consideration of the needs of this group.
- 4.2 In a 2019 report that RCOA drafted with a number of peak bodies on the challenges of newly arrived refugees with disability, we mentioned that there is an overall lack of statistics and good data about refugees with disability in Australia.¹⁵ This is also the case for people with disability in immigration detention.
- 4.3 In its 2015 report on the plight of people with disability living in Australian immigration detention, the National Ethnic Disability Alliance (NEDA) also highlighted this issue, noting that

*Data relating to people living with disability, their families and carers, in Australian run immigration detention facilities is practically non-existent.*¹⁶

- 4.4 NEDA added that prior to drafting its report, it had lodged a formal request for information with the then Department of Immigration and Border Protection and the responsible Minister, but did not receive specific data on people with disability living in immigration detention. It raised concerns that lack of information and data about this group further reinforces their invisibility and marginalisation.¹⁷

¹³ United Nations High Commissioner for Refugees, *Inquiry on the Serious Allegations of Abuse, Neglect and Self-Harm on Nauru and Manus Island* (Submission, November 2016), <https://www.apf.gov.au/DocumentStore.ashx?id=125eb4f5-9a67-4313-8b19-c6664a24398d&subId=460245>.

¹⁴ Suresh Sundram and Peter Ventevogel, 'The mental health of refugees and asylum seekers on Manus Island' (2017) 390 (10112) *The Lancet* 2534-2536.

¹⁵ Refugee Council of Australia, Federation of Ethnic Communities' Council of Australia, National Ethnic Disability Alliance, and Settlement Council of Australia (2019), *Barriers and Exclusions: The support needs of newly arrived refugees with disability*, https://www.refugeecouncil.org.au/wp-content/uploads/2019/02/Disability_report_WEB.pdf, p.9.

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

¹⁷ *Ibid*, p.6.

- 4.5 The monthly statistics relating to onshore immigration detention and offshore processing facilities do not include information relating to people with disability. In our opinion, this presents a serious and ongoing gap in information and data. Further, as the experience of NEDA detailed above shows, the Department of Home Affairs and its predecessors have not been transparent and consistent in responding to important questions in this regard from civil society.
- 4.6 It is fair to say the Australian Government has never been proactive in providing information relating to people with disability in immigration detention. The information we have today has been mainly provided in response to parliamentary questions on notice or occasional Freedom of Information requests.¹⁸ RCOA's search of the responses to Senate questions on notice in the past seven years shows that the Department has been especially non-committal in response to the questions relating to offshore detention and shifted the responsibility entirely to Governments of Nauru and PNG.
- 4.7 Below, we provide a summary of information relating to people with disability in immigration detention obtained through responses to questions on notice:

People with disability in onshore immigration detention

- 4.8 The most comprehensive and recent statistics was provided in July 2018 and in response to a question on notice enquiring about the number of people with disability in immigration detention and community detention between 2014 to 2018. The question also requested a breakdown of the disability types and the number of people who received assistive equipment.¹⁹ Unfortunately, the response does not provide a breakdown of the number of people by facility type (i.e. closed immigration detention facilities vs. community detention).

Disability Type	2014	2015	2016	2017	2018
Acquired brain injury	0	6	7	9	5
Autism	0	1	0	2	1
Developmental delay	27	2	3	1	2
Hearing impairment	49	36	18	13	4
Intellectual	0	4	2	3	0
Neurological	0	3	23	24	11
Physical	0	7	9	7	0
Psychiatric	0	244	286	237	112
Specific learning disorder (other than intellectual)	0	6	4	7	5
Visual impairment	73	47	10	6	4
Amputation	11	0	0	0	0
Cognitive	2	0	0	0	0
Functional impairment	67	0	0	0	0
Other (Epilepsy, Lupus)	52	0	0	0	0
Total per year	281	356	362	309	144

¹⁸ For an example of a relevant FOI, see: <https://www.homeaffairs.gov.au/foi/files/2018/2018-180701332-document-released.pdf>

¹⁹ Senator Nick McKim, Answer to Question on Notice BE18/187 (5 July 2018), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld3-Portfoliold20-QuestionNumber103>

Assistive Device	2014	2015	2016	2017	2018	Total
Wheelchairs	6	3	2	1	1	13
Crutches	16	19	23	2	0	60
Scooters	0	0	1	0	0	1
Beds	13	41	7	7	6	74
Commode	13	40	17	0	0	70
Glasses	228	212	193	175	44	852
Hearing Aids	20	10	6	1	1	38
Shoes (clinically indicated)	5	2	22	9	1	39

4.9 This response is an improvement when compared to the response to a question on notice in October 2016 about the number of people with disability in onshore and offshore detention. At that time, the then Department of Immigration and Border Protection provided a one-line response that it “does not record data in a format to identify numbers of those people in immigration detention with disability”.²⁰

People with disability in offshore processing facilities

4.10 Provision of data regarding disability in offshore processing facilities is much more limited than onshore. The last time the Department provided some data was in response to a question on notice in October 2014 when it stated that 114 people transferred to offshore processing facilities had disabilities and 5 of whom were children. The Department also provided that the types of disabilities in onshore and offshore detention network (with no further breakdown between the two) included amputation, cognitive (e.g. dementia), developmental (e.g. Asperger’s disorder, autism, developmental delay), functional impairment (e.g. reduced mobility, deformity, multiple sclerosis), hearing impairment (e.g. hearing loss, deafness), visual impairment (e.g. blindness of eye, visual impairment, Coloboma), and other (e.g. epilepsy and neuralgia).²¹

4.11 However, in subsequent years, the Department refused to provide further information in relation to people with disability subject to offshore processing. In October 2016, it did not respond to a question about funding for disability support for people in offshore detention and about policies and practices to accommodate them and ensure their participation.²² In July 2018, in response to a question enquiring about the number of people with disability on Manus Island and Nauru and their disability type, the Department commented that it “does not collect any statistics on the number of people with disabilities on Manus Island or Nauru”.²³ Similarly in October 2020 and in response to a question about the number of people transferred offshore since 19 July 2013 and their recorded disability, the Department claimed that “the health of transferees under regional processing arrangements is the responsibility of the Governments of Papua New Guinea and Nauru”;²⁴ a statement that disregards the ongoing role of Australia

²⁰ Senator Rachel Siewert, Answer to Question on Notice SE16/160 (2 December 2016), https://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/sup_1617/DIBP/QoN_Answers/SE16-160.pdf

²¹ Senator Sarah Hanson-Young, Answer to Question on Notice SE14/467 (30 January 2015), https://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/sup_1415/DIBP/SE14467.pdf

²² Senator Rachel Siewert, Answer to Question on Notice SE16/160 (2 December 2016), https://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/sup_1617/DIBP/QoN_Answers/SE16-160.pdf

²³ Senator Nick McKim, Answer to Question on Notice BE18/186 (5 July 2018), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId3-PortfolioId20-QuestionNumber35>

²⁴ Senator Stirling Griff, Answer to Question on Notice LCC-BE20-249 (23 December 2020), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId9-PortfolioId20-QuestionNumber249>

in management of offshore processing and its continued responsibility in ensuring health and welfare of people subject to these policies.

Recommendation 3 Provide robust and targeted data

RCOA recommends that the Australian Government publish monthly or quarterly data on the number of people with disability in onshore immigration detention and offshore processing facilities (in Nauru and PNG). The statistics should also be disaggregated by the type of disability, the detention facility where people with disability are held and the length of time they are detained.

5 Identifying disability in immigration detention

- 5.1 How the Department of Home Affairs and detention service providers identify people with disability further impacts the accuracy of data on this population group. If there are gaps in this process, it is highly likely that some people will be overlooked and not included in the statistics and data that are sporadically released.
- 5.2 In October 2014, in response to a Senate question on notice about how the Department defines, assesses and determines disability and how it ensures people with disability in detention have access to disability support, the Department responded that the detention health provider

*...is responsible for the assessment and management of detainee healthcare. Detainees with a potential or actual disability are identified during initial health screening and referred for further specialist assessment, diagnosis and support, including the provision of assistive devices as required”.*²⁵

The Department further reported that a person in detention is considered to have disability

*...if they have a diagnosed condition which restricts everyday living activities and is of a long lasting or permanent nature.*²⁶

- 5.3 With regards to the identification of disability, we agree with the points raised by Sydney Centre for International Law (SCIL) in its submission to this Royal Commission: that any process relating to the identification of disability should not be limited to the initial screening and needs to happen periodically during a person’s time in detention.²⁷ This is because indefinite detention not only exacerbates existing disabilities, it can also be a cause for disability, especially psychosocial disability. Further, given the length of time people are being detained they are likely to develop age related impairments and disability.
- 5.4 The research and consultations conducted by RCOA for this submission brought us to a similar conclusion to the SCIL, that inefficiencies in the identification procedures and gaps in knowledge of staff regarding different types of disability often mean these processes favour visible disability.²⁸ Furthermore, people with disability may not feel safe to disclose due to the lack of opportunity to develop trusting relationships or a belief that disclosure will make little difference or impact them adversely. As we will elaborate further in this submission, many people with psychosocial disability in detention are not identified initially, but later may be labelled as having “behavioural issues” that need to be managed through punitive measures.

²⁵ Senator Sarah Hanson-Young, Answer to Question on Notice SE14/467 (30 January 2015), https://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/sup_1415/DIBP/SE14467.pdf

²⁶ Senator Sarah Hanson-Young, Answer to Question on Notice SE14/467 (30 January 2015), https://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/sup_1415/DIBP/SE14467.pdf

²⁷ Sydney Centre for International Law (2021), *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*, pp.107-108.

²⁸ *Ibid*, p.105.

Recommendation 4 Properly identify disability amongst the detention population

RCOA recommends that the Australian Government ensures that the identification of disability is not limited to the initial screening of the person in detention and occurs at regular intervals during the person's life in detention and is also inclusive of all types of disability.

6 The impact of character-related visa refusals and cancellations on people with disability

- 6.1 Under section 501 of the *Migration Act 1958*, the Minister for Home Affairs has the power to refuse a person's application for a visa, or cancel a person's visa, if that person does not satisfy the Minister that they pass the 'character test'. The visa could be any type of visa, including a protection visa.
- 6.2 Section 501(6) of the *Migration Act* provides a number of grounds for failing the character test. They include having a substantial criminal record, being convicted of offences while in immigration detention, and if the Minister 'reasonably suspects' that the person is or has been a member of or has associations with a group, organisation or person that are involved in criminal activity. The last point means that a person does not necessarily need to be convicted of a crime to have their visas cancelled or refused, but the Minister merely needs to 'reasonably suspect' that they have *association* with persons or organisations involved in criminal activity.
- 6.3 RCOA has previously expressed profound concerns about the scope of current visa cancellations framework. We have raised concerns about:
- the risk (and reality) of indefinite detention for refugees whose visas have been cancelled, the risk that has now been amplified due to the recent passage of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021;
 - the mandatory nature of cancellations which means that people are detained without consideration of context, and are forced to wait on a review of the cancellation decision only once they are detained, and often after months or years in detention;
 - lack of adequate safeguards in the process, including lack of independent legal advice and very strict and tight timelines for appeal; and
 - the extraordinary level of Ministerial discretion and intervention, with the Minister being able to overturn the decisions of an independent tribunal or to avoid the tribunal's review by personally making decisions, and to also make ministerial guidelines.
- 6.4 Failing the character test as a result of offences committed in immigration detention is of serious concern. As the Australian Human Rights Commission explains below, a lower level of criminality can cause a person to fail the character test in this instance. This has significant consequences as the person may never be granted a visa to leave immigration detention.

The effect of these amendments is that if a person commits an offence while in (or while escaping from) immigration detention, pursuant to subsection 501(6)(aa) or (ab) their criminal behaviour will trigger the power in section 501 to refuse or cancel their visa, even if the offence is not serious enough to warrant a sentence of 12 months' imprisonment (or any period of imprisonment). Under subsection 501(6)(aa) or (ab) therefore, a lower level of criminality may cause a person to fail the character test, because of the context in which their offence was committed, as compared to the criminality required for a 'substantial criminal record' for the purposes of subsection 501(6)(a).

Also, unlike under the ground of 'past and present criminal or general conduct' in subsection 501(6)(c), under subsections 501(6)(aa) and (ab) there is no consideration of the severity (or lack thereof) of the offending, or any mitigating circumstances. If an

'immigration detention offence' conviction has been recorded, the person will automatically fail the character test.²⁹

- 6.5 What is of particular relevance to this Royal Commission is the risk of indefinite detention without consideration of that person's vulnerabilities (for example disabilities) and, in the case of offences committed in detention, without regard for the severity of the offending. For everyone in detention and notably for people with disability, such detention is inherently abusive and can create an enabling environment for violence and neglect.
- 6.6 RCOA is deeply troubled by situations where a person's psychosocial disability and insufficient support services available to them contribute to offending in detention. As outlined earlier, prolonged detention has been shown to cause or exacerbate psychosocial disability. Several people who provided feedback to us for this submission raised concerns about insufficient mental health support in detention and the heavy-handed response to any signs of distress. They described a destructive cycle where clients' declining mental health made them more likely to get into trouble, disengage from legal support, get charged with offences and move between prisons and immigration detention indefinitely with a minimal chance of ever getting a visa. For those who cannot be removed from Australia, this effectively means a life sentence. The below case study (case study 1) illustrates this issue clearly.
- 6.7 It should also be noted that a significant number of people who have failed the character test are held in remote facilities, like Yongah Hill IDC or North West Point IDC on Christmas Island. These facilities are considered to have higher security and in a system that looks at placement predominantly from a risk-management perspective, considered most appropriate for this population. What this ignores, however, is the fact that the quality of mental health support in remote facilities is often inferior to other facilities. Further, the remote location adds to the sense of isolation and reduces the support that people can receive from their social networks.

Case study 1: Mr A

In 2013, Mr A, who was aged 16 years, arrived in Australia by sea with his mother. Both were detained upon arrival. It was reported that Mr A had psychosocial disability from a young age. His disability was recognised early on in his detention in Australia and therefore the Department advised against the family's transfer to Nauru, recommending that Mr A and his mother were placed in community detention.

In May 2014, while still in closed detention, Mr A was arrested and charged with two counts of assault on a public officer and one count each of common assault in circumstances of aggravation and damaging property. While the family was released to community detention three weeks after the incident, this was revoked shortly after. Mr A spent a short time in a juvenile detention centre and then was moved within the immigration detention network a few times along with his mother. In January 2015, he received a caution in court in relation to the May 2014 incident, and the court noted that all criminal matters were finalised.

Mr A was reportedly involved in a number of subsequent incidents in detention where his behaviour was described as aggressive, property was reportedly damaged and officers assaulted. Nonetheless, it does not appear that charges were laid. This may be because the detention service provider acknowledged the misfit of the detention environment to Mr A's impairment. In case reviews, the providers discussed his "transfer to an alternative facility in a larger city which offers the recommended support services for his known cognitive and behavioural vulnerabilities", highlighted that "the case has complex barriers and vulnerabilities which present a clear risk to the detainee and prevention of status resolution" and that "this detainee demonstrates little self-agency and requires

²⁹ Australian Human Rights Commission, *when can a visa be refused or cancelled under section 501?*, <https://humanrights.gov.au/our-work/2-when-can-visa-be-refused-or-cancelled-under-section-501>

active support to engage necessary processes and services.”³⁰ However, Mr A remained in detention because according to his case reviews “his ongoing behavioural issues [were] a barrier to a community release”.³¹

In July 2016, Mr A was found to be owed protection by Australia as a refugee. His mother was released into community detention a month after and was granted a five-year Safe Haven Enterprise Visa (SHEV) in December that year. In the meantime, Mr A remained in immigration detention as his case was being reviewed for possible visa refusal under section 501 of the *Migration Act*, due to character concerns. In April 2017, he was issued with a *Notice of Intention to Consider Refusal* of the grant of a SHEV, in response to which his lawyer made a submission. In 2018, when the United Nations Working Group on Arbitrary Detention (WAGD) reviewed the ongoing detention of Mr A, it noted that he was still awaiting a decision by the Minister. The WGAD considered that his ongoing detention was arbitrary and constituted a breach of articles 2, 9, 16 and 26 of the *International Covenant on Civil and Political Rights*.³²

RCOA understands that in September 2019 the Minister refused to grant Mr A a SHEV under section 501 of the *Migration Act* despite acknowledging such refusal will result in indefinite detention because Mr A has been recognised as a refugee and cannot be returned to the country of origin.

The Commonwealth Ombudsman assessed the ongoing detention of Mr A several times in recent years and maintained that the ongoing detention of this young man was inappropriate for his mental health needs. The Ombudsman noted that the detention health provider had also recommended community placement with specialised assistance. A recent report from Commonwealth Ombudsman indicates that Mr A was finally placed in the community in early 2021 **after 2,560 days (more than 7 years) in detention**.³³

6.8 RCOA also refers to a comprehensive case study drafted by the SCIL about a Tamil man³⁴ who remained in detention for **over 9 years** after his application for a temporary protection visa was refused by the Minister under section 501 of the *Migration Act*. This was due to his history of violent behaviour in detention. The man had a number of disabilities: he was legally blind, had an acquired brain injury and serious mental health issues. The Minister even agreed that his behaviour resulted directly or indirectly from his mental illness, which was exacerbated by the detention environment but still refused to grant him a visa. Eventually a ruling in Federal Court of Australia was the catalyst for the Minister to finally release this man to the community and into the care of his family.

Recommendation 5 Consider alternatives to closed detention for people with character concerns who face indefinite detention

RCOA recommends that the Australian Government consider alternatives to closed detention for people who fail to pass the character test and face indefinite detention. RCOA believes most people in this group can be managed appropriately in a less restricted form of detention with proper reporting and supervision. Those who cannot be placed in the community should not be placed in remote detention centres like Yongah Hill IDC or North West Point IDC.

³⁰ United Nations Human Rights Council: Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018: Opinion No. 74/2018 concerning [...] (Australia)*, https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session83/A_HRC_WGAD_2018_74.pdf (please note that the Working Group refers to Mr A by his full name but RCOA has chosen not to name him in this submission).

³¹ Ibid.

³² Ibid.

³³ This information is based on the Commonwealth Ombudsman’s immigration assessments under section 486O of the *Migration Act*. This information is de-identified and only refers to individual’s unique Ombudsman ID. As a result, RCOA decided not to link to these reports in this public submission.

³⁴ Sydney Centre for International Law (2021), *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*, pp.73-76.

7 Physical environment of detention facilities and their suitability for people with disability

Accessibility

- 7.1 For years, detention monitoring agencies, human right organisations and civil society have been highlighting serious flaws in the design and fit-out of onshore and offshore detention facilities, especially in terms of accessibility for people with disability. It is disappointing to not only see many of those issues remain unresolved but that they are not even taken into account when new facilities or compounds are designed and built.
- 7.2 In 2015, NEDA assessed that the Australian Government failed to consider the needs of people with disability, especially those with mobility disabilities, in the design of onshore and offshore detention facilities. NEDA referred to demountable elevated dongas that were only accessible by stairs, large tents that were being used to accommodate people in offshore facilities, and uneven, dusty or muddy surfaces, as some of the examples that made it impossible for people with physical disability to live independently in detention.³⁵
- 7.3 People who spoke to RCOA and had spent time offshore highlighted that the fact that most surfaces were covered with gravel made it extremely challenging for people with mobility issues, for example those who needed to use a wheelchair, to move around independently.
- 7.4 And yet in 2019 the newly built compounds continued to have serious accessibility issues. In its inspection of onshore immigration detention facilities in the first half of 2019, the Commonwealth Ombudsman noted that the new high-security compounds in Melbourne ITA did not meet the disability standards and did not have a ramp to assist people with disability to enter or exit the buildings.³⁶ The Ombudsman repeated those concerns in his next inspection report. He raised concerns that there was no mobility access to high security residential compounds at both Melbourne ITA and Yongah Hill IDC³⁷ but “despite the department’s assurances, mobility impaired detainees continue[d] to be placed in” those compounds.³⁸ In the last publicly available inspection report, the Ombudsman confirmed that this issue remained outstanding as capital work would be required to address it and highlighted that not only these newly built compounds but “infrastructure available at most facilities does not adequately meet the needs of mobility impaired detainees”.³⁹
- 7.5 RCOA is not aware of any recent work to improve accessibility in any onshore detention facility and finds it extraordinary that such significant oversight has happened. In our view, this is the result of lack of regard for the needs of people with disability and their invisibility in the eyes of decision makers.
- 7.6 It should be noted that similar concerns were also repeated by Australian Human Rights Commission in its 2019 report on inspection of detention facilities. The AHRC noted a range

³⁵ National Ethnic Disability Alliance (2015), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned*, <https://neda.org.au/sites/default/files/2017-06/People%20living%20with%20Disability%20in%20Immigration%20Detention-%20FINAL.pdf> , p.20.

³⁶ Commonwealth Ombudsman (2019), *Immigration Detention Oversight: Review of the Ombudsman’s activities in overseeing immigration detention January to June 2019*, https://www.ombudsman.gov.au/__data/assets/pdf_file/0017/109700/Immigration-Detention-Oversight-Report_January-to-June-2019.pdf, p.12.

³⁷ Commonwealth Ombudsman (2019), *Monitoring Immigration Detention: Review of the Ombudsman’s activities in overseeing immigration detention July to December 2019*, https://www.ombudsman.gov.au/__data/assets/pdf_file/0015/111390/Six-monthly-immigration-detention-report-Jul-Dec-2019.pdf , p.25.

³⁸ *Ibid*, p.40.

³⁹ Commonwealth Ombudsman (2020), *Monitoring Immigration Detention: the Ombudsman’s activities in overseeing immigration detention January to July 2020*, https://www.ombudsman.gov.au/__data/assets/pdf_file/0015/112560/Report-No.-04_2021-Monitoring-Immigration-Detention-The-Ombudsmans-activities-in-overseeing-immigration-detention-January-June-2020-A2184717.pdf , p.28.

of concerns raised by people detained at high-security compounds in Brisbane ITA, Melbourne ITA and Yongah Hill IDC. They included safety issues arising from the lack of safety rails on bunk beds, accessibility issues for elderly people or people with a disability, and lack of privacy.⁴⁰

- 7.7 The above points show that high security compounds are least accessible. These compounds tend to be more recently built to accommodate the changing profile of people in immigration detention. This presents significant challenges for people in detention who have a high risk rating.⁴¹ Elsewhere, there is a lack of consistency in the national detention network infrastructure; while some detention centres have better and more accessible facilities, others significantly fall behind. As people in detention are often moved multiple times within the network, this creates an added challenge for people with disability.
- 7.8 Finally, requests for modification or provision of accessibility aids are either not addressed or addressed with significant delays. For example, a man with a vision impairment told RCOA that he requested a screen reader to be able to use computers. He reported it took a long time for him to be provided with such and even then he only received the demo version of the software that would turn itself off every 40 minutes and needed to be restarted, something that he could not independently do. Others told us that rooms are often narrow, making them difficult to use for wheelchair users. Even when they are provided with bigger and more accessible rooms, people are often limited in their movement around the centre and need to depend on others for assistance, as many parts of the facilities are not accessible.

Recommendation 6 Ensure accessibility of detention facilities

RCOA recommends that the Australian Government ensure that all compounds of immigration detention facilities are safe and accessible, with a design and layout that support the needs of people in detention with disability. Requests made by people in detention for accessibility aids need to be addressed promptly.

Privacy

- 7.9 With an increasing detention population and limited number of operational facilities, there are fewer opportunities for privacy for detained people.
- 7.10 The Australian Human Rights Commission noted this overcrowding in its recent report. The Commission observed that the 2020 capacity information provided for each detention facility was much higher than even the 2019 surge capacity figures. For example, the 2020 capacity of Yongah Hill IDC was 558 people, compared to its surge capacity of 460 people (and operational capacity of 420 people) in 2019. This is of concern as the Commission was not provided with any information that could explain this significant increase in capacity, for example construction of new infrastructures. The only conclusion here is that in the absence of any structural changes, sharing rooms and facilities are the only ways the Department can achieve this increased capacity.⁴²

⁴⁰ Australian Human Rights Commission (2020), *Inspection of Australia's immigration detention facilities 2019 report*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention>, p.94.

⁴¹ RCOA remains concerned that there are serious gaps in how risk assessments are made as for many people their risk rating does not reflect any objective risk they may pose. For a comprehensive look at risk assessment in detention, see: Australian Human Rights Commission (2019), *Risk management in immigration detention*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention2019>

⁴² Australian Human Rights Commission (2021), *Management of COVID-19 risks in immigration detention*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/management-covid-19-risks-immigration-detention>, p.21.

- 7.11 While privacy is important for everyone in detention, it is of particular importance for some people with disability, such as people who have mental health issues with paranoia, and people who are subject to prolonged detention. This group needs to have access to private rooms as much as possible to remain safe and dignified. Based on the available information, it is reasonable to conclude that the majority of people are currently not provided with private rooms.
- 7.12 The issue of lack of privacy was highlighted by those who spoke to RCOA for this submission. Those who work with both people in prisons and people in immigration detention, highlighted the differences between services and support offered to people with disability in these two settings. They reported that in criminal custody there are units that provide additional support to this population, for example Additional Support Units in NSW that accommodate people who, because of their disability, require placement outside the mainstream correctional centre environment. These Units provide better opportunities for privacy and enhanced support. However, none of these opportunities exist in immigration detention. This can be particularly problematic for people who are transferred from prisons to immigration detention and lose access to such support. It is likely that this can then result in an escalation in disruptive behaviour that is seen by detention management as a reason to increase those individuals' risk ratings, subjecting them to even more restrictions.

Recommendation 7 Address overcrowding and lack of privacy

RCOA recommends that the Australian Government consider that people with disability or people subject to long-term detention may need access to private rooms and facilities and consider this in calculating the maximum capacity of each detention facility.

Alternative Places of Detention (APODs)

- 7.13 According to the Department of Home Affairs, hotels, hospitals, aged-care facilities, and mental health inpatient facilities can be designated as Alternative Places of Detention (APOD). These facilities were meant to be used temporarily and to address a specific need; for example if a person in immigration detention needs to be hospitalised for a period of time, the hospital will be considered an APOD.
- 7.14 In response to a Senate question on notice, the Department reported that from 1 January 2018 to 31 January 2021, 170 APODs were used in Australia at any time, with the highest number in Queensland. As at 31 January 2021, 56 APODs were classified as "hotel-type APODs".⁴³
- 7.15 The growing problem is that the Department of Home Affairs no longer uses the APODs, especially the hotel-type APODs, as short-term measures. Instead, people are being detained there for long periods of time. There are now dozens of people who have spent over two years in these facilities.
- 7.16 RCOA maintains that the continuous and long-term use of non-purpose-built APODs, like hotels, is not a solution to the growing overcrowding of immigration detention. Facilities that are not built for detention purposes are highly unlikely to meet many of the detention standards. As many of the detention monitoring agencies have stated over the past two years, the hotel APODs have over-restrictive conditions, lack facilities for exercise and recreation, do not provide appropriate access to outdoor, are overcrowded, and lack privacy.⁴⁴ For example, in

⁴³ Senator Nick McKim, Answer to Question on Notice AE21-346 (21 May 2021), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId10-PortfolioId20-QuestionNumber346>

⁴⁴ For some of the examples, see Commonwealth Ombudsman (2019), *Immigration Detention Oversight: Review of the Ombudsman's activities in overseeing immigration detention January to June 2019*, https://www.ombudsman.gov.au/__data/assets/pdf_file/0017/109700/Immigration-Detention-Oversight-Report_January-to-June-2019.pdf; Commonwealth Ombudsman (2019), *Monitoring Immigration Detention: Review of the Ombudsman's activities in overseeing immigration detention July to December 2019*,

2019 the Commonwealth Ombudsman raised concerns that in those APODs, the makeshift medical and mental health clinics do not provide adequate privacy for medical consultations.⁴⁵

7.17 Further, when the Australian Human Rights Commission assessed the management of COVID-19 risks in immigration detention, it noted with concern that in order to manage the risks of an outbreak, more restrictions have been placed on people detained at hotel APODs. For example, they were no longer taken to the closest detention facilities to access outdoors areas or to access services such as programs and activities or the IHMS medical clinic. The AHRC was seriously concerned about a number of people in those APODs who had not left the hotel floor on which they were detained for an extended period of time and remained in cramped rooms where they were not able to even open the windows.⁴⁶

7.18 Such an environment undoubtedly contributes to the deterioration in physical and mental health of people in detention. It is not appropriate to use for long-term and causes harm to people with pre-existing health conditions and people with disability. It is of profound concern that a significant number of people held in such environment are those who have been transferred from offshore for medical treatment. They have all experienced in excess of eight years of either detention or restriction of movement and the majority have serious mental and physical health issues, the very reason for their transfer to Australia.

Recommendation 8 Refrain from using non-purpose-built APODs for people with disability

RCOA recommends against placing anyone, particularly people with disability, in non-purpose-built APODs. If it is absolutely necessary, this group should be held in those facilities for the shortest period possible.

8 Immigration detention practices and their impacts on people with disability

Securitisation of immigration detention

8.1 The overall securitisation of immigration detention in recent years has resulted in a detention management system that is predominately risk-focused. While some of the measures added in recent years are required to respond to the changing detention population, the overall detention management system does not adequately consider the needs and additional support that many people need. RCOA believes this securitisation has had disproportionately negative effects on people with disability.

8.2 While a comprehensive assessment of the current risk management practices in immigration detention is outside of the scope of this submission,⁴⁷ this section highlights some of our main concerns in this regard.

https://www.ombudsman.gov.au/__data/assets/pdf_file/0015/111390/Six-monthly-immigration-detention-report-Jul-Dec-2019.pdf; Australian Human Rights Commission (2020), *Inspection of Australia's immigration detention facilities 2019 report*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention>.

⁴⁵ Commonwealth Ombudsman (2019), *Immigration Detention Oversight: Review of the Ombudsman's activities in overseeing immigration detention January to June 2019*, https://www.ombudsman.gov.au/__data/assets/pdf_file/0017/109700/Immigration-Detention-Oversight-Report_January-to-June-2019.pdf, p.10.

⁴⁶ Australian Human Rights Commission (2021), *Management of COVID-19 risks in immigration detention*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/management-covid-19-risks-immigration-detention>, p.46.

⁴⁷ For a comprehensive and relatively recent report on risk management practices in immigration detention, see: Australian Human Rights Commission (2019), *Risk management in immigration detention*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>

- 8.3 Placement within the immigration detention network is primarily determined by an individual's risk rating. While the Australian Border Force has stated that it considers a range of factors (e.g. medical needs, family and community links, and the capacity of the network) when determining a person's placement, risk rating is the main factor taken into account. A high risk rating means people are placed in higher security detention centres that are often more remote. It also means they are placed in higher security compounds that are more isolated and prison-like and are subject to more restrictive practices.
- 8.4 Therefore, we find it highly problematic that there are a number of serious issues associated with the detention risk rating system. The Australian Human Rights Commission has expressed concern that this system is not sufficiently nuanced, for example it is disproportionately influenced by a person's offending history. The AHRC asserts that a person's involvement in an incident impacts their risk rating without consideration of the severity of the incident. The fact the incident categories are often quite broad makes this more challenging. For example, the 'abusive and aggressive behaviour' category can range from shouting to threats of violence.⁴⁸ It is also of concern that risk of harm to others and risk of harm to self can both increase an individual's risk rating and subject them to more restrictive measures. People are also often not told of their risk ratings.
- 8.5 RCOA is concerned that this risk-management lens does not allow for a holistic response to a person's needs. We argue that there is rarely any genuine effort to understand the underlying reasons for challenging behaviours. Instead, they are swiftly met with a punitive response. In other words, instead of a supportive and therapeutic response, led by mental health experts, the detention service providers are responding to all incidents through a rigid risk-management lens. As one of the legal providers put it simply "people who are unwell often get punished".
- 8.6 Placement of people in 'high care' accommodation or 'behavioural management units' in response to their involvement in incidents is one of those punitive responses. RCOA has been told many times of the significant distress that people with psychosocial or cognitive disability experience when they are placed in such environments. One service provider told us of the distress that her client (who had psychosocial disability) experienced as a result of receiving his meals through a window to his solitary room. The AHRC highlighted this concern as well and maintained that the prison-like conditions of high care accommodation, especially those operating under 'closed-door' arrangements (in which people are confined to their rooms) are unsuitable for people with significant mental health impairment or at risk of self-harm.⁴⁹
- 8.7 It is also of concern to observe an increased rigidity in how the detention system operates. When people need additional support or flexibility to respond to a requirement, this is rarely provided and their inevitable failure to meet their obligations is considered non-compliance. For example, people with cognitive impairment have been reported to find it difficult to access care and get to their medical appointments. This is because they are often provided with an appointment slip without additional support or explanation as to the nature of the appointment. When people do not attend those appointments, they are considered to have failed to comply.

Recommendation 9 Review the risk assessment tool used in immigration detention

RCOA recommends that the Australian Government review the current risk assessment tool used in immigration detention to ensure it appropriately considers an individual's vulnerability and needs and provides real opportunities for a downgrade in risk ratings in response to positive behaviour.

⁴⁸ Ibid, pp. 21-22.

⁴⁹ Ibid, pp. 39-40.

Use of force

8.8 The securitisation of immigration detention has also led to increased (and at times disproportionate) use of force on people in detention.

8.9 Perhaps the most alarming measure is the routine use of handcuffs and other mechanical restraints like body belts and spit hoods. While the Department of Home Affairs maintains that an individual risk assessment is undertaken before the application of mechanical restraints, their frequent use and their reported application to people with different types of disability, show a low threshold for the authorisation of their use. We also understand that the detention facility's Superintendent needs to approve the use of mechanical restraints in writing. It should be noted, however, that one of the main factors involved in the decision of the Superintendent is the person's risk rating about which we raised concerns in the previous section.

8.10 Those we spoke to for this submission raised particular concerns about the use of mechanical restraints during escorts to medical appointments. They were troubled by the negative impacts of this measure on people's willingness to receive medical care. Referencing this practice and placement of people in medical quarantine after an appointment (to manage the risk of COVID-19), one service provider said

There are just too many hoops for people to go through and I have seen it happen to people with disability because they often have unique needs that require external appointments. They just give up and stop going to those appointments because they do not want to be handcuffed, do not want to be stared at in the doctor's surgery and then spend two weeks in isolation.

8.11 Another person agreed with this and mentioned that this can impede people's ability to engage with medical professionals. He referred to examples where people reported a lack of trust in medical professionals who proceeded to treat them while mechanically restrained. Those detained considered the medical professionals as "working for the Government" even though they were not associated with the detention health providers.

8.12 Handcuffs are also routinely applied during transfers between detention facilities and even within the facility when a person is being moved to a different compound. RCOA is also concerned by the reports that minors have been mechanically restrained.⁵⁰

8.13 In 2020, the AHRC raised concerns about the cases where the use of restraints during escorts outside of immigration detention has been unnecessary and disproportionate and caused significant distress for people. Examples included people being handcuffed while in a wheelchair or even handcuffed to a hospital stretcher bed. The AHRC assessed that "restraints can be unnecessary for people with restricted mobility, caused by physical disability, frailty or old age".⁵¹ In another report, the Commission highlighted other examples that showed inappropriate use of restraints on people with mental health impairments. One example was about a woman who had given birth in detention and suffered from post-natal depression and panic attacks. After her involvement in a protest, she was removed from her room in detention before dawn and without her husband and newborn. She was taken to a police station and was put in a cell by herself. She was in handcuffs for almost two hours and remained separated from her family for 32 hours.⁵² Another example related to a man with severe mental health

⁵⁰ See the case of Master KH, a 17-year old minor in detention in: Australian Human Rights Commission (2019), *Use of force in immigration detention*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>

⁵¹ Australian Human Rights Commission (2020), *Inspection of Australia's immigration detention facilities 2019 report*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention>, p.64.

⁵² Australian Human Rights Commission (2019), *Use of force in immigration detention*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>, pp.105-110.

impairment who was handcuffed during a highly traumatising pre-dawn transfer of people from one detention facility to another.⁵³

- 8.14 In addition to the use of restraints, RCOA has also been told of frequent and disproportionate use of force against people with psychosocial disability. This aligns with what we have previously mentioned, that often signs of distress are treated as behavioural concerns and responded to with increased force and punitive measures.

Recommendation 10 Refrain from use of restraints on people with disability

RCOA recommends that the Australian Government refrain from the use of restraints on people with disability as much as possible.

Medical quarantine

- 8.15 The management of COVID-19 risks in immigration detention has brought the use of medical quarantine into the spotlight. Medical quarantine is being used more frequently and therefore the issues associated with it are more important than ever.
- 8.16 When the Australian Human Rights Commission examined the management of COVID-19 risks in immigration detention, it identified a number of serious issues with the use of medical quarantine. They were:

Use of high-care accommodation units for quarantine purposes

- 8.17 The AHRC raised concerns about this practice as high-care accommodation units are designed for behaviour management. As a result, their design is prison-like and highly restrictive with fixed furniture, limited natural light and limited access to outside. When people are placed in those units for medical quarantine, the conditions of their detention are similar to those who are placed there for behaviour management: they are mostly confined to their rooms and have very limited access to outside, and are without some of their personal items and access to facilities and activities.
- 8.18 The AHRC considered the conditions in those units unsuitable for medical quarantine and raised particular concerns about the impacts on people with psychosocial disability. This is particularly an issue as there are concerns about the level of access to mental health support when people are placed in high-care accommodation.⁵⁴

Use of medical quarantine after hospital discharge

- 8.19 The AHRC was concerned that people with significant physical or mental health conditions were being placed into 14-day quarantine, again in high-care accommodation units, after their discharge from hospital. The Commission stated that people returning from hospitals were likely to have significant vulnerabilities and their placement in such restrictive environment could cause significant harm.⁵⁵

14-day quarantine after offsite appointments

- 8.20 The AHRC stated that it was unclear why people in some detention facilities were being placed into 14-day operational quarantine after each offsite appointment. It was of concern that this practice happened in locations where the rates of community transmission of COVID-19 were

⁵³ Ibid, pp.111-113.

⁵⁴ Australian Human Rights Commission (2021), *Management of COVID-19 risks in immigration detention*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/management-covid-19-risks-immigration-detention>, pp. 37-40.

⁵⁵ Ibid, pp. 40-41.

low. The practice was also inconsistent with the treatment of security staff accompanying people in detention to the appointments as those staff were not required to be placed in quarantine.⁵⁶ RCOA reiterates what we heard from service providers that this measure has resulted in a significant number of people declining medical care as they do not want to be in isolation for two weeks after their appointments.

8.21 The above issues raised by the Commission are all serious. The AHRC made two relevant recommendations: it asked the Australian Government to cease the use of high-care accommodation units for quarantine purposes and use less restrictive options. It also recommended that the Department of Home Affairs not place people with significant physical and/or mental health conditions, who were discharged from hospitals, in those units.⁵⁷ We are troubled by the fact that the Department of Home Affairs disagreed with these recommendations.⁵⁸

8.22 The reports we have received clearly show the negative impacts of isolation and other restrictive measures that have been employed to respond to COVID-19 risks in immigration detention. Those impacts are more visible amongst people with psychosocial and cognitive disability, as well as those who have been in detention for a long time. We believe there needs to be a balance between managing the risks posed by COVID-19 and ensuring people in detention are connected and supported. It is simply unacceptable to employ the most restrictive measures without regard for the mental wellbeing of the most marginalised people in detention.

8.23 The case study below clearly illustrates the impact of these measures:

Case study 2: medical quarantine

Mr X is a man with schizophrenia who has spent most of his time in Australia between prisons, immigration detention and compulsory hospital stays. Mr X's psychosocial disability is well known to detention service providers because of the prolonged period he has spent in detention.

In second half of 2020, Mr X displayed some symptoms that were similar to COVID-19 symptoms. He was coughing and had a runny nose. Mr X was told that he had to go to isolation in a high-care accommodation unit until he could get tested. No additional information was provided to him. This news caused significant distress which was responded to heavy-handedly and without consideration of his psychosocial disability.

He reported that when he said he did not want to be put in isolation, he was restrained by multiple Serco guards, placed in handcuffs and forcibly taken to the high-care accommodation unit. The COVID-19 test was not immediately available, so he had to wait in isolation in the high-care accommodation unit for two days.

Mr X called his lawyer in distress from isolation. Reportedly she struggled to ensure he was supported and safe as she was unable to speak to anyone from detention health to alert them to his precarious mental state at the time and was unable to speak to his allocated Home Affairs Case Manager.

⁵⁶ Ibid, p. 44.

⁵⁷ Ibid, pp. 52-53.

⁵⁸ The Department of Home Affairs response to this report is available here:

https://humanrights.gov.au/sites/default/files/homeaffairs_response_covid-19_immigration_detention_2021_0.pdf

Recommendation 11 Cease the use of high-care accommodation for quarantine purposes

RCOA recommends that the Australian Government cease the use of high-care accommodation units for quarantine purposes and under no circumstances place people with disability in such accommodation for the purpose of medical or operational quarantine.

People with disability and living independently in detention

- 8.24 To be able to live independently in detention, people with disability require prompt access to necessary aids and equipment, yet there are several examples of people having to live in detention for a long period of time without such.
- 8.25 NEDA documented examples where assistive equipment was removed from people with disability when they arrived by boat and was not returned for a long period of time. It refers to one particular example when the loss and non-replacement of a hearing aid caused significant distress for a child with hearing impairment and led to him engaging in self-harm.⁵⁹
- 8.26 A person with vision impairment told RCOA that when he lost his white cane during his sea journey, he was not provided with another one for **one year** as he was told he might use the cane as a weapon. He experienced significant distress as a result and reported that he spent the first 20 days in his room and on a bed. Afterwards, this severely limited his ability to live independently in detention.
- 8.27 The arrival in detention and the induction process can also be challenging for people with disability. The man with vision impairment told RCOA that initially he was not even believed to have a disability and was told that he was pretending to be blind. He also recalled that his specific needs were not considered during the induction process. He was, for example, never told where the toilets were:

No one told me where the toilets are. For a blind person it is important to know where things are. For a person to live independently, they need their dignity to be recognised and it was not the case for me.

- 8.28 RCOA is also aware of people with hearing impairment who struggled with isolation during their time in detention. This was particularly an issue for those who were not familiar with Australian Sign Language who felt they were left on their own.

Recommendation 12 Ensure appropriate aids and equipment are provided

RCOA agrees with the recommendation from NEDA that, if the Government continues with the policy of mandatory detention without considering people's disability, it should ensure that at least appropriate aids and equipment, assistance technology and 'reasonable adjustments' are provided to them.⁶⁰

Programs and activities

- 8.29 The design and availability of programs and activities in immigration detention often does not consider the specific needs of people with disability. Therefore, this group have lower level of access to recreation, compared to others in detention. Further, as participation in activities is

⁵⁹ National Ethnic Disability Alliance (2015), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned*, <https://neda.org.au/sites/default/files/2017-06/People%20living%20with%20Disability%20in%20Immigration%20Detention-%20FINAL.pdf>, p.22.

⁶⁰ National Ethnic Disability Alliance (2015), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned*, <https://neda.org.au/sites/default/files/2017-06/People%20living%20with%20Disability%20in%20Immigration%20Detention-%20FINAL.pdf>, p.35 (Recommendation 7).

linked to receiving 'points' (which can be used to purchase personal items such as phone cards, snacks and cigarettes), this group is disadvantaged through no fault of their own. This has created significant frustration amongst this group.

- 8.30 There have been examples when people with mobility issues or vision impairment have been told the only activity available on a day are sports like running or soccer that were unsuitable for them. People with vision impairment told us that despite submitting requests there were insufficient books available in Braille in the detention facility's library and no effort was made to subsequently supply them, even when those individuals remained in that detention facility for several months.

Recommendation 13 Ensure accessibility of programs and activities

RCOA recommends that the Australian Government ensures all program and activities in immigration detention be accessible to people with disability. If they are not, reasonable accommodations should be made to ensure that people with disability have equivalent options to programs and activities as other detainees.

9 Mental health treatment and support in immigration detention

- 9.1 Given the prevalence of mental health impairments amongst the people in immigration detention, some of which are the result of prolonged and indefinite detention, RCOA aims to look at some of the issues related to mental health treatment and support in immigration detention. While RCOA acknowledges that it is not qualified to make a comprehensive assessment of mental health treatments provided to people in detention, we aim to highlight some of the main issues of concern that were conveyed to us.
- 9.2 As mentioned before, detention management and service providers can fail people with psychosocial disability by not identifying the underlying reasons for their challenging behaviours and merely responding to distress, aggression and self-harm through punitive or restrictive measures.
- 9.3 In its inspection of immigration detention in the first half of 2019, the Commonwealth Ombudsman analysed the use of the Behaviour Management Plan (BMP). The BMP is one of the tools employed by detention management to manage and monitor the behaviour of people in detention. In its review of this measure, the Ombudsman identified a number of shortfalls. The Ombudsman highlighted that the input of detention health provider in those Plans is essential as it can inform others of any relevant clinical considerations. The Ombudsman asserted that "at a minimum, IHMS [the current detention health provider] should confirm that the detainee's non-compliant behaviour is not reflective of an underlying mental health or other issue that the detainee cannot reasonably be held accountable for". And yet in some of the BMPs that the Ombudsman's inspection team reviewed, the input from the detention health provider was too inadequate and non-specific to provide such reassurance.⁶¹
- 9.4 Almost all of the people who spoke to us, from service providers to supporters to former detainees, raised significant concerns about the quality and availability of mental health treatment and support in detention.
- 9.5 A man with disability who spent over a year in immigration detention told us while some of the security officers were helpful and sympathetic to him and provided some welfare support, the quality of mental health support he received was low, culturally incompetent and "tick-boxy". He also raised concerns about the support provided to people who engaged in or threatened self-

⁶¹ Commonwealth Ombudsman (2019), *Immigration Detention Oversight: Review of the Ombudsman's activities in overseeing immigration detention January to June 2019*, https://www.ombudsman.gov.au/__data/assets/pdf_file/0017/109700/Immigration-Detention-Oversight-Report_January-to-June-2019.pdf, p.21.

harm. He mentioned that he saw some people being placed on Psychological Support Program (PSP) following a suicide attempt but it merely meant constant observation of the person by a security officer which was at times significantly counter-productive.⁶²

- 9.6 Service providers also raised concerns that people in immigration detention often have to wait a long time to go through psychiatric assessments and to receive required treatments and medications; they rapidly deteriorate in the process.
- 9.7 Further, for people with psychosocial disability who require certain medications to live safely and independently, the disruption in the provision of those medications presents a significant challenge. This can happen when a person is transferred from correctional facilities to immigration detention and often as a result of improper handover between the health providers in prisons and immigration detention.
- 9.8 It is reasonable to conclude that while the complexity and range of mental health issues in detention have grown, the available mental health support has not been proportionally expanded. There is still a widespread lack of clarity amongst service providers about the available treatments in detention. For example, it is unclear if antipsychotic depot injections (used, for instance, for people with schizophrenia) is available on Christmas Island. A legal provider told RCOA that even though it is important for the lawyers to know about the care and treatment their clients receive, they remain in dark about what is available to their clients.
- 9.9 In 2019, the Australian Human Rights Commission inspected the detention facilities along with independent medical consultants. Following the inspection, the AHRC expressed alarm about the mental health of the detention population and assessed that the “treatment practices appear inadequate to deal with this problem”.⁶³
- 9.10 The main issues of concern for the AHRC were significant delays in receiving mental health support and reported inferior quality of care. A number of people who spoke to the AHRC reported that they were dissatisfied with how the detention health provider responded to their issues, especially what they perceived to be attempts at minimising their issues.⁶⁴ The AHRC highlighted that reports about lack of access to timely mental health support were much higher in Brisbane ITA. It raised concerns about the fewer resources available for mental health care in this facility and lack of access to psychologists.⁶⁵
- 9.11 In light of these issues, the AHRC recommended that the Department of Home Affairs commission a comprehensive review of the mental health care provided to people in detention.⁶⁶ In its response, the Department of Home Affairs stated that in early 2020, it commissioned a “holistic review of mental health services to detainees in the immigration detention network including processes set out in the Procedural Instruction (PI) such as Supportive Monitoring and Engagement”.⁶⁷
- 9.12 RCOA, however, has significant concerns about this review. In March 2021, when the Department of Home Affairs was asked for a copy of the review through a Senate question on notice, it refused to provide it on the grounds that the review will be “used to inform a planned

⁶² The Australian Human Rights Commission in its inspection report of immigration detention in 2019 mentions the mixed feedback its team received about this monitoring. Some people reported that they found it important for their safety while others expressed significant discomfort or fear about this measure.

⁶³ Australian Human Rights Commission (2020), Inspection of Australia’s immigration detention facilities 2019 report, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention>, p.4.

⁶⁴ Ibid, pp.49-51.

⁶⁵ Ibid, pp. 51-53.

⁶⁶ Ibid, p.51.

⁶⁷ The Department of Home Affairs response to this report is available here:

https://humanrights.gov.au/sites/default/files/att_a_-_home_affairs_response_-_ahrc_2019_idc_inspection_report_-_ohr-20-00262_0.pdf

major procurement activity and could advantage some tenderers during this process, compromising probity”.⁶⁸

- 9.13 The Department’s response to other Senate questions on notice in May 2021, revealed further information about the review, including a limited scope and methodology. The contract was awarded to a recruitment agency, was only for two months, no detention facility was visited by the review panel “due to COVID-19”, and while some staff and stakeholders were consulted, only two detainees in one detention facility were interviewed. The recruitment agency that was awarded the contract recruited a clinical team which included “a Specialist Psychiatrist with a special interest in psychodynamic psychotherapy and personality disorders”.⁶⁹
- 9.14 In our opinion, the low participation rate by people in detention in this review, despite what the Department called “an open call for interviews”, does not mean lack of concern about the mental health care or lack of willingness to participate. In a detention system where lack of trust in authorities is commonplace and many people with mental health impairments are disengaged and withdrawn, an open call for interviews by virtual means, without any physical inspection or significant encouragement of people, does not represent a genuine effort to comprehensively review the mental health support provided to people in detention. The Department reported that it is not considering a follow up review.⁷⁰
- 9.15 All the issues mentioned in this section point to an urgent need for a comprehensive review of mental health care in detention. This review needs to have genuine input from detained people. Those who conduct the review must employ measures to encourage people to participate. They should also de-identify the information to ensure people in detention will not face reprisals if they raise concerns. While we cannot assess the review that the Department has already conducted, because it has not been released publicly, the lack of consultation with people with lived experience and the lack of improvement in the care provided to people indicate that it has not achieved its purpose.

Recommendation 14 Commission a comprehensive review of the mental health care provided in immigration detention

RCOA recommends that the Australian Government commission a comprehensive review of the mental health care provided in immigration detention. This review needs to have genuine input from people in detention with psychosocial disability and other people with disability who access mental health services as required.

10 Specific issues with detention facilities on Christmas Island

- 10.1 RCOA and many other organisations have always maintained that no one should be detained at facilities on Christmas Island. They are remote, inaccessible and without proper access to comprehensive physical and mental health support.

⁶⁸ Senator Stirling Griff, Answer to Question on Notice AE21-283 (7 May 2021), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld10-Portfoliold20-QuestionNumber283>

⁶⁹ This is based on a number of Senate questions on notice, including above, as well as the following: Senator Stirling Griff, Answer to Question on Notice BE21-198 (16 July 2021), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld11-Portfoliold20-QuestionNumber198> ; Senator Stirling Griff, Answer to Question on Notice BE21-199 (16 July 2021), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld11-Portfoliold20-QuestionNumber199> ; Senator Stirling Griff, Answer to Question on Notice BE21-200 (16 July 2021), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld11-Portfoliold20-QuestionNumber200> ;

⁷⁰ Senator Stirling Griff, Answer to Question on Notice BE21-201 (16 July 2021), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld11-Portfoliold20-QuestionNumber201>

10.2 Christmas Island detention facilities have never been safe and appropriate for anyone, especially for people with disability. In 2015, NEDA highlighted this issue and stated that the facilities on Christmas Island did not have the capacity to meet the specific needs of people with disability. It referred to a letter of concern written by 15 doctors working for the detention health provider, International Health and Medical Services (IHMS), which considered Christmas Island detention facilities “unsuitable for any person living with significant intellectual or physical disability”, stating that “the facilities and medical services provided are inadequate to accommodate their needs”. The authors of that letter described the case of a young woman with cerebral palsy who used a wheelchair and the barriers she encountered on Christmas Island. They voiced their disappointment that she was not transferred off Christmas Island, despite repeated concerns by medical professionals in detention and her increasing distress.⁷¹

10.3 The Australian Human Rights Commission in its recent report recommended that

*...as a matter of urgency, the Australian Government should decommission the use of all immigration detention facilities on Christmas Island.*⁷²

10.4 This recommendation shows that not much has improved since 2015 when NEDA published its report. In its assessment, the AHRC raises concerns about the remote location, security infrastructure, limited access to facilities and services, limited healthcare, and restricted communication with lawyers and social network. The AHRC specifically warned against the use of these facilities for “people who are vulnerable or have been detained for prolonged periods of time”.⁷³ RCOA fully agrees with these recommendations.

Provision of mental health care on Christmas Island detention facilities

10.5 Amongst all of the detention facilities in Australia, mental health support is most inadequate on Christmas Island.

10.6 RCOA understands that torture and trauma counselling is provided by phone. This is despite the fact that there are documented reports about significant issues with mobile reception in the detention facilities on the Island.

10.7 There is also no psychiatrist permanently on site. That means if someone needs an appointment they need to wait until the next time a psychiatrist flies to Christmas Island. This extends the wait time beyond the already long period that people on mainland facilities experience.

10.8 Further, the remoteness of Christmas Island and (effective) impossibility to have in-person visits make people feel more isolated and exacerbate mental health issues and pre-existing vulnerabilities.

Recommendation 15 Decommission detention facilities on Christmas Island

RCOA recommends that the Australian Government decommission the use of all detention facilities on Christmas Island. While the Government plans for this measure, it should urgently transfer anyone with disability out of Christmas Island; this includes people with psychosocial disability.

⁷¹ National Ethnic Disability Alliance (2015), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned*, <https://neda.org.au/sites/default/files/2017-06/People%20living%20with%20Disability%20in%20Immigration%20Detention-%20FINAL.pdf>, p.21.

⁷² Australian Human Rights Commission (2021), *Management of COVID-19 risks in immigration detention*, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/management-covid-19-risks-immigration-detention>, p.51. (Recommendation 5).

⁷³ *Ibid*, p.25.

11 People with disability subject to offshore processing

11.1 On 19 July 2013, Australia further hardened its offshore processing policy, announcing that that no one arriving by boat in Australia seeking protection would be settled in Australia, even if they are found to be refugees. Since that day, the Australian Government has sent 3,127 people to offshore processing centres on Nauru and Manus Island, Papua New Guinea (PNG).⁷⁴ Around 1,000 people seeking asylum who were already on those islands at that time (after being sent there following the re-introduction of offshore processing policies in August 2012) were transferred back to Australia permanently.

11.2 Of the 3,127 people sent offshore since 19 July 2013:

- 767 people subsequently returned to countries of origin, either voluntarily or involuntarily.⁷⁵
- 14 people have died either offshore or when transferred to Australia for medical treatment.
- 1,012 people were resettled in third countries, 977 of whom in the United States of America.⁷⁶
- 107 people were still on Nauru and 124 people were still in PNG.⁷⁷
- 1,219 remained temporarily in Australia.^{78,79}

11.3 There are abundant reports and undeniable evidence that the offshore processing regime has caused and exacerbated physical and psychosocial disability. People with disability were transferred to PNG and Nauru even though it was obvious that the systems in those countries were not equipped to address their needs. Further, years of neglect, substandard healthcare, and numerous incidents inside and outside processing centres created and exacerbated disability.

11.4 Australia continues to carry legal responsibility for people it sent to Nauru and PNG and their treatments and experiences in those countries. Under the *CRPD*, Australia has committed 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”. This extends to all people under Australia’s *territory* and *jurisdiction*. As the Kaldor Centre for International Refugee Law has highlighted, Australia maintains jurisdiction and responsibility over people transferred to offshore processing:

Australia cannot avoid or ‘contract out’ of its international legal obligations by sending people seeking asylum to other countries, delegating the processing of their protection claims to those countries, and outsourcing detention and care to private contractors. Instead, international law sets out clear rules governing the scope of Australia’s

⁷⁴ Senator Kim Carr, Answer to Question on Notice AE17/170 (27 February 2017), https://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/add_1617/DIBP/QoNs/AE17-170.pdf .

⁷⁵ Senator Stirling Griff, Answer to Question on Notice AE21-294 (7 May 2021), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld10-Portfoliold20-QuestionNumber294>

⁷⁶ Department of Home Affairs, *Statistics of transitory persons in Nauru and PNG* (31 July 2021), <https://www.homeaffairs.gov.au/about-us-subsite/files/population-and-number-of-people-resettled.pdf>

⁷⁷ *Ibid.*

⁷⁸ Senator Nick McKim, Answer to Question on Notice BE21-431 (16 July 2021), <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld11-Portfoliold20-QuestionNumber431>

⁷⁹ Due to different reporting dates for these numbers, there is a slight discrepancy and the numbers do not add up to 3,127.

*obligations, and the circumstances in which it is legally responsible for failing to comply with them.*⁸⁰

- 11.5 Australia also has domestic legal responsibilities to people held in offshore detention. In *Plaintiff S99/2016 v Minister for Immigration and Border Protection*, the Federal Court held that the Immigration Minister had a duty of care for people sent offshore by Australia.
- 11.6 As such, the Royal Commission has jurisdiction to investigate matters concerning the treatment of people with disability in offshore processing. This is reflected in the Royal Commission's Terms of Reference, which highlight that "Australia has international obligations to take appropriate legislative, administrative and other measures to promote the human rights of people with disability". The Terms of Reference require the Commission to look into "in all settings and contexts" where abuse may occur. As such, **RCOA strongly urges the Royal Commission** to consider the treatment of people with disability in offshore processing centres and to consider how offshore processing policy exacerbated and created disability amongst the group sent to Nauru and PNG.
- 11.7 We agree with the SCIL's submission that the process for sending individuals to offshore processing facilities was opaque, with no proper oversight mechanism in place. The SCIL refers to the Pre-Transfer Assessment Guidelines containing a list of physical and psychological factors that officers needed to consider but highlights that those officers could only make a recommendation to the Minister who retained the ultimate responsibility for the decision to send an individual offshore. Indeed, people who were clearly unsuitable for that environment were sent offshore, including children, unaccompanied minors and people with disability, for example a man of short stature.⁸¹ The SCIL's case study of this man illustrates a clear example of neglect and abuse of people with disability by the Australian Government through the policy of offshore processing.⁸²
- 11.8 While there are currently no children offshore, this regime resulted in significant mental health issues, developmental issues, and cognitive disability amongst children subject to offshore processing policy. In 2015, NEDA reported that there was substandard care on Nauru for children with special needs because of lack of allied health services such as physiotherapy, speech therapy, and audiology.⁸³
- 11.9 As RCOA and Asylum Seeker Resource Centre documented in 2018, many children on Nauru started to develop a rare psychiatric condition called 'Traumatic Withdrawal Syndrome' (also known as 'resignation syndrome'). Children with significant mental health impairments could not be treated on Nauru as this country did not have inpatient mental health facilities for children.⁸⁴ There is still no legislation against the future transfer of children offshore, where those services remain unavailable. This is particularly relevant now as Australia recently signed a new agreement with the Government of Nauru to create "an enduring form" of offshore processing in this country.⁸⁵

⁸⁰ Kaldor Centre for International Refugee Law, 'State Responsibility | Factsheet | Kaldor Centre' <<https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-australia%E2%80%99s-responsibility-asylum-seekers-and-refugees-nauru-and>>.

⁸¹ Sydney Centre for International Law (2021), *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*, pp.150-151.

⁸² *Ibid*, pp. 152-153.

⁸³ National Ethnic Disability Alliance (2015), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned*, <https://neda.org.au/sites/default/files/2017-06/People%20living%20with%20Disability%20in%20Immigration%20Detention-%20FINAL.pdf> , p.18.

⁸⁴ Refugee Council of Australia and Asylum Seeker Resource Centre (2018), *Australia's man-made crisis on Nauru: Six years on*, https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/Nauru_Manmade_Crisis.pdf , pp.5-7.

⁸⁵ Ben Doherty, 'Australian signs deal with Nauru to keep asylum seeker detention centre open indefinitely' *The Guardian* (24 September 2021) <https://www.theguardian.com/australia-news/2021/sep/24/australia-signs-deal-with-nauru-to-keep-asylum-seeker-detention-centre-open-indefinitely>

- 11.10 Many people subject to offshore processing experienced physical ill-health that remained untreated and resulted in permanent impairments. Several others developed disability as a result of violence and abuse. The SCIL referred to the case of an Iraqi man whose eye was injured during the February 2014 riots at Manus Island processing centre. He became permanently blind in his right eye and then lost most vision in his left eye. The SCIL reported that the substandard care he received on Manus Island and the adverse impact it had on his mental health led to two suicide attempts.⁸⁶
- 11.11 In 2018 and 2019, when RCOA was gathering evidence to strengthen its advocacy for medical transfer of people to Australia, it came across several people who required surgeries for injuries on their back, legs and knees, and were yet to receive them despite waiting a long time. As a result, their mobility was significantly limited. We also spoke to people with failing eyesight as a result of untreated diabetes or cataracts.
- 11.12 The significant scale of mental health issues amongst the population transferred by Australia to Nauru and Manus Island is well known. RCOA documented some of those issues on Nauru in its joint report with Asylum Seeker Resource Centre.⁸⁷ We also provided a comprehensive analysis of mental health issues and significant gaps in mental health care in PNG in our 2018 joint report with Amnesty International.⁸⁸ In that report we highlighted that PNG's mental health system was ill-equipped to deal with high level of need, as it lacked resources and expertise.
- 11.13 RCOA travelled to Port Moresby in November 2019 and engaged with many refugees and people seeking asylum transferred there. We directly witnessed the alarming level of mental ill-health. While we are not mental health experts, we observed that some people were unable to continue their daily lives independently due to their significant mental health issues; and yet, their access to health and rehabilitation services was limited. Several people who spoke to RCOA told us of their peers who did not leave their rooms and were withdrawn and disengaged. We saw a man who walked aimlessly in circles in the accommodation outdoor area and did not speak to anyone. Several people raised concerns about his situation and his complete inability to live independently.
- 11.14 One case study provided in our 2018 report on PNG shows the scale of neglect faced by refugees with significant psychosocial disability. That case relates to an Iranian man whose rapidly declining mental health was flagged several times by mental health professionals, advocates, and journalists but remained in PNG and did not receive adequate mental health support, especially in the final year of his life. He had several psychotic episodes and had been found wandering the streets of Lorengau. Alarmingly, his mental health issues were increasingly regarded as behavioural concerns that needed to be addressed through punitive measures. He was jailed several times for behaving aggressively, for example. Eventually, his body was found near East Lorengau transit centre in August 2017. The PNG police reported that he ended his life but that report was contested by some refugees on the Island.⁸⁹
- 11.15 Since the publication of our reports, we continued to hear of troubling ways the authorities responded to mental health concerns. This issue was more prevalent in PNG because, since late 2017, the Australian Government shifted the responsibility of healthcare provision to local contractors and PNG's strained public health system. When in the aftermath of 2019 election, there was a spike in the number of self-harm and suicide attempts, the PNG authorities deployed a notorious paramilitary police unit to patrol the camps. When a man tried to end his

⁸⁶ Sydney Centre for International Law (2021), *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*, pp.155-156.

⁸⁷ Refugee Council of Australia and Asylum Seeker Resource Centre (2018), *Australia's man-made crisis on Nauru: Six years on*, https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/Nauru_Manmade_Crisis.pdf , pp.4-10.

⁸⁸ Refugee Council of Australia and Amnesty International (2018), *Until When: The forgotten men of Manus Island*, https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/Until_When_AIA_RCOA_FINAL.pdf , pp. 22-28.

⁸⁹ *Ibid*, p. 25.

life by setting fire to himself and his room in June 2019, the PNG police stated that they would charge him with arson and attempted suicide. Under the PNG criminal code, attempting suicide remains a crime which carries a penalty of up to one year in prison.

- 11.16 These examples demonstrate that offshore facilities cannot adequately meet the needs of people with disability. RCOA's position is that offshore processing policy is harmful and needs to end. However, if the bipartisan support for this policy continues, at the minimum no person with disability should be transferred offshore. Those who develop disability offshore need to be permanently transferred to Australia and be placed in the community where they can access health and rehabilitation services.

Recommendation 16 Cease offshore processing of people with disability

RCOA recommends that the Australian Government do not subject people with disability to offshore processing.

12 Oversight

- 12.1 Independent oversight of immigration detention facilities improves the chance of detecting and addressing issues of concern. It can, to some extent, provide safeguards against abuse and neglect and give more visibility to groups like people with disability. That is why in December 2017 RCOA welcomed Australia's ratification of Optional Protocol to the Convention against Torture (OPCAT) as it had, at its core, prevention of mistreatment in places of deprivation of liberty through monitoring and oversight.
- 12.2 Currently there are some government and non-government bodies that have a level of oversight over onshore immigration detention facilities. The Commonwealth Ombudsman continues to monitor immigration detention facilities. It reviews the detention of people who spend more than two years in detention and in its relatively new role as the National Preventive Mechanism under OPCAT, it monitors the places of detention under the control of the Commonwealth which includes immigration detention. The Australian Human Rights Commission and the Australian Red Cross also monitor the conditions of detention facilities.
- 12.3 The oversight of offshore facilities is more limited because of jurisdictional issues. For example, the Australian Human Rights Commission cannot monitor the conditions of offshore processing facilities.
- 12.4 Delayed reports⁹⁰ or lack of public reporting (in the case of Red Cross) and the fact that none of the recommendations that oversight bodies make are binding on the Government are some of the issues that reduce the robustness of detention monitoring mechanisms in Australia. In fact, our analysis of the Department of Home Affairs' responses to the Australian Human Rights Commission reports shows that in recent years, the Department is rejecting an increasing number of the AHRC's recommendations.
- 12.5 Some of the previous oversight measures have also been abandoned altogether. For example, Immigration Health Advisory Group (IHAG) that was the only independent oversight body with medical expertise was disbanded in December 2013. The IHAG had representatives from professional health authorities and provided oversight and advice to the Government in relation to medical care in detention, including mental health care. In response to the disbanding of IHAG, the Australian Medical Association (AMA) said in December 2013 that

...the Government and the Department now have a major challenge in understanding and dealing with complex health conditions in difficult

⁹⁰ While Commonwealth Ombudsman undertakes regular monitoring visits to immigration detention facilities, the last public report it published relates to the monitoring visits it undertook in the first half of 2020.

circumstances without the benefit of the expert advice of the highly qualified and respected IHAG members.⁹¹

The AMA called on the Government to establish a truly independent medical panel to oversee and report regularly on the health services available to people in onshore and offshore immigration detention facilities. This advice was not heeded and one can conclude that some of the challenges people with disability face today in immigration detention facilities are the result of such lack of oversight.

12.6 Further, in 2015, NEDA raised concerns that no disability specialists had been invited to monitor and assess the suitability of detention for people with disability.⁹² Sadly, it remains the case today. While the monitoring bodies may draw on the expertise of disability specialists, there is no history of independent disability advisory groups with an oversight over the operation of immigration detention. As far as RCOA understands they do not have a regular or formal presence in the inspection teams of current monitoring bodies either.

Recommendation 17 Establish an independent disability advisory group

RCOA supports the recommendation of NEDA and recommends that the Australian Government establish an independent disability advisory group that can provide advice to the Government about the support required by people with disability in detention and review the appropriateness of detention for people with disability.

13 Summary of recommendations

Recommendation 1 Interim report on people in detention with disability

RCOA recommends that the Royal Commission publish an interim report focusing on the experiences of people with disability in immigration detention (or other places where people are deprived of their liberty) and highlight some of the most pressing issues.

Recommendation 2 Limit the detention of people with disability

RCOA recommends that the Australian Government limit the detention of people with disability to the measure of absolute last resort and place this group in community alternatives to closed detention.

Recommendation 3 Provide robust and targeted data

RCOA recommends that the Australian Government publish monthly or quarterly data on the number of people with disability in onshore immigration detention and offshore processing facilities (in Nauru and PNG). The statistics should also be disaggregated by the type of disability, the detention facility where people with disability are held and the length of time they are detained.

Recommendation 4 Properly identify disability amongst the detention population

RCOA recommends that the Australian Government ensures that the identification of disability is not limited to the initial screening of the person in detention and occurs at regular intervals during the person's life in detention and is also inclusive of all types of disability.

⁹¹ Australian Medical Association, 'AMA shocked by disbanding of Immigration Health Advisory Group' (16 December 2013), <https://www.ama.com.au/media/ama-shocked-disbanding-immigration-health-advisory-group-ihag>

⁹² National Ethnic Disability Alliance (2015), *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned*, <https://neda.org.au/sites/default/files/2017-06/People%20living%20with%20Disability%20in%20Immigration%20Detention-%20FINAL.pdf>, p.5.

Recommendation 5 Consider alternatives to closed detention for people with character concerns who face indefinite detention

RCOA recommends that the Australian Government consider alternatives to closed detention for people who fail to pass the character test and face indefinite detention. RCOA believes most people in this group can be managed appropriately in a less restricted form of detention with proper reporting and supervision. Those who cannot be placed in the community should not be placed in remote detention centres like Yongah Hill IDC or North West Point IDC.

Recommendation 6 Ensure accessibility of detention facilities

RCOA recommends that the Australian Government ensure that all compounds of immigration detention facilities are safe and accessible, with a design and layout that support the needs of people in detention with disability. Requests made by people in detention for accessibility aids need to be addressed promptly.

Recommendation 7 Address overcrowding and lack of privacy

RCOA recommends that the Australian Government consider that people with disability or people subject to long-term detention may need access to private rooms and facilities and consider this in calculating the maximum capacity of each detention facility.

Recommendation 8 Refrain from using non-purpose-built APODs for people with disability

RCOA recommends against placing anyone, particularly people with disability, in non-purpose-built APODs. If it is absolutely necessary, this group should be held in those facilities for the shortest period possible.

Recommendation 9 Review the risk assessment tool used in immigration detention

RCOA recommends that the Australian Government review the current risk assessment tool used in immigration detention to ensure it appropriately considers an individual's vulnerability and needs and provides real opportunities for a downgrade in risk ratings in response to positive behaviour.

Recommendation 10 Refrain from use of restraints on people with disability

RCOA recommends that the Australian Government refrain from the use of restraints on people with disability as much as possible.

Recommendation 11 Cease the use of high-care accommodation for quarantine purposes

RCOA recommends that the Australian Government cease the use of high-care accommodation units for quarantine purposes and under no circumstances place people with disability in such accommodation for the purpose of medical or operational quarantine.

Recommendation 12 Ensure appropriate aids and equipment are provided

RCOA agrees with the recommendation from NEDA that, if the Government continues with the policy of mandatory detention without considering people's disability, it should ensure that at least appropriate aids and equipment, assistance technology and 'reasonable adjustments' are provided to them.

Recommendation 13 Ensure accessibility of programs and activities

RCOA recommends that the Australian Government ensures all program and activities in immigration detention be accessible to people with disability. If they are not, reasonable accommodations should be made to ensure that people with disability have equivalent options to programs and activities as other detainees.

Recommendation 14 Commission a comprehensive review of the mental health care provided in immigration detention

RCOA recommends that the Australian Government commission a comprehensive review of the mental health care provided in immigration detention. This review needs to have genuine input from people in detention with psychosocial disability and other people with disability who access mental health services as required.

Recommendation 15 Decommission detention facilities on Christmas Island

RCOA recommends that the Australian Government decommission the use of all detention facilities on Christmas Island. While the Government plans for this measure, it should urgently transfer anyone with disability out of Christmas Island; this includes people with psychosocial disability.

Recommendation 16 Cease offshore processing of people with disability

RCOA recommends that the Australian Government do not subject people with disability to offshore processing.

Recommendation 17 Establish an independent disability advisory group

RCOA supports the recommendation of NEDA and recommends that the Australian Government establish an independent disability advisory group that can provide advice to the Government about the support required by people with disability in detention and review the appropriateness of detention for people with disability.