Dissenting Report by Labor and Greens members in relation to the Migration Amendment (Repairing Medical Transfers) Bill 2019

1.1 Australian Labor Party and Australian Greens members (dissenting members) of the Parliamentary Joint Committee on Human Rights (committee) consider it regrettable that it has become necessary to prepare another dissenting report for this previously well-functioning committee.

1.2 However, the important mandate of this committee to examine bills for compatibility with the rights and freedoms recognised or declared by the seven core international human rights treaties that Australia is a signatory to must be discharged by its members.

1.3 At the time of the formation of the committee, the then Attorney-General McClelland, said in his second reading speech:

> The Parliamentary Joint Committee on Human Rights will contribute to debate on human rights issues by examining and reporting to parliament on human rights compatibility with new and existing laws and in that sense that parliamentary committee process… will promote greater participatory democracy by enabling Australian citizens to have a direct say on how their rights might be affected by particular legislation.[1]

1.4 As members of this committee, we must never lose sight of the committee's important mandate. This committee does not exist to be partisan; and it does not exist to rubber-stamp government policy, irrespective of the political party occupying the Treasury benches.

1.5 The legislation scrutinised in this report deserves to be properly considered by this committee through a human rights framework. The limitation of human rights that may flow from the repeal of the subject legislation, include a limitation of: Australia's 'non-refoulement' obligations under the International Covenant on Civil and Political Rights (ICCPR) (including the right to an effective remedy) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the right to health.

1.6 Reputable bodies have raised concerns about outcomes flowing from decisions of the Coalition Government. The Office of the United Nations High Commissioner for Refugees has cautioned about a 'deteriorating health situation' in

1 The Hon. Robert McClelland MP, Attorney General, *House of Representatives Hansard*, 23 November 2010, p. 3525.

Papua New Guinea and Nauru which has 'led to significant risks of irreparable harm and loss of life'.

1.7 The Queensland State Coroner has raised concerns in relation to the death of Hamid Khazaei that 'insufficient and transparent and accountable procedures for acting upon serious health concerns can have life-threatening and tragic consequences'.[2] Hamid Khazaei was a 24 year old Iranian citizen who became ill while being detained on Manus Island. Throughout his time in detention, the Australian government had significant responsibilities for Mr Khazaei's health and wellbeing.

1.8 We mention these matters in introduction to this dissenting report by way of reminder that legislation can save lives, it can be transformative, but in some cases when human rights are limited to such an extent to cause harm, it can be deadly. It is why the Human Rights Committee is so important and its work should not be hindered or tainted by partisanship. As the work of the Human Rights Committee is closely followed by similar committees internationally, and by the judiciary, it would be a horrible reflection of the members of this committee if in the 46th Parliament the Human Rights Committee became politicised.

1.9 Currently, the medical transfer provisions of the *Migration Act 1958* (Migration Act)[3] allow two treating doctors to recommend that a person, held under regional processing arrangements[4] be transferred to Australia for medical treatment or assessment.[5] Within 72 hours, the minister must approve the transfer unless the minister reasonably believes or suspects there are medical,[6] security or character grounds for refusal.[7] If the minister's ground for refusing a transfer is medical, the matter is reviewed by the Independent Health Advice Panel. If the panel recommends the transfer be approved, the minister must approve the transfer unless there remain security or character grounds for refusal.[8]

1.10 The bill seeks to repeal these medical transfer provisions.[9] Additionally, the bill seeks to apply the requirement under section 198(1A) of the Migration Act that

2 Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, Findings of Inquest, 30 July 2018.

3 As amended by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019.*

4 Nauru and Papua New Guinea are 'regional processing countries' for the purpose of the *Migration Act 1958*.

5 *Migration Act 1958*, section 198E.

6 Except in cases of children under 18 years of age: *Migration Act 1958*, sections 198D.

7 *Migration Act 1958*, sections 198D; 198E (3), (3A), (4).

8 *Migration Act 1958*, section 198F.

9 Schedule 1.

persons transferred to Australia under the medical transfer provisions are to be removed from Australia or returned to a regional processing country, as soon as reasonably practicable, unless a specified exemption applies.[10]

The obligation of non-refoulement and the right to an effective remedy

1.11 In *Report 4 of 2019*,[11] the Parliamentary Joint Committee on Human Rights raised a number of human rights concerns with regards to this bill, and requested further information from the minister as to the compatibility of these measures with the obligation of non-refoulement and the right to an effective remedy, in particular

- what are the conditions for such individuals in regional processing countries and is there a risk that such conditions could amount to torture or cruel, inhuman or degrading treatment or punishment;
- what safeguards are in place to ensure that a person is not removed from Australia to a regional processing country in contravention of Australia's non-refoulement obligations; and
- whether there is independent, impartial and effective review of any decision to remove the person from Australia.

1.12 As noted in the Parliamentary Joint Committee on Human Rights' initial analysis of this bill,[12] sending a person back to a regional processing country may engage Australia's 'non-refoulement' obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

1.13 These obligations provide that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[13] Non-refoulement obligations are absolute and may not be subject to any limitations.

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10 Schedule 1, items 3-8. The explanatory memorandum also notes, at page 6, that section 198AD of the *Migration Act 1958* (the power to take an unauthorised maritime arrival to a regional processing country) would apply in relation to persons covered by subsections 198AH(1A) and (1B). Subsection 198AH(1B) provides that a child, who has been born in Australia to an unauthorised maritime arrival who was brought to Australia for a temporary purpose, is subject to removal pursuant to section 198AD.

11 Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) pp. 2-9.

12 Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) p. 3.

13 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018).

1.14 As a matter of international law, the obligation of non-refoulement in this bill does not involve the extraterritorial application of obligations. This is because the persons who may be removed from Australia as a result of these amendments are currently present in Australian territory. Australia therefore owes human rights obligations to them, including an obligation not to send them to a country where there is a real risk of that they would face persecution, arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment.

1.15 The obligation of non-refoulement and the right to an effective remedy also require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[14] On a number of previous occasions, the Parliamentary Joint Committee on Human Rights has raised serious concerns about the adequacy of protections against the risk of refoulement in the context of the existing legislative regime.[15] It is unclear from the statement of compatibility whether there is sufficient scope for independent and effective review of such a removal.[16] More generally, it is unclear whether there are sufficient legislative and procedural mechanisms to guard against the consequence of a person being sent to a regional progressing country even in circumstances where there may be a risk that the conditions could amount to torture or cruel, inhuman or degrading treatment or punishment.

1.16 We note the minister's advice, received on 1 October 2019, that Nauru and Papua New Guinea have committed to treat transferees with respect and dignity and in accordance with relevant human rights standards, and that both countries are

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14 International Covenant on Civil and Political Rights, article 2 (the right to an effective remedy).

15 See, for example, the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77-78. The UN Human Rights Committee in its Concluding observations on Australia recommended '[r]epealing section 197(c) of the *Migration Act 1958* and introducing a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations': CCPR/C/AUS/CO/6 (2017), [34]. See, also, Parliamentary Joint Committee on Human Rights*, Report 1 of 2019* (12 February 2019) pp. 14-17; *Report 12 of 2018* (27 November 2018) pp. 2-22; *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

16 In relation to the requirement for independent, effective and impartial review, see *Agiza v Sweden*, UN Committee against Torture Communication No.233/2003 (2005) [13.7]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9]; *Josu Arkauz Arana v France*, UN Committee against Torture Communication No.63/1997 (2000); *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183.

parties to a number of relevant human rights treaties. We also note the advice that the Australian Government works with the governments of Nauru and PNG to provide health, welfare and support services to transferees.

1.17 However, reported conditions for individuals in regional processing countries raise concerns as to the adequacy of these undertakings and arrangements. In 2013 the Parliamentary Joint Committee on Human Rights itself raised human rights concerns about such transfers and about the conditions in regional processing countries. This included concerns in relation to the right to humane treatment in detention; the right not to be arbitrarily detained; the right to health and the rights of the child.[17] The United Nations Committee Against Torture has also expressed concerns about the transfer of individuals to regional processing centres in Papua New Guinea and Nauru in view of reports of 'harsh conditions' and 'serious physical and mental pain and suffering'.[18] Similarly, the UN Special Rapporteur on the human rights of migrants has raised concerns about 'systemic human rights violations' and recommended the closure of regional processing centres.[19] In relation to the conditions on Nauru and Manus Island, the UN Special Rapporteur has specifically stated that '[t]he forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards.'[20] The UN High Commissioner for Refugees (UNCHR) has likewise urged immediate action by Australia to address what it describes as a 'collapsing health situation', and called for all refugees and asylum seekers to be immediately moved to Australia.[21] It has described offshore processing itself as the

17 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (19 June 2013).

18 UN Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5 (2014) [17]. See, also, UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

19 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [77]–[79],[82] and [118].

20 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [80].

21 See UN High Commissioner for Refugees, 'UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates', 12 October 2018 at: https://www.unhcr.org/en-au/news/briefing/2018/10/5bc059d24/unhcr-urges-australia-evacuate-off-shore-facilities-health-situation-deteriorates.html.

cause behind severe and negative health impacts, 'which are as acute as they are predictable'.[22]

1.18 We also note that there have been a number of inquiries into allegations of abuse, self-harm and neglect in relation to the regional processing centres over a number of years, with the Senate Legal and Constitutional Affairs Committee finding in 2017 that refugees and asylum seekers living in regional processing centres are 'living in an unsafe environment'.[23] More recently, Médecins Sans Frontières Australia (MSF) recently reported that 65 per cent of refugee and asylum seeker patients seen by MSF on Nauru had suicidal ideation and/or engaged in self-harm or suicidal acts.[24] MSF also reported that 'curative treatment for the overwhelming majority of cases was not possible whilst the key stressors of uncertainty, isolation and family separation on Nauru was present.'[25] UNHCR similarly report that conditions for refugees and asylum-seekers on Nauru and PNG have 'led to the deterioration of the health of the vast majority…[and] to significant risks of irreparable harm and loss of life.'[26]

1.19 In relation to the existence of sufficient safeguards to ensure that a person is not removed from Australia to a regional processing country in contravention of Australia's non-refoulement obligations, we note advice as to the department's practice of considering non-refoulement obligations prior to a person being transferred from Australia to a regional processing country. We also note the advice

22 See also a joint communication from the Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, to Australia in April 2019 seeking a response to a range of human rights concerns associated with the regional processing centres at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24482.

23 See Senate Standing Committee on Legal and Constitutional Affairs, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*, 21 April 2017, paragraph [7.14].

24 Médecins Sans Frontières (MSF), *Submission 44*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

25 Médecins Sans Frontières (MSF), *Submission 44*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

26 The Office of the United Nations High Commissioner for Refugees (UNHCR), *Submission 7*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

that the minister has the power under section 198AE(1) of the Migration Act to exempt an individual from being removed from Australia to a regional processing country if it is in the public interest to do so. However, administrative arrangements and ministerial discretion would appear to be insufficient to protect against refoulement, particularly noting that the discretion can only be exercised where the minister considers it in the public interest to do so, and not on the basis of a risk to an individual. Further, we note that, for the purposes of exercising removal powers, the Migration Act provides it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.[27] Therefore, there is no statutory protection available to ensure that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia.

1.20 In relation to the availability of independent, impartial and effective review of any decision to remove a person from Australia, we note the minister's advice that 'persons who wish to challenge their removal from Australia or return to a regional processing country are not precluded from seeking judicial review'. However, judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977* and the common law, and represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision.

1.21 The jurisprudence of the UN Human Rights Committee and the UN Committee against Torture establish the proposition that there is a strict requirement for 'effective review' of non-refoulement decisions. The purpose of an 'effective' review is to 'avoid irreparable harm to the individual'. In particular, in *Singh v Canada*, the UN Committee against Torture considered a claim in which the complainant stated that he did not have an effective remedy to challenge the decision of deportation because the judicial review available in Canada was not an appeal on the merits. In this case, the Committee against Torture concluded that judicial review was insufficient for the purposes of ensuring persons have access to an effective remedy. Accordingly, the Parliamentary Joint Committee on Human Rights has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' because it is only available on a number of restricted grounds of review.[28]

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27 See section 197C of the *Migration Act 1958*.

28 See Parliamentary Joint Committee on Human Rights*, Report 1 of 2019* (12 February 2019) pp. 14-17; *Report 12 of 2018* (27 November 2018) pp. 2-22; *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

1.22 The dissenting members note that the Migration Amendment (Repairing Medical Transfers) Bill 2019, in providing for the return to a regional processing country of all persons brought to Australia under the medical transfer provisions, may engage Australia's 'non-refoulement' obligation not to return any person to a country where there is a real risk they would face persecution or other serious forms of harm, including cruel, inhuman or degrading treatment.

1.23 The dissenting members note that reported conditions for individuals in regional processing countries raise concerns as to the adequacy of these undertakings and arrangements in ensuring that persons returned to such countries would not be at risk of suffering serious harm.

1.24 The dissenting members note the minister's advice that an individual assessment is made prior to a person being taken from Australia to a regional processing country, including consideration of whether the transfer would contravene Australia's non-refoulement obligations. However, we note there is no statutory requirement[29] to consider these obligations, and discretionary or administrative safeguards alone are less stringent than the protection of statutory processes and can be amended or removed at any time.

1.25 The dissenting members note the minister's advice that judicial review is available to individuals who wish to challenge their removal from Australia to a regional processing country. However, the obligation of non-refoulement and the right to an effective remedy requires an opportunity for independent, effective and impartial review of decisions to remove a person. Judicial review, without the availability of merits review, is not likely to be sufficient to fulfil the international standard required of 'effective review' as it is only available on a number of restricted grounds of review.

1.26 As such, the dissenting members consider that there is a risk that repealing the current medical transfer provisions could lead to the return of persons to regional processing countries in circumstances that may not be consistent with Australia's non-refoulement obligations and the right to an effective remedy.

Right to health

1.27 In *Report 4 of 2019*,[30] the Parliamentary Joint Committee on Human Rights noted that by repealing the medical transfer provisions, these measures engage and

29 In fact, section 197C of the *Migration Act 1958* specifically states that for the purposes of exercising removal powers, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

30 Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) pp. 2-9.

may limit the right to health. This is because restricting access to a type of medical transfer to Australia may in turn restrict access to appropriate health care for those held under regional processing arrangements (in circumstances where Australia may owe human rights protection obligations).[31] The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and requires available, accessible, acceptable and quality health care.

1.28 The Parliamentary Joint Committee on Human Rights raised concerns that the repeal of the medical transfer provisions may constitute a backward step, that is, a retrogressive measure with respect to the level of attainment of right to health including access to health care.[32] While the statement of compatibility points to the ongoing availability of section 198B of the Migration Act to allow for medical transfers, there is a serious concern that section 198B is likely to provide a lower level of attainment of the right to health and access to health care than the medical transfer provisions which are proposed to be repealed.[33] This is because the use of section 198B to bring a person requiring treatment to a third country including Australia is discretionary and may or may not be exercised. Further, it could potentially be used to transfer a person requiring medical attention to a third country that has a lower standard of health care than Australia.[34] Retrogressive measures, as a type of limitation, may be permissible under international human rights law provided that they address a legitimate objective and are rationally connected and proportionate to achieve that objective.

1.29 As such, the Parliamentary Joint Committee on Human Rights, sought further information from the minister to assist it in completing its assessment of the compatibility of the measure with the right to health, including:

- to what extent the repeal of the medical transfer provisions will restrict access to health care for those held on Nauru and Manus Island; and

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31 See the committee's initial analysis, Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) pp. 7-8. Note that the minister's response did not address the committee's conclusion that Australia exercises effective control over the regional processing centres and that Australia owes human rights obligations to those transferred to, and held in, regional processing countries, including in relation to the right to health.

32 Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) pp. 6-9.

33 Section 198B of the *Migration Act 1958* provides that 'an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia'.

34 For a discussion of the Commonwealth's duty of care relating to offshore medical transfers under section 198B, see *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483. By contrast, for a discussion of the new medical transfer provisions that this bill proposes to repeal, see *CEU19 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCA 1050.

- the adequacy and effectiveness of the remaining discretionary transfer provisions under section 198B of the *Migration Act 1958* in protecting the right to health.

1.30 We note the minister's advice, received on 1 October 2019, that Australia has contracted health services to support the delivery of health care to transferees in regional processing countries. However, in light of reported conditions, there are ongoing concerns around whether the quality of healthcare available to refugees and asylum seekers in regional processing countries is sufficient to meet their complex health needs. As noted by the Parliamentary Joint Committee on Human Rights itself in 2013, concerns have been raised as to the adequacy of access to health care and the right to health for those held under regional processing arrangements.[35]

1.31 The UN Committee on Economic, Social and Cultural Rights has expressed serious concerns about 'harsh conditions' in regional processing centres and 'limited access to basic services, including health care.'[36] It has called on Australia to halt its policy of offshore processing of asylum claims.[37] The UN Special Rapporteur on the human rights of migrants has also raised concerns about the health and health care of those held in regional processing countries including that 'protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental anguish and suffering'.[38]

1.32 More recently, the Office of the United Nations High Commissioner for Refugees reports that despite efforts in PNG and Nauru that have led to isolated improvements in the provision of care in some circumstances, 'locally-available services continue to be inadequate' and the 'deteriorating health situation in both countries has led to significant risks of irreparable harm and loss of life'.[39] *Médecins Sans Frontières* Australia have also raised concerns around the adequacy of available health care services to meet the needs of refugees and asylum seekers on Nauru,

35 See, Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation: Ninth Report of 2013* (19 June 2013) p. 83.

36 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

37 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO (2017) [17].

38 UN Human Rights Council, François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, A/HRC/35/25/Add.3 (2017) [73] and [77].

39 The Office of the United Nations High Commissioner for Refugees (UNHCR), *Submission 7*, p. 5, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

especially in relation to the 'dangerous mental health crisis developing on Nauru', and the lack of 'therapeutic solutions' under existing conditions.[40]

1.33 We note the minister's advice that where a transferee requires medical treatment not available in a regional processing country, they may be transferred to a third country (including Australia) for assessment or treatment, in line with the transfer mechanisms set out in section 198B of the Migration Act, which allows a person to be brought to Australia for a temporary purpose (including for medical or psychiatric assessment or treatment). We also note the minister's advice that the repeal of the medical transfer provisions would not compromise the integrity of these existing medical transfer processes and that all section 198B transfers are based on clinical assessment and recommendation from treating medical practitioners.

1.34 However, the dissenting members of the committee note that section 198B transfers are discretionary. There is no requirement that a person be transferred for medical treatment if it cannot be provided in the regional processing country. As such there is no timeframe for making a decision on whether to transfer a person. In contrast, the medical transfer provisions sought to be repealed require the minister to approve or refuse to approve a person's transfer to Australia within 72 hours after being notified by two or more treating doctors that they are of the opinion the person requires medical or psychiatric assessment that is not being received in the regional processing country and it is necessary to remove them to do so.[41] If the minister refuses to approve a person's transfer to Australia, the Independent Health Advice Panel[42] must conduct a further clinical assessment of the person, and if their advice is that the transfer be approved, the minister must approve the transfer (except where the transfer would be prejudicial to Australia's security or the person has a substantial criminal record).[43]

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40 Médecins Sans Frontières (MSF), *Submission 44*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019; Médecins Sans Frontières (MSF), Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru (December 2018) p. 7.

41 Section 198E of the *Migration Act 1958*.

42 The panel consists of a person occupying the positions of Chief Medical Officer of the Department and the Surgeon‑General of the Australian Border Force; the person occupying the position of Commonwealth Chief Medical Officer; and not less than 6 other members, including: at least one person nominated by the President of the Australian Medical Association; one by the Royal Australian and New Zealand College of Psychiatrists; one by the Royal Australasian College of Physicians; and one who has expertise in paediatric health. See section 199B of the *Migration Act 1958*.

43 Section 198F of the *Migration Act 1958*.

1.35 A number of organisations have recently raised concerns about the frequency of delays in the administration of urgent medical transfers under the discretionary transfer system available under section 198B of the Migration Act and the negative health implications of these delays.[44] The UNHCR highlighted the report of the Queensland State Coroner in relation to the death of Hamid Khazaei as demonstrating 'that insufficiently transparent and accountable procedures for acting upon serious health concerns can have life-threatening and tragic consequences.'[45] Repealing the current mandatory legislative provisions and relying solely on administrative discretion to ensure persons receive adequate medical or psychiatric assessment raises concerns around whether this represents a retrogressive step in relation to the realisation of the right to health for refugees and asylum seekers in regional processing countries.

1.36 The dissenting members note the minister's advice that Australia has contracted health services to support the delivery of health care to refugees and asylum seekers in regional processing countries, and that where an individual requires medical treatment not available in a regional processing country, they may be transferred to a third country (including Australia) for assessment or treatment under section 198B of the *Migration Act 1958* (Migration Act).

1.37 However, the dissenting members note that there are concerns as to whether the healthcare available to refugees and asylum seekers in regional processing countries is sufficient to meet their complex health needs, particularly in relation to the treatment of serious mental health issues. There are also concerns as to whether the discretionary transfer system available under section 198B of the Migration Act adequately protects the right to health for those needing urgent medical care.

1.38 The dissenting members consider that the medical transfer provisions sought to be repealed by this bill would appear to provide a higher degree of access to healthcare. As such, repealing this legislative safeguard may represent an unjustified retrogressive step in relation to the realisation of the right to health for refugees and asylum seekers in regional processing countries.

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44 The Office of the United Nations High Commissioner for Refugees (UNHCR), *Submission 7*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019, citing Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, Findings of Inquest, 30 July 2018; Médecins Sans Frontières Australia (MSF), *Submission 44*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019.

45 The Office of the United Nations High Commissioner for Refugees (UNHCR), *Submission 7*, Legal and Constitutional Affairs Legislation Committee Inquiry into Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019, citing Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, Findings of Inquest, 30 July 2018.

1.39 We draw these human rights concerns to the attention of the minister and the Parliament.

Graham Perrett MP
Deputy Chair
Member for Moreton

Steve Georganas MP
Member for Adelaide

Senator Nita Green
Senator for Queensland

Senator Pat Dodson
Senator for Western Australia

Senator Nick McKim
Senator for Tasmania