Submission

UN Sub-Committee on Prevention of Torture (SPT) visit to Australia

ASRC
Asylum Seeker Resource Centre

Introduction on possible causes of torture and ill-treatment

The Asylum Seeker Resource Centre (ASRC) works closely with people seeking asylum and refugees currently and previously held in Australia's network of detention centres and people seeking asylum held offshore.

Australia is failing its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, through serious violations in Australia's onshore and offshore detention network, including:

- The attempt to render indefinite detention legal
- Manifestly excessive timeframes for people held in detention
- A lack of mechanisms for reviewing the detention of individuals and the conditions across detention centres
- Insufficient access to legal, medical, social and other services
- Extremely poor conditions in detention centres exacerbating, and causing, serious pain and suffering
- The use of force, isolation and restraints against people in detention without just cause
- Inadequate implementation of the National Preventive Mechanisms designation process

Australia's immigration detention regime has had a severe and widespread mental and physical health impact on refugees and people seeking asylum, keeping people in detention with no independent oversight, minimum standards or timeframes.

Australia has a mandatory detention framework. Any person who is an unlawful non-citizen - generally speaking, a person without a visa - *must* be detained pursuant to s 189 of the *Migration Act 1958* (Cth) (**the Act**).

Anyone who arrives in Australia by plane without a valid visa, or who has a valid visa but has their visa cancelled at the airport (often because they have asked for protection), will be taken to an immigration detention centre in Australia. Most people in this situation spend years in detention while their protection claims are assessed. They are not kept in detention for any health or security reason, but simply because of their visa status on arrival.

People who arrive by sea without a visa are also mandatorily detained with many released only after varying and lengthy arbitrary periods. Some people have still not been released from detention. Other people are re-detained after having their bridging visas cancelled.

People whose visas expire or are cancelled are also subject to immigration detention.

According to the most recent statistics, 736 people in detention held a humanitarian or protection visa before being detained or are in the application process.[1] This accounts for around half of all people held in immigration detention centres.

There is also a group of around 6 people who were held in offshore detention centres but were moved to Australia for medical reasons mostly under the now-repealed Medevac legislation, who have been in detention for 9 years. The Government has provided no reasons as to why these people are held in detention while hundreds of other people in almost identical situations are in the community.

The ASRC welcomes further consultation about the matters raised in this submission.

Analysis of situations of risk

Priority issues that need addressing to better prevent torture and ill-treatment

There are a myriad of issues with the current immigration detention regime, however, ASRC has identified the following areas of chief concern:

- Arbitrary and indefinite detention
- Access to advice and support
- Mental health support for people in detention
- The health of people with psychiatric conditions or disabilities in detention
- The response to COVID-19
- Use of restraints
- Use of force
- Detention of people seeking asylum and refugees who have had a refusal or cancellation of a visa on "character grounds"
- Deaths in detention

These breaches occur in an environment of opacity, marked by a lack of access and accountability mechanisms. There is an increasing move toward prison-like conditions. People in detention may have access to outside areas for very short periods; there is little education or activity available, and their requests are often delayed or not actioned. The use of remote detention facilities separates people from their families and communities, and inadequate communication facilities exacerbate the harm this causes.

These breaches are occurring across the detention network. However, they are particularly apparent in some locations. The Subcommittee should visit North West Point (Christmas Island) Immigration Detention Centre (**Christmas Island**), Yongah Hill Immigration Detention Centre (**Yongah Hill**), and Melbourne Immigration Transit Accommodation (**MITA**). **Christmas Island**

[1] Legal and Constitutional Affairs Committee, Home Affairs Portfolio: BE21-377 (May. 2021).

and **Yongah Hill** are of particular interest because of the conditions there, which have led to riots and deaths. **MITA** is of particular interest because of our experience that it is used for people with complex health needs.

Clear timeframes for the length of time a person can be held in immigration detention.

The ASRC is extremely concerned about the increasing length of immigration detention in Australia. According to the Department's statistics, as of 31 March 2022, the average time length of detention was 700 days (approximately 1.9 years).[2] Of the 1,512 people held in detention facilities as of 31 March 2022, approximately 41.6 percent of people in detention (629 people) had been detained for over 730 days, while 8.5 percent of people in detention (129 people) had been detained for over a staggering 1,825 days (five years).[3] This reflects a significant increase from the average length of detention of approximately 500 days in January 2020.

This average length of detention is also significantly longer than that recorded in other countries, including Canada, the United States, and the United Kingdom. In Canada, as of 30 June 2022, the average length of detention was only 24 days,[4] while in the United States, as of 21 July 2022, the average length of detention was 43 days.[5] In the United Kingdom, as of 31 March 2022, 57 percent of people in detention had been held for less than 29 days, and 86 percent had been held for less than six months.[6]

These statistics reflect that it is not only desirable but entirely possible for persons detained in detention facilities in Australia to be held for much shorter periods of time.

ASRC advocates for an end to mandatory and indefinite detention of people seeking asylum in Australia without visas. Detention of people seeking asylum must be a last resort and there be strict timeframes of no more than 30 days for adults and 72 hours for children, transparent information on conditions in detention and clear mechanisms to challenge adverse security concerns. Where detention is legally indicated, we recommend the Department expedite or prioritise the processing of protection applications – or other processes that have resulted in detention – to ensure a person's detention can be resolved.

Aside from the severe impact it can have on mental health, prolonged or indefinite detention can also lead to refoulement in breach of international obligations. Refugees in detention are faced with the prospect of indefinite detention or 'voluntary' return to countries where they face serious harm. Changes to the Act purport to make such returns permissible[7]: s 197C(3) of the Act

[2] Department of Home Affairs, "Immigration Detention and Community Statistics Summary", 31 March 2022, p 12.
[3] Ibid.
[4] Government of Canada, "Detention statistics: Second quarter fiscal year 2021 to 2022", 30 June 2022.
[5] US Immigration and Customs Enforcement, "ICE Detention Data, FY22 YTD", 21 July 2022.
[6] UK Home Office, "Immigration statistics data tables, year ending March 2022", 31 March 2022.
[7] The Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 purported to make indefinite detention legal, amongst other changes of serious concern.

provides that, even if a person has been found to be a refugee, they may be removed if they make a written request. In ASRC's experience, people in detention are routinely pressured to sign forms requesting return, including a disavowal of their claims to protection, despite the existence of protection findings. In one notable case, a person found by a psychiatrist not to have capacity with serious claims to fear harm on the basis of his medical condition was scheduled for removal, requiring emergency intervention from our lawyers.

The ASRC also recommends that s 197C be removed from the Act, or amended, to ensure that Australia's international obligations are properly reflected and constructive refoulement is not a likely outcome.

Furthermore, as of December 2021, the average period of time people who previously held a protection visa or humanitarian visa spent in immigration detention was 925 days.[8]

This is a completely unacceptable average period of immigration detention and speaks volumes of what are defective processes and inadequate safeguards.

Lack of review mechanisms

Contributing to the length of immigration detention is the lack of any reliable and enforceable review mechanism by which the reasonableness and necessity of a person's detention is periodically evaluated by an independent arbitrator.

While the Department must report to the Commonwealth Ombudsman on the circumstances of a person's detention every six months after they have been detained for two years, and the Ombudsman responds with a report evaluating the appropriateness of ongoing detention, any recommendations on the Department are non-binding and it is not compelled to take any action.

Moreover, two years is an extremely lengthy period of time to wait for the mandatory reporting procedure to be engaged, particularly when regard is had to the mandatory review mechanisms in place in other countries. In Canada, an officer of the Canada Border Services Agency must review the reasons for detention within 48 hours of a person being detained, and, if the person is kept in detention beyond 48 hours, the Immigration Refugee Board of Canada is to review the necessity of ongoing detention, and make a binding decision as to whether a person is to be kept in detention, and repeat the review after seven days, and again every 30 days thereafter.[9]

Similarly, in the United Kingdom, ongoing detention must be reviewed at a minimum after a person has been detained for 24 hours, seven days, 14 days, 21 days, 28 days, and each month thereafter,[10] while in the United States, an Immigration Judge is required to review the necessity of the detention of an alien, with the alien being entitled to request review of his or her detention periodically.[11]

[8] Legal and Constitutional Affairs Committee, Home Affairs Portfolio: AE22-135 (Feb. 2022).
[9] Canada Border Services Agency, "Arrests, detentions and removals", 9 March 2022.
[10] United Kingdom Home Office, "Enforcement Instructions and Guidance, Chapter 55: Detention", pp 30 – 31.
[11] United States Department of Justice, "Immigration Court Practice Manual, Detention Review", 23 June 2022.

Recommendations made by the Australian Human Rights Commission as to the conditions of detention following visits to detention facilities, and investigating complaints, are non-binding.

In the ASRC's experience, the recommendations of the Commonwealth Ombudsman or the Australian Human Rights Commission are rarely given effect.

Not only does the lack of any periodic review mechanism enable the occurrence of arbitrary detention, and the violation of international human rights law, but it further impacts upon the poor mental health of people held in detention through compounding the indefinite nature of the detention.

ASRC recommends the establishment of an effective detention review mechanism, entitling a person to appear before an independent body regarding the appropriateness of their ongoing detention as well as regarding complaints that may arise during detention.

Access to advice and support

Section 256 of the Act requires that the detainer affords to people detained "all reasonable facilities" for seeking advice and taking action. In our experience, this does not occur. Even basic advice and support are extremely hard to access in detention. Detention staff routinely refuse to facilitate correspondence or visits with our clients, impairing their ability to exercise their rights.

People in detention should be assisted to access advice from reputable services. Clear structures for access and communication need to be in place, and people's right to clear communication must be ensured.

Mental health support for people in detention

The restrictive approach that successive Australian governments have used to meet their aims of the Refugee Convention has failed to 'protect asylum seekers and ensure their fundamental rights and freedoms'.[12] Australia continues to breach its obligations under Refugee Convention art. 31 and 32 by penalising asylum seekers, with people arriving by boat treated radically different to those arriving by air.[13]

A recent study demonstrated that onshore detention of less than three months was correlated with mental health issues relatively similar to the general Australian population, while detention longer than three months resulted in significantly greater psychological distress; those detained offshore showed significantly greater psychological distress at all timeframes.[14]

[12] Freyer, B., & Mckay, F. H. (2021). An investigation of incident reports from the detention center Nauru: Has Australia breached the Universal Declaration of Human Rights? Journal of Human Rights, 20(4), 449-467. https://doi.org/10.1080/14754835.2021.1915118, p. 452)

[13] Elton, A. (2022, 2022-01-02). Administrative justice theory and benchmarks in mandatory immigration detention: principled tensions or power imbalance? *Griffith Law Review, 31*(1), 57-97. https://doi.org/10.1080/10383441.2022.2054574.

[14] Essex, R., Kalocsányiová, E., Young, P., & Mccrone, P. (2022). Psychological Distress in Australian Onshore and Offshore Immigration Detention Centres from 2014–2018. *Journal of Immigrant and Minority Health, 24*(4), 868-874. https://doi.org/10.1007/s10903-022-01335-7.

Médecins Sans Frontières' (MSF) Indefinite Despair Report in 2018 found that, amongst the 208 refugee and asylum seekers they had assessed, 129 (62%) were diagnosed with moderate to severe depression. The second highest diagnosis was anxiety disorder (25%), followed by PTSD (18%), mild depression (11%), complex trauma (6%) and traumatic withdrawal syndrome (6%).[15]

Since 2013, 46 deaths have occurred in detention, 32 of these in onshore facilities; deplorable conditions have been cited as direct contributors, including: indefinite detention, lack of access to medical care, appropriate mental health care, multiple cases of abuse, isolation, and living and hygiene conditions well below the expected.[16] Rates of self-harm among those detained in IDCs, APODs, and ITAs were calculated to be 187 times, 220 times, and 376 times higher (respectively) than the self-harm rates reported in the Australian general community.[17]

For detained people seeking asylum, the expanded use of well-established community-based arrangements for the processing of refugee claims, such as community detention would represent a modest cost for the Australian Government.[18]

From a costs perspective alone, increased use of community-based arrangements would actually save money, with an annual cost of around $346,000 to hold someone in onshore detention, compared with $4,429 for that same person to live in the community on a BVE with work rights.[19]

More importantly, from a mental health and support standpoint, living in the community, even under strict conditions, would clearly increase access to appropriate mental health services and much-needed social supports, and provide housing and income security.[20]

High prevalence of 'detention fatigue', depression and adjustment disorders related to family separation have long been reported, with high rates of mental health problems correlated to the length of detention and trauma suffered.[21] Self-harm and suicide are highly prevalent; medical services have been labelled as sub-standard with reports of excessive wait times and long lists, a lack of access to specialists and delays in transferring sick people in detention requiring urgent medical care, and during detention, access to services appears to be limited and arbitrary.[22]

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[15] MSF. (2018). *Indefinite despair: The tragic mental health consequences of offshore processing on Nauru*. Médecins Sans Frontières. Retrieved 27 Jul 2022 from https://www.msf.org/indefinite-despair-report-and-executive-summary-nauru.
[16] Vigneswaran, N. (2022). "Tough on borders": How Australia's immigration detention system fails refugee and asylum seeker health. *Medical Journal of Australia*. https://doi.org/https://doi.org/10.5694/mja2.51632.
[17] Hedrick, K., & Borschmann, R. (2021, 2021-02-01). Addressing self-harm among detained asylum seekers in Australia during the COVID-19 pandemic. *Australian and New Zealand Journal of Public Health, 45*(1), 80-80. https://doi.org/10.1111/1753-6405.13061.
[18] Kaldor Centre (2020). *The costs of Australia's refugee and asylum policy: A source guide*. https://www.kaldorcentre.unsw.edu.au/publication/cost-australias-asylum-policy and AHRC. (2013). *Alternatives to detention*. https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/alternatives-detention.
[19] Hedrick & Borschmann, 2021; Legal and Constitutional Affairs Committee, Home Affairs Portfolio: BE21-445 - People in Detention - Cost (Apr. 2022).
[20] Hedrick & Borschmann, 2021.
[21] von Werthern, M., Robjant, K., Chui, Z., Schon, R., Ottisova, L., Mason, C., & Katona, C. (2018, 2018-12-01). The impact of immigration detention on mental health: a systematic review. *BMC Psychiatry, 18*(1). https://doi.org/10.1186/s12888-018-1945-y.
[22] Elton, 2022.

For people in detention, access to independent, external mental health services needs to be facilitated, with clear structures providing for access.

The health of people with psychiatric conditions or disabilities in detention

As at 9 June 2021, there were 130 people in held detention known by the Department to have an ongoing disability.[23] The ASRC has acted for a number of individuals with serious disabilities, including acquired brain injuries, intellectual and psychiatric disabilities. In our experience people with these conditions suffer disproportionately in immigration detention, are unable to access appropriate support and treatment in detention, generally experience a severe decline in health, and have their conditions managed inappropriately, including with the use of isolation. They are also more likely to experience protracted or indefinite detention and have issues with incidents in detention affecting their outcomes.

In our experience, in many cases, people with severe psychiatric or psychological conditions are labelled as having problems with authority or aggression rather than being appropriately diagnosed and supported. This affects not only the health of the person but their outcomes.

People with a disability should be released from held detention wherever possible. Current standards are dangerously deficient: IHMS has failed to provide adequate standards of care and is placing people's health at risk. We recommend that urgent action be taken to set clear standards for independent medical and other support for people with disability, and more broadly, in immigration detention. Means of accessing that treatment and support also must be clarified.

COVID-19 Pandemic

The pandemic has brought to light the government's already-existing failures and has drawn attention to the underlying structural harms of, and produced vulnerabilities for people living in, closed, congregated settings.[24] In the context of IDCs, the Australian government has not only been staunchly resistant to releasing people detained; it has revealed a steadfast commitment to detaining people regardless of the epidemiological risk.[25]

During Covid, a rise in already elevated incidents of self-harm amongst people in detention in most detention centres has been reported.[26] People in IDCs have commented

[23] Department of Home Affairs, FOI disclosure logs 2021, FA 21/06/00239.
[24] Dehm, S., Loughnan, C., & Steele, L. (2021). COVID-19 and sites of confinement: Public health, disposable lives and legal accountability in immigration detention and aged care. *The University of New South Wales Law Journal, 44*(1), 60-103.
[25] Vogl, A., Fleay, C., Loughnan, C., Murray, P., & Dehm, S. (2021). COVID-19 and the relentless harms of Australia's punitive immigration detention regime. *Crime, Media, Culture: An International Journal, 17*(1), 43-51. https://doi.org/10.1177/1741659020946178.
[26] Stayner, T., & Trask, S. (2020). *Fears for immigration detainees as new figures reveal hundreds of self-harm incidents in 2020*. SBS. Retrieved 27 Jul 2022 from https://www.sbs.com.au/news/article/fears-for-immigration-detainees-as-new-figures-reveal-hundreds-of-self-harm-incidents-in-2020/.

that they feel like 'sitting ducks' for COVID-19, held in 'potential death trap[s] in which we have no option or means to protect ourselves'.[27]

COVID-19 measures – specifically the prohibition on external visitors – have intensified experiences of social isolation. In IDCs, the visitor program ceased on 24 March 2020 and additional steps were taken to prohibit people from delivering food, gifts, or other items to people in Victorian IDCs, effectively further marginalising an already isolated cohort.[28] Shortly after the pandemic began, the Morrison Government attempted to remove mobile phones of people held in detention based on dubious claims from (former) Minister Alan Tudge that such an action will prevent people detained from accessing 'inappropriate' internet sites during the pandemic, but which only served to deprive people of their main form of contact with the outside world.[29]

Early in the pandemic, before much state and federal policy could be clarified, people detained reported limited or no access to personal protective equipment ('PPE') and hand sanitiser, as well as the inability of security guards to adhere to infection control guidelines.[30] This was further impacted by the impracticality of observing social distancing in cramped living quarters and narrow hotel corridors.[31]

Additionally, vaccine administration has been well below that of the general public, with only 55% of people detained having received two doses of the COVID-19 vaccine by the end of February 2022.[32]

Throughout the pandemic, there has been a relative lack of culturally appropriate information regarding Covid-19 testing alongside anecdotal evidence about fears that testing positive to Covid-19 may lead to deportation under health criteria – notwithstanding the continual release from pandemic restrictions in the wider community, greater attention is required to address differences in health literacy and help-seeking behaviours in culturally diverse and traumatised populations.[33]

This is particularly so for people with disability or medical conditions in detention. People who have been required to attend external sites for treatment, for example, hospitalisation for psychiatric episodes, have then been required to isolate for 14 days on return to immigration detention. In one case, a man with paranoid schizophrenia was returned from hospital to

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[27] Holt, R., & Vasefi, S. (2020). *"We are Sitting Ducks for Covid 19": Asylum Seekers Write to PM after detainee tested in immigration detention*. The Guardian. Retrieved 27 Jul 2022 from https://www.theguardian.com/australia-news/2020/mar/24/we-are-sitting-ducks-for-covid-19-asylum-seekers-write-to-pm-after-detainee-tested-in-immigration-detention.
[28] Dehm et al., 2021.
[29] Dehm et al., 2021.
[30] Holt & Vasefi, 2020.
[31] Mares, S., Jenkins, K., Lutton, S., & Newman Am, L. (2021). Impact of Covid-19 on the mental health needs of asylum seekers in Australia. *Australasian Psychiatry, 29*(4), 417-419. https://doi.org/10.1177/10398562211005445.
[32] Vigneswaran, 2022.
[33] Mares et al., 2021.

detention, detained for 14 days, given food through a small window, and given his medication by people in full PPE, seriously exacerbating his condition.

Use of restraints, including body restraints

The use of mechanical restraints by Serco and ABF personnel when processing or relocating people held in immigration detention is also of direct importance to the Subcommittee and increasing concern. People in detention are placed in mechanical restraints in some instances for over 8 hours at a time, and often multiple times per day. Use of restraints has been justified by Serco staff as being to "prevent escape", however, it fails to consider the potential adverse physical and psychological impacts prolonged restraint use can have on people in detention. Use of such restraints has directly exacerbated existing injuries in some instances.[34] Use of these restraints in this manner continues in all instances where a person in detention is moved, even where they are not assessed as being a security risk.

The Department of Home Affairs Detention Services Manual provides procedural instructions where it instructs that there is a presumption against the use of force, including restraints, even when transporting people in detention outside of an immigration detention facility.[35] The manual directs that restraints only be used as a last resort, be used for the shortest amount of time, and be proportionate. In contrast to these directions, the practical approach shown to be taken by Serco and ABF personnel is that even people with a low-risk assessment and no concerns will be placed in restraints whenever they are escorted.

Also of concern is that people in detention are escorted to their migration court appearances in mechanical restraints despite being assessed as low risk, with no history of incidents.[36] Restraints are often used for a prolonged period and in some instances, on individuals who have raised claims for protection on the basis of facing arbitrary arrest or prosecution in their country of origin. Engagement with the judicial system is stressful enough for people detained without the added impact of being restrained excessively directly before and after being present in a courtroom.

The use of solitary confinement, body restraints and spit hoods must cease. Restraint during transfer and appointments must also cease except where that restraint is approved by an independent authority.

Use of force

People in detention are also subject to inappropriate use of force. This is particularly the case for people with psychiatric conditions. If they become distressed, rather than using appropriate

[34] Australian Human Rights Commission, 'Use of Force in Immigration Detention', 2019, AusHRC 130 <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-forceimmigration-detention>.
[35] The Department of Home Affairs, 'Detention Services Manual', 2018, <https://www.homeaffairs.gov.au/foi/files/2020/fa-200100011-document-released.PDF
[36] Castan Centre for Human Rights Law, 'Use of Force in Detention and other Closed Environments', 2020 <https://www.monash.edu/__data/assets/pdf_file/0005/2396597/Castan-Centre-for-Human-Rights-Law-Use-of-force-in-detention-and-other-closed-environments-2020.pdf>.

intervention, the first response is often use of force restraint, exacerbating the person's distress and endangering their health and outcomes.

Clarity around appropriate use of force is urgently required. Detention facilities need to have strategies for managing distress or incidents without escalation and harm.

Detention of asylum seekers and refugees who have had a refusal or cancellation of a visa on "character grounds"

For a person to be granted a visa, they must pass the "character test" contained at s 501(6) of the Act. Likewise, the Act vests broad powers in the Minister for Immigration, Citizenship and Multicultural Affairs to cancel a non-citizens visa in a variety of circumstances. This includes mandatory cancellation for people who have a "serious criminal record".[37] Once a visa is cancelled, a person is detained in the immigration detention network pending review processes and/or arrangements for removal from Australia.

There is a concerning increase in the number of visa cancellations and refusals on character grounds for people who hold refugee and humanitarian category visas or people who hold other visas and any removal to their country of nationality/origin would breach Australia's non-refoulement obligations.

Increasingly, ASRC is seeing more people being held indefinitely in immigration detention where all review options have been exhausted, but Australia's non-refoulement obligations prohibit their removal from Australia under s 197C of the Act. People who have undergone cancellation or refusal typically spend extended time in detention.

The High Court of Australia has found that the consequences of these legislative arrangements are permissible even in circumstances where indefinite detention is the only or likely outcome.[38]

The threat of indefinite detention in connection with visa cancellation or refusal is leading to people not exercising their right of review or being constructively refouled - that is, ostensibly choosing to return to a country where they have been found to face serious harm by making a request in writing for s 197C.

It is also worth noting people in detention with character refusals or cancellations are often held in remote detention centres such as Christmas Island and Yongah Hill, exacerbating existing gaps in access to lawyers and other services, in particular medical or other support. Indefinite detention of this kind is unquestionably arbitrary and punitive detention constituting cruel, inhuman or degrading treatment or punishment.

[37] This includes, but is not limited to, people who have been given a custodial sentence of 12 months or more, see the Migration Act 1958, s 501(7).
[38] Commonwealth of Australia v ALJ20 [2021] HCA 21.

Immigration detention facilities are politicised, closed environments lacking the accountability or transparency of other systems such as prisons or closed mental health facilities.[39] Prolonged and indefinite detention is recognised as a form of torture[40] and there is documented evidence that it compounds pre-existing mental health illnesses in individuals who are torture and trauma survivors.[41] Detention has a devastating impact on health – particularly mental health – with exceptionally high rates of mental distress and disorder and levels of distress often increasing with the length of time detained.[42]

Australia must urgently replace the use of closed detention with already existing community-based models for processing in order to protect asylum seekers from further preventable harm.[43]

The ASRC is deeply concerned about the limited access people in detention currently have to legal advice and representation, medical and social support as well as personal visits which have been heightened by the COVID-19 pandemic. This is particularly true for people being held in remote detention centres such as Christmas Island and Yongah Hill.; as well as the Melbourne Immigration Transit Accommodation, where people with more complex health needs are often detained.

Overview of types of places of detention (and/or regions) where there is a higher risk of torture and ill-treatment

Australia currently has a network of detention centres onshore where over 1,400 people are held, 736 of whom are people seeking asylum. While all detention centres are inadequate for refugees and people seeking asylum APODs and the Christmas Island detention centre are of particular concern.

Name of detention centre	Number of people in detention (2022)
Villawood IDC	498
Christmas Island APODs	297
APODs (NSW)	258
Melbourne ITA	196
APODs (QLD)	101
APODs (NT)	48
APODs	29
APODs (VIC)	25
Perth IDC	25
Adelaide ITA	23
Brisbane ITA	8
APODs (SA)	5
Yongah Hill IDC	5

APODs

The legal basis for APODs can be found in s 5(1) of the Act, which provides that immigration detention includes being held by, or on behalf of, an officer in another place approved by the Minister in writing. but the legality of APODs is currently being challenged in Federal Court.

Force secrecy: Effective asylum-seeker healthcare requires
atry, 24(1), 15-18. https://doi.org/10.1177/1039856215623354.

Despite the ostensible justification that APODs provide 'better' facilities because they are designed for people in detention deemed low-risk (thereby implying that in APODs people have more freedoms), people are still ultimately detained in a facility that prevents them from leaving and removes their freedoms. Notably, unlike detention centres, which are purpose-built, APODs are not purpose-built; rather, they are using private housing, hotels or community facilities to house people on a long-term and often indefinite basis. The increased use of APODs is particularly problematic as APODs are only designed for short-term detention, but are exceedingly used for long periods of detention.

APODs are not adequately designed to meet the basic needs of people who are detained and often cause or exacerbate existing medical conditions, often mental health conditions. This is particularly alarming given that APODs were primarily used to accommodate people who were transferred to Australia to seek medical treatment, often for their mental health. While APODs are often sold politically as an improvement to detention conditions, they are not fit for purpose and have a significant impact on the health and wellbeing of people detained.

In the experience of ASRC's lawyers and caseworkers, people detained in APODs often do not have access to a computer and/or phone which creates a communication 'barrier' whereby it is difficult for representatives to speak with their clients. When a line of communication is established, it is often inconsistent due to the sporadic nature of contact with a client. Moreover, due to the lack of technology available in APODs, there is difficulty obtaining signed consent forms/authority to act on forms impacting the representative's ability to progress matters at all, or within appropriate timeframes.

Clients in APODs often are not afforded their right to receive private or confidential advice due to the practical living arrangements that people in detention are sometimes assigned. Clients often share rooms with others, meaning that there is a lack of privacy when discussing their legal situation with lawyers and there are few 'private' spaces people in detention can access. There is also a prevailing sense of a lack of privacy in terms of the fact of detention and the overarching supervision people in detention are subject to.

The conditions and facilities at APODs were wildly insufficient. Fresh air was a significant issue, with the centres having insufficient access to outdoor areas for exercise/recreation. At Park Hotel the only outdoor access was via the rooftop smokers' area, even though this was only available for those who smoked. Windows were not able to be opened for the most part and special tinting material was added to the glass to ensure clients were not visible from outside the hotel. A makeshift gym area was made in a communal kitchen-type space at Park Hotel which was small and hardly involved any equipment.

At Mantra hotel APOD there was no such access to fresh air or a gym, and clients were restricted to one floor and could only walk up and down the corridor. Prior to the outbreak of COVID in March 2020, clients were sometimes allowed to be transported from APODs such as Mantra or Kangaroo Point in Brisbane to the main detention centre (BITA/MITA) in order to use outdoor facilities/gym equipment. There were also no prayer rooms or communal spaces for worship.

During a COVID-19 outbreak level 1 of Park Hotel was used for quarantine/isolation purposes for positive cases, but it also contained the dining area where clients dined in a communal environment for the first few days before stricter social distancing/covid measures were imposed.

APODs generally lack the capacity for clients to self-cater beyond making instant noodles with boiling water or access to a microwave.

Many APODs, including Park Hotel, were, at times, overcrowded with three or more clients in rooms designed for one or two people.

Following the COVID-19 outbreak at Park Hotel men were generally only one person to a room. However this in turn led to greater isolation.

Restrictions on equipment allowed into APODs were severe, with a client at Kangaroo Point refusing access to a rubber exercise band given to him by a physiotherapist. Any item sent to clients in APODs had to be screened through the main detention centre and sometimes subject to COVID-19 quarantining.

Strict COVID-19 quarantine measures were introduced at APODs and detention centres, eliminating all visitors and imposing 7 -14 days quarantine if one went to an outside appointment. This meant many clients were put in an unenviable situation of refusing to attend medical appointments while in APODs/detention. People held in quarantine were often refused access to their personal effects, including mobile phones or anything they did not have with them during the appointment.

For many who already had poor mental health, a week of isolation from the rest of the group was especially harmful and intolerable and hence it is preferable to skip vital external medical appointments rather than be subjected to lengthy quarantine. “ABF [Australian Border Force] said I need another scan at the hospital, but I refuse. I will not go. I will wait. I cannot go to quarantine,” one refugee at Park Hotel said.

Christmas Island

Christmas Island was closed down in 2018 after a decade of use, however, the Morrison Government reopened the detention centre in 2019 and in 2020 during the COVID-19 pandemic began forcibly moving people caught in Australia’s immigration detention network to the remote island.

At the time of its reopening, medical experts across Australia – including the Australasian Society for Infectious Diseases and the Australasian College for Infection Prevention and Control – advised that the Government release people held in detention to protect against a widespread outbreak.

Human rights groups were also greatly concerned that people seeking asylum and refugees may return to Christmas Island due to the previous abusive treatment of people held in detention there. The Australia Border Force at the time said: "No refugees are being transferred to [Christmas Island.]"

Within 9 months ASRC knew of 103 refugees that had been transferred to Christmas Island, of which 102 have a history of self-harm, mental health conditions or physical health conditions requiring specialist care.

There are currently around 212 people held on Christmas Island around 90 of whom had protection, refugee or humanitarian visas, which were cancelled by the Minister of Home Affairs. Within this group 63 are engaged in an ongoing visa assessment process, merits review, judicial review or ministerial intervention process, according to Senate Estimates.[44] Access to lawyers and communication is limited on Christmas Island making it difficult for caseworkers and lawyers to contact their clients. There is also a paucity of medical treatment or support.

The Australian Human Rights Commission has called for the closure of Christmas Island as not fit for purpose.

Our clients report an environment of fear and pervasive despair. There is a perception that they have been abandoned as lost on Christmas Island and deliberately exposed to these severe conditions as a means of punishment. Some clients described it as feeling like being put in the rubbish.

The ASRC recommends that the Christmas Island facility be closed permanently as a matter of urgency.

Views on OPCAT implementation

Comments on National Preventive Mechanisms (NPM) designation process

The Australian Government ratified OPCAT in December 2017 and elected to defer its obligation to establish a National Preventive Mechanism (NPM) until January 2022. At the seventy-third session of the Committee against Torture, Australia sought an extension of time within which to establish a NPM, citing the coronavirus pandemic, the federal system of government, and resources.[45] The Committee granted a one-year extension of time until December 2023.[46]

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[44] Legal and Constitutional Affairs Committee, Home Affairs Portfolio: AE22-055 - Christmas Island detainees (Apr 2022)

[45] Committee against Torture, "Decision of the Committee against Torture, adopted at its seventy-third session (19 April - 13 May 2022), on the request of Australia, under article 24, paragraph 2, of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", para [4] <https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT_CAT_DES_AUS_73_33933_E.pdf>.

[46] Commonwealth Ombudsman, "Monitoring Places of Detention - OPCAT", <https://www.ombudsman.gov.au/what-we-do/monitoring-places-of-detention-opcat>; Committee against Torture, "Decision of the Committee against Torture, adopted at its seventy-third session (19 April - 13 May 2022), on the request of Australia, under article 24, paragraph 2, of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", para [4].

Currently, the Commonwealth Ombudsman is responsible for performing the Commonwealth NPM function and monitors places of immigration detention under its NPM mandate.[47] To ensure compliance with the OPCAT, it is critical that any other bodies designated as NPM bodies are independent,[48] and have adequate resources to carry out their function.[49]

The Ombudsman Regulations 2017 (the Regulations), which provide for the function of the Ombudsman as a NPM in Division 2, fail to provide for the expansive range of responsibilities that NPM bodies are to be delegated under the OPCAT. For example, visiting places of detention for the purposes of observing conditions of detention, identified in Article 19 of the OPCAT as a "minimum" power, is not provided for in the Regulations. The Regulations also fail to provide for the power of NPM bodies to submit proposals and observations on drat or existing legislation.

The Subcommittee on the Prevention of Torture (SPT) has indicated that establishing a NPM through enacting legislation is imperative for ensuring full compliance with OPCAT and the NPM Guidelines.[50] However, contrary to this indication, the Australian Government has said that it does not intend on enshrining the NPM model, or required inspections of detention facilities by the SPT, through legislation.[51] Rather, the government's indications suggest that the intention is to enter an agreement with the states and territories formalising the NPM model, meaning the mechanism would be incapable of judicial enforcement.[52] The ASRC shares the concern of other stakeholders that the Australian Government does not intend to enshrine the NPM model in domestic legislation contrary to the guidance of the SPT.[53]

Moreover, initial indications by the government suggested that the NPM would initially focus its attention on "primary places of detention", which, while including immigration detention centres, does not include all places where persons are detained for immigration purposes, such as Alternative Places of Detention (APOD).[54] This is of particular concern given the harsh and unsuitable conditions experienced by persons detained in APODs. Such an approach would also be contrary to the guidance of the SPT that the NPM should be permitted to visit all, including suspected, places of deprivation of liberty.[55]

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[47] Australian Human Rights Commission, "Implementing OPCAT in Australia", 2020, p 23.
[48] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) art 18(1).
[49] Ibid art 19(3).
[50] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism: recommendations and observations addressed to the State party", UN Doc CAT/OP/NLD/1, 3 November 2016), para [24]-[26].
[51] Australian Human Rights Commission, "OPCAT in Australia: Interim report to the Commonwealth Attorney-General", September 2017, para [70].
[52] Commonwealth of Australia, "Senate Legal and Constitutional Affairs Legislation Committee, Estimates", 23 May 2018, p 122.
[53] Australian Human Rights Commission, "OPCAT in Australia: Interim report to the Commonwealth Attorney-General", September 2017, para [71].
[54] Senator George Brandis, "2017 DFAT-NGO Forum on Human Rights", 9 February 2017 <https://www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement>.
[55] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Guidelines on National Preventive Mechanisms", UN Doc CAT/OP/12/5, 9 December 2010, paras [24]-[25].

In devising and implementing the NPM model in Australia, the ASRC further supports the meaningful consultation of non-governmental and civil society organisations to help ensure the effectiveness and workability of the final NPM model and compliance with human-rights-based principles in its design and implementation. It is critical that any organisations incorporated in the NPM model without specific experience in human rights receive education on the OPCAT and its enforcement targeted at building the capacity of these organisations to effectively monitor, assess and improve conditions in detention facilities, as well as awareness on engaging with vulnerable groups, including children, Aboriginal and Torres Strait Island peoples, and people with disabilities.

The ASRC also supports the involvement of human rights organisations, including the AHRC, in the final NPM model, noting that, unlike the Commonwealth Ombudsman, the AHRC has particular expertise in the monitoring of detention conditions against international human rights standards. These organisations may be well-placed to deliver training to other organisations incorporated into the NPM without specific experience in human rights law and policy.

Comments on cooperation of authorities to NPM recommendations

For the NPM model ultimately implemented in Australia to achieve its purpose of ensuring conformity with the OPCAT, it is vital that government authorities, including the Department of Home Affairs and the Australian Border Force, respect the rights and powers of NPM bodies stipulated in Articles 19 and 20 of the OPCAT.

This includes ensuring that a NPM has the power to examine the treatment of people in detention facilities,[56] make recommendations directed at the improvement of detention conditions,[57] submit proposals and comment upon draft or existing legislation,[58] conduct private interviews with people held in detention and any person they wish to interview,[59] choose the places and people they wish to visit,[60] and share information with the SPT.[61]

To enable the NPM bodies to effectively perform these functions, and in accordance with the terms of the OPCAT, bodies must have access to all information regarding persons detained in places of detention;[62] all information concerning the treatment of those detained persons and the conditions of their detention;[63] as well as unimpeded access to their places of detention.[64]

To ensure compliance with the obligations of the Australian Government under the OPCAT, it is further vital that any recommendations, observations, and comments made by NPM bodies with

[56] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) art 19(a).
[57] Ibid art 19(b).
[58] Ibid art 19(c).
[59] Ibid art 20(d).
[60] Ibid art 20(e).
[61] Ibid art 20(f).
[62] Ibid art 20(a).
[63] Ibid art 20(b).
[64] Ibid art 20(c).

respect to places and conditions of detention are given serious consideration with a view to acting upon those recommendations, observations and comments as soon as reasonably possible. To do otherwise would be contrary to the terms of Article 22 of the OPCAT, requiring state authorities to examine the recommendations of NPM bodies, and enter into a dialogue with those bodies on possible implementation measures, as well as rendering the efforts of state and non-government authorities to establish an effective and workable NPM system futile.