A Legislative Vacuum

The Healthcare Crisis in Onshore Immigration Detention

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I Introduction

Healthcare in Australian immigration detention is in crisis. For many years now, people in immigration detention continue to be arbitrarily refused medical treatment, leading to the exacerbation and non-diagnosis of many serious conditions. Consequently, healthcare services for people in immigration detention are not comparable to those available to the Australian community.

This paper reflects the views of the Public Interest Advocacy Centre ('PIAC') and is based on our work. It sets out the current mechanisms in place regarding the provision of healthcare in onshore immigration. We then set out the legislative and common law framework, focusing on the federal government's non-delegable duty of care to the people it detains, and we highlight the absence of any legislative provisions that entrench a minimum standard of healthcare. Finally, we provide an overview of our findings to demonstrate that healthcare in immigration detention is in crisis, as informed by our clients' experiences.

This article shows that the Australian government is failing to provide people in immigration detention with access to the medical care and treatment they need. This is despite the fact that the federal government owes a clear common law duty of care to the people it detains.[1] We argue that non-compliance is exacerbated because this duty is not reflected in legislation. One way to assist with government oversight would be to introduce a regulation that reflects that people in immigration detention are entitled to access healthcare commensurate with Australian community standards. While legislative standards are a key component of ensuring people in immigration detention obtain the healthcare they need, we recognise that arbitrary and indefinite detention is inherently harmful, and detention should be a last resort.

II Background to PIAC's Work

PIAC launched its Asylum Seeker Rights Project in September 2016 to address serious concerns about the lack of adequate healthcare in Australia's onshore immigration detention system.[2] PIAC does not support Australia's system of mandatory immigration detention. This system holds people for excessive and indefinite periods of time and causes harm to their physical and mental health. We maintain that it is a system that is cruel and unnecessary.

Australia's system of immigration detention is implemented in a way that causes harm, including the failure to ensure people in detention have access to an adequate standard of health and medical care. The focus of our work to date has been ensuring that people in immigration detention have access to the medical care and treatment they need at a standard consistent with the Australian community.

We run strategic litigation, file complaints with agencies and oversight bodies, make submissions, engage with decision-makers and use the media to protect these basic human rights of asylum seekers and refugees. In 2018, we released *In Poor Health: Health Care in Australian Immigration Detention* ('*In Poor Health*'), a report into the state of healthcare in Australian immigration.[3] We wrote a follow-up report in December 2021 called *Healthcare Denied: Medevac and the Long Wait for Essential Medical Treatment in Australian Immigration Detention* ('*Healthcare Denied*'),[4] which demonstrates that healthcare in immigration detention remains in crisis.

III An Overview of Healthcare in Australian Onshore Immigration Detention

Australian law requires all non-citizens in Australia without a valid visa, including people seeking asylum, to be detained in immigration detention.[5] As of June 2022, there are 1,398 people detained in onshore immigration detention.[6] The average length of time that people are detained is currently 742 days.[7] This can be contrasted with the United States of America, where the average length of stay is 55 days, and in Canada, where it is 14 days.[8] Detaining people for these extended periods is disproportionate to any legitimate aim. It is punitive in its impact and contrary to the position of the United Nations Office of the High Commissioner for Human Rights Working Group on Arbitrary Detention, which has consistently held that immigration detention should never be punitive, and seeking asylum is not a criminal act.[9] Regrettably, the High Court of Australia has consistently upheld the lawfulness of indefinite immigration detention.[10]

Healthcare services to people in onshore detention are delivered and facilitated by International Health and Medical Services ('IHMS'), a for-profit business contracted by the Commonwealth government.[11] IHMS has delivered services in immigration and community detention since 2004.[12] The most recent contract was entered into on 11 December 2014.[13] The current contract is valued at $688 million for immigration detention facilities and community detention, and is due to expire on 10 December 2023.[14] IHMS delivers these services as directed by the Commonwealth, according to the terms and conditions of the contract.

IV The Legal Framework: A Non-Delegable Duty of Care

As we set out in *In Poor Health,* the Commonwealth government has a duty of care to prevent any reasonably foreseeable harm to people detained in onshore immigration detention. This duty means that the Commonwealth is responsible for providing a range of services to them, including healthcare.[15] This duty exists because people in immigration detention are detained against their will (the same as prisoners) and are especially vulnerable.[16]

This obligation is not in dispute. As noted by the Commonwealth Ombudsman in 2013:

> Because the Department [of Immigration and Citizenship] has a high level of control over particularly vulnerable people, its duty of care to detainees is therefore a high one. It is not enough for the department to avoid acting in ways that directly cause harm to detainees. It also has a positive duty to take action to prevent harm from occurring.[17]

The Australian government's non-delegable duty of care owed to people in immigration detention, including in relation to providing adequate health services, is well-established under the common law. As to the content of this duty, in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,[18] Gleeson CJ noted:

> Harsh conditions of detention may violate the civil rights of an alien. An alien does not stand outside the protection of the civil and criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a detention centre fail to comply with their duty of care, they may be liable in tort.[19]

A suite of cases confirms that Australia not only owes a non-delegable duty of care to people in immigration detention, but also that the government has historically failed to fulfil this duty.[20]

V The Legal Framework: A Legislative Vacuum

As we highlighted in *In Poor Health*, despite the common law position that the Commonwealth government owes a non-delegable duty of care to provide appropriate health services to people in immigration detention, this is not reflected in the current legislative framework. Section 273 of the *Migration Act 1958* (Cth) ('*Migration Act*') confers power on the Minister to make regulations regarding the day-to-day running of facilities. These regulations could provide useful legislative guidance to clarify the 'operation and regulation of detention centres'.[21] However, none of the regulations made under the *Migration Act*[22] provide for the 'operation and regulation of detention centres' in relation to the provision of adequate medical care.[23]

The absence of legislative standards has been criticised by Australian courts. For example, in *Mastipour v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*, Selway J noted: 'What is surprising is that there are virtually no provisions, either in the [*Migration*] *Act* or in the *Migration Regulations 1994* (Cth) which purport to regulate the manner and conditions of that detention'.[24] Finn J was more critical: 'The present legislative vacuum is, in my view, potentially unfair both to those involved in the conduct of detention centres and to the detainees. … I need hardly add that this state of affairs is not conducive to ordered and principled public administration'.[25] This 'legislative vacuum' contributes to ambiguity and non-compliance.[26] Further, it stands in stark contrast to the laws of Australian states and territories that ensure people in correctional custody have a guaranteed right to reasonable medical care and treatment.[27]

VI A Healthcare Crisis

The provision of healthcare in Australian onshore immigration detention is failing to meet the basic needs of the people we detain. Healthcare services for people in immigration detention are not comparable to those available to the Australian community. For many years now, people in immigration detention have been arbitrarily refused or delayed medical treatment, leading to exacerbation and failure to diagnose many serious conditions. Furthermore, indefinite and arbitrary immigration detention causes mental illness and worsens existing medical conditions.[28] Prolonged immigration detention is known to have a significant negative impact on mental health and there are increasing numbers of asylum seekers who have been detained for increasing periods of time.[29] The Commonwealth Ombudsman has reported that 'immigration detention in a closed environment for longer than six months has a significant, negative impact on mental health'.[30]

The failure to create minimum legislative standards of healthcare that are commensurate with healthcare received by Australians in the community has, in our view, contributed to the healthcare crisis in onshore immigration detention.[31] Our recent casework confirms that there is chronic non-compliance with the common law duty as it pertains to the provision of healthcare.[32] These serious problems are ongoing — made even more complex by the COVID-19 pandemic — and highlight the need for urgent reform. These concerns have been echoed, over many years, by organisations such as the Australian National Audit Office[33] and the Australian Human Rights Commission ('AHRC'),[34] and confirmed by the Parliamentary Joint Committee of Public Accounts and Audit.[35]

In conducting our casework, we have identified several particularly concerning issues, including:

- arbitrary failure to provide medical treatment to refugees and asylum seekers transferred to Australia expressly to receive treatment (the 'Medevac cohort');
- routine denial of antiviral therapy for people detained in immigration detention living with hepatitis C; and
- arbitrary use and overuse of handcuffs and mechanical restraints, particularly when transferring detained asylum seekers with poor mental health to external medical appointments or between facilities.

VII Findings from PIAC's Casework

A Medevac Cohort

As we set out in *Healthcare Denied*, it is of particular concern that many people who were transferred to Australia to access urgent medical treatment under the

'Medevac scheme'[36] experienced significant delays to access healthcare once they arrived in Australia.[37] The Medevac scheme provided for asylum seekers and refugees to be transferred from Nauru and Papua New Guinea to Australia to obtain urgent medical care, in circumstances where medical treatment was not available in those places.[38] The scheme operated for eight months until December 2019.[39] Approximately 192 people were transferred to Australia during that period.[40]

Everyone transferred to Australia under the Medevac scheme was arbitrarily detained in onshore immigration detention facilities upon arrival, despite the fact that many were already living in the community offshore in Nauru and Papua New Guinea where they were determined to be refugees.[41] Some people were detained in hotels where the detention conditions have been widely condemned.[42] Many in the cohort waited for months or years for the healthcare that expressly triggered their transfer to Australia. This has included excessive delay for treatment of painful and debilitating conditions including severe gum disease, chest pain and heart palpitations.[43] While most people transferred under the Medevac scheme were released just prior to the federal election in May 2021, some are still detained.[44]

The combination of delayed treatment and long-term confinement has also exacerbated existing medical conditions. Since being transferred, onshore detention conditions have resulted in the deterioration of many people's mental health to the point they have been at risk of suicide.[45] This is not limited to the Medevac cohort. For example, between 2020 and 2021, there were 195 instances of self-harm across the entire onshore immigration detention population.[46] The experience of the Medevac cohort reflects access to healthcare in immigration detention generally: in too many cases, the government is failing to provide basic medical care for people in Australian immigration detention.

B Routine Denial of Antiviral Therapy for Detainees Living with Hepatitis C

Shortly after the launch of the Asylum Seeker Rights Project, PIAC was flooded with complaints from people in immigration detention living with hepatitis C who were denied curative, antiviral therapy despite it being readily available to people living with hepatitis C in the community. Over the last five years, PIAC has ensured access to treatment for nine immigration detainee clients living with hepatitis C, including in two cases before the Federal Court of Australia and a group complaint to the Commonwealth Ombudsman.[47]

As a result of PIAC's joint advocacy with the Commonwealth Ombudsman, a breakthrough systemic outcome was achieved in 2019, when the Commonwealth agreed to provide all immigration detainees living with hepatitis C with antiviral therapy, commensurate with Australian community standards.[48] However, at the time of writing this article, and despite this commitment and ongoing advocacy, the Commonwealth government has not fully implemented its revised policy in the field. People in immigration detention living with hepatitis C remain without treatment, which could ultimately have significant consequences for their health.

C Arbitrary Use of Force and the Overuse of Handcuffs

Our work with people in immigration detention demonstrates that the overuse of handcuffs is a significant barrier to people receiving medical treatment.[49] Our casework reveals that people in immigration detention, regardless of their security profile, are routinely handcuffed during and in transit to medical appointments. These practices are particularly concerning given that many asylum seekers have a history of trauma and torture.[50] In many instances, the use of force and restraints in immigration detention is arbitrary, yet the impact on our clients is severe.

The experiences of our clients are consistent with the findings made by the AHRC and the Commonwealth Ombudsman. In 2019, the AHRC published a report that highlighted the widespread use of restraints in immigration detention and recommended that practices be immediately tailored to individual circumstances and risks.[51] In 2020, the Commonwealth Ombudsman echoed these concerns and raised the growing tendency for force, including the use of handcuffs, to be used as the first, rather than last choice in facilities.[52] The Ombudsman expressed concern that the use of restraints was being 'exercised in a manner both inconsistent with the [Department of Home Affairs'] own procedures and possibly without legal basis'.[53]

In November 2020, PIAC filed a landmark litigation test case in the Federal Court of Australia challenging the lawfulness of restraints in immigration detention.[54] Our client, Yasir,[55] is living with severe mental illness and the use of handcuffs

is particularly retraumatising for him. Yasir is taking action under the *Disability Discrimination Act 1992* (Cth) and challenging the lawfulness of handcuffs under the *Migration Act*. The use of handcuffs has led to frequent disruption and delay to Yasir's medical care. As a result of his background of torture and trauma, the use of handcuffs causes Yasir to have seizures, which has prevented him from attending specialist appointments. The case is ongoing.

VIII Conclusion: Are Legislative Standards Enough?

Our casework demonstrates the Commonwealth government's poor treatment and inadequate provision of healthcare for people in Australian immigration detention. Consequently, people detained onshore are not receiving the same standard of healthcare that is provided to members of the Australian community. The failure to provide this care has serious consequences. It means that the Commonwealth government is not fulfilling its duty of care to people in immigration detention. This is particularly appalling given that many people detained in onshore immigration detention have already experienced serious trauma before arriving in Australia. This trauma is compounded by prolonged — and, in some cases, indefinite — detention and the unsatisfactory conditions of confinement, including the use of hotels.

The absence of legislation to guarantee people in immigration detention a right to healthcare commensurate with Australian community standards is a gap that must be filled as a matter of priority. However, we recognise that legislative standards alone are not enough. Legislative change must be accompanied by government action to ensure that people in immigration detention actually receive the healthcare to which they are entitled. These steps are essential for the Commonwealth government to properly fulfil its duty of care.

Finally, while the provision of adequate healthcare in detention is a basic human right, we note that Australia's system of arbitrary and indefinite detention is inherently harmful and punitive. It continues to cause further harm and exacerbate existing medical conditions. It should only occur as a last resort.

1 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 216 CLR 486, 499 [21] (Gleeson CJ) ('*Behrooz*').
2 Public Interest Advocacy Centre, *Healthcare Denied: Medevac and the Long Wait for Essential Medical Treatment in Australian Immigration Detention* (Report, December 2021) 8 <https://piac.asn.au/wp-content/uploads/2021/12/PIAC_Medevac-Report_2021_IssueF_250122.pdf> ('*Healthcare Denied*').
3 Public Interest Advocacy Centre, *In Poor Health: Health Care in Australian Immigration Detention* (Report, June 2018) <https://piac.asn.au/wp-content/uploads/2018/06/18.06.14-Asylum-Seeker-Health-Rights-Report.pdf> ('*In Poor Health*').
4 *Healthcare Denied* (n 2).
5 *Migration Act 1958* (Cth) s 189 ('*Migration Act*').
6 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 30 June 2022) 4 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-june-2022.pdf>.
7 Ibid 12.
8 American Immigration Council, *Immigration Detention in the United States by Agency* (Fact Sheet, 2 January 2020) 4 <https://www.americanimmigrationcouncil.org/research/immigration-detention-united-states-agency>; Government of Canada, 'Annual Detention, Fiscal Year 2019 to 2020', *Canada Border Services Agency* (Web Page, 8 September 2020) <https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2019-2020-eng.html>.
9 Human Rights Council Working Group on Arbitrary Detention, *Opinion No 17/2021 concerning Mirand Pjetri (Australia)*, UN GAOR, 90th sess, UN Doc A/HRC/WGAD/2021/17 (3–12 May 2021) 9 [78], 11 [100]. See also Human Rights Council Working Group on Arbitrary Detention, *Opinion No 28/2017 concerning Abdalrahman Hussein (Australia)*, UN GAOR, 78th sess, UN Doc A/HRC/WGAD/2017/28 (19–28 April 2017) 5 [32]–[33]; Human Rights Council Working Group on Arbitrary Detention, *Opinion No 42/2017 concerning Mohammad Naim Amiri (Australia)*, UN GAOR, 79th sess, UN Doc A/HRC/WGAD/2017/42 (21–25 August 2017) 5 [28]–[30]; Human Rights Council Working Group on Arbitrary Detention, *Opinion No 35/2020 concerning Jamal Talib Abdulhussein (Australia)*, UN GAOR, 87th sess, UN Doc AR/HRC/WGAD/2020/35 (27 April–1 May 2020) 7 [56], 10 [84], 13 [99].
10 See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 [33] (McHugh J), 609 [126] (Gummow J); *Commonwealth v AJL20* (2021) 391 ALR 562, 578–9 [58] (Kiefel CJ, Gageler, Keane and Steward JJ), 593 [106] (Edelman J), quoting *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 586 (Williams J).
11 Auditor-General, Australian National Audit Office, *Delivery of Health Services in Onshore Immigration Detention: Department of Immigration and Border Protection* (Report No 13, 1 September 2016) 15–16 ('*Delivery of Health Services*').
12 Ibid.
13 Ibid.
14 Details of the tender notice are available at Australian Government, 'Contract Notice View: CN2792102-A1', *AusTender* (Web Page, 27 September 2019) <https://www.tenders.gov.au/Cn/Show/d6c87cb5-2f14-4ddd-9f32-f4b11089526a>. See also *Delivery of Health Services* (n 11) 15–16 [1.9].
15 *Delivery of Health Services* (n 11) 15 [1.8]; Department of Home Affairs, 'Detention Services Manual: Safety and Security Management' (Procedural Instruction, 10 October 2018) 5–6.
16 See, eg, *In Poor Health* (n 3) 15.
17 Commonwealth and Immigration Ombudsman, *Suicide and Self-Harm in the Immigration Detention Network* (Report No 2, May 2013) 27 [4.6] ('*Self-Harm in the Immigration Detention Network*').
18 *Behrooz* (n 1).
19 Ibid 499 [21].
20 See, eg, *Mastipour v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 259 FCR 576 ('*Mastipour*'); *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217 ('*S v Secretary*'); *SBEG v Commonwealth* (2012) 208 FCR 235; *MZYYR v Secretary,*

Department of Immigration and Citizenship (2012) 292 ALR 659; *AS v Minister for Immigration and Border Protection* [2014] VSC 593.
21 *Migration Act* (n 5) s 273(2).
22 The primary regulation is the *Migration Regulations 1994* (Cth) ('*Migration Regulations*').
23 Ibid. Regulation 5.35 does concern the medical treatment of immigration detainees but only in the context of the Secretary's power to take certain steps in instances where 'there will be a serious risk' to the immigration detainee's 'life or health'. The regulation does not address the standard or quality of medical care more generally.
24 *Mastipour* (n 20) 578 [8].
25 Ibid 577 [2].
26 See *In Poor Health* (n 3) 5.
27 See, eg, *Corrections Management Act 2007* (ACT) s 53; *Correctional Services Act 2014* (NT) s 82; *Corrections Act 1986* (Vic) s 47(1)(f).
28 See, eg, Irina Verhülsdonk, Mona Shahab and Marc Molendijk, 'Prevalence of Psychiatric Disorders among Refugees and Migrants in Immigration Detention: Systematic Review with Meta-Analysis' (2021) 7(6) *BJPsych Open* e204:1–8; Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (Report, March 2012) ch 5, 103–33.
29 Verhülsdonk, Shahab and Molendijk (n 28) e204:1–8; Joint Select Committee on Australia's Immigration Detention Network (n 28) ch 5, 103–33. See also *Healthcare Denied* (n 2); *In Poor Health* (n 3).
30 *Self-Harm in the Immigration Detention Network* (n 17) 59 [7.80]. See also *Healthcare Denied* (n 2); *In Poor Health* (n 3).
31 *Healthcare Denied* (n 2) 5.
32 Ibid. See also *In Poor Health* (n 3) 24.
33 *Delivery of Health Services* (n 11).
34 See, eg, Australian Human Rights Commission, *Inspection of Yongah Hill Immigration Detention Centre* (Report, 16–18 May 2017) <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-yongah-hill-immigration-detention>; Australian Human Rights Commission,, *Inspection of Melbourne Immigration Transit Accommodation* (Report, 9–10 March 2017) <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-melbourne-immigration-transit>; Australian Human Rights Commission, *Inspection of Maribyrnong Immigration Detention Centre* (Report, 7–8 March 2017) <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-maribyrnong-immigration-detention>.
35 Joint Committee of Public Accounts and Audit, Parliament of Australia, *Commonwealth Procurement: Inquiry Based on Auditor-General's Reports 1, 13 and 16 (2016-17)* (Report 465, September 2017).
36 *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) ('*Home Affairs Legislation Amendment*').
37 *Healthcare Denied* (n 2) 27.
38 *Migration Act* (n 5) ss 198C–198J, as amended by *Home Affairs Legislation Amendment* (n 36) sch 6.
39 The Medevac law was repealed on 4 December 2019: *Migration Amendment (Repairing Medical Transfers) Act 2019* (Cth). The repeal bill was passed following a 'secret deal' between Senator Jacqui Lambie and the Coalition government: see Alex Reilly, 'Explainer: The Medevac Repeal and What it Means for Asylum Seekers on Manus Island and Nauru', *The Conversation* (online, 4 December 2019) <https://theconversation.com/explainer-the-medevac-repeal-and-what-it-means-for-asylum-seekers-on-manus-island-and-nauru-128118>.
40 Refugee Council of Australia, *Seven Years On: An Overview of Australia's Offshore Processing Policies* (Report, July 2020) 13 ('*Seven Years On*'); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *AE20-216: Medevac Transferees* (Answer to Question on Notice No 216, 2 March 2020).
41 *Seven Years On* (n 40) 11.
42 *Healthcare Denied* (n 2) 13–14.
43 Ibid 17, 29, 31.
44 See, eg, Eden Gillespie, 'More Refugees Released from Detention in Move "Absolutely Due" to Election', *The Guardian* (online, 4 April 2022) <https://www.theguardian.com/australia-news/2022/apr/04/absolutely-due-to-upcoming-election-australian-government-releases-more-refugees-from-detention>.
45 See, eg, *Healthcare Denied* (n 2) 17.
46 Department of Home Affairs, *Annual Report 2020–2021* (Report, September 2021) 120 <https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/home-affairs-annual-report-2020-21.pdf>.
47 *In Poor Health* (n 3) 27–9. See also Helen Davidson, 'Man Waits Years for Hepatitis C Medication after Immigration Detention Transfer', *The Guardian* (online, 22 October 2019) <https://www.theguardian.com/australia-news/2019/oct/22/man-waits-years-for-hepatitis-c-medication-after-immigration-detention-transfer>.
48 'Hepatitis C Win', *Public Interest Advocacy Centre* (Web Page, 2 June 2020) <https://piac.asn.au/project-highlight/hepatitis-c-win/>.
49 *In Poor Health* (n 3) 4, 24; *Healthcare Denied* (n 2) 20.
50 See *In Poor Health* (n 3) 4, 24.
51 Australian Human Rights Commission, *Risk Management in Immigration Detention* (Report, 2019) 29–30 <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019?_ga=2.195069100.1607295212.1656389767-1412818163.1656389767>.
52 Commonwealth Ombudsman, *Monitoring Immigration Detention: Review of the Ombudsman's Activities in Overseeing Immigration Detention* (Report, July–December 2019) 23 [6.35] <https://www.ombudsman.gov.au/__data/assets/pdf_file/0015/111390/Six-monthly-immigration-detention-report-Jul-Dec-2019.pdf>.
53 Ibid.
54 Public Interest Advocacy Centre, 'Test Case Challenges the Misuse of Handcuffs against Detained Asylum Seekers' (Media Release, 24 November 2020) <https://piac.asn.au/2020/11/24/excessive-force-test-case-challenges-the-misuse-of-handcuffs-against-detained-asylum-seekers/>.
55 Not his real name.