Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

16 August 2019

Dear Committee Secretary,

Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions]

We welcome the opportunity to provide a submission to the Committee's Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions].

The Bill proposes to repeal the provisions inserted by Schedule 6 to the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (the 'medical provisions'). If passed, the Bill would repeal two important measures established by this Act: (i) a statutory framework providing an avenue for people to be brought to Australia from the Republic of Nauru (Nauru) and Papua New Guinea (PNG) for urgent medical or psychiatric treatment or assessment (the 'medevac system'); and (ii) the monitoring and oversight functions of the Independent Health Advice Panel (IHAP) (the 'monitoring and oversight functions').

It is our view that the medical provisions should not be repealed, because they are a necessary, reasonable and appropriate measure that assist the Australian Government in meeting its duty of care with respect to the health and well-being of people transferred offshore pursuant to 'regional processing' arrangements. For this reason, we strongly recommend that the Bill should **not** be passed.

Part 1 of this submission explains why the medical provisions are a necessary, reasonable and appropriate feature of the Government's regional processing arrangements. Part 2 addresses some of the arguments that have been put forward in favour of repealing them.

1 The medical provisions are necessary, reasonable and appropriate

A. Australia has a duty of care with respect to the health and well-being of people transferred offshore to Nauru and PNG

Under international law, Australia has a duty of care with respect to the health and well-being of people transferred offshore to Nauru and PNG. This duty arises directly from Australia having exercised control and authority over the refugees and asylum seekers. It begins at the moment when control and authority are first exercised – at interception, for example – and it continues until such time as the individuals concerned are able to return in safety and dignity to their own countries; or until another State voluntarily assumes responsibility to provide a durable solution consistent with international standards, including the consent of those involved. This duty of care is implicit in the specific obligations that Australia has accepted (for example, with regard to children, the family, health and medical care), and is explicit in Australia's general duty to respect, protect and fulfil the human rights of those over whom it has exercised and continues to exercise control and authority.

The duty of care is non-delegable. If medical care is needed by those to whom Australia owes a duty of care, and if it cannot be provided to the requisite international standard by those authorities or organisations which act as agents of Australia in the implementation of its policy and practice in PNG or Nauru, then Australia's primary responsibility is immediately engaged.

International legal responsibility for any failure to meet this duty may be held jointly with PNG and Nauru. In this regard we note that, notwithstanding the presence of the refugees and asylum seekers on the territory of those States, it is common knowledge that Australia has contracted with various organisations to provide certain 'services', including health services, and that it has sent or 'seconded' Australian government officials and contractors to exercise public powers over those transferred. However, since the arrangements with Nauru and PNG do not meet the conditions for full 'transfer' of legal responsibility for those affected and their futures, liability overall remains with Australia.

Australia also has a duty of care under domestic law. In a 2016 decision, the Federal Court of Australia held that the Commonwealth owed a novel duty of care to a refugee on Nauru requiring urgent medical treatment.[1] While the duty of care was only recognised to exist on the facts of that case, the reasoning suggests that such a duty would exist in most, if not all, cases brought by people transferred to Nauru and PNG and needing medical treatment not available there. Indeed, in a series of subsequent cases before the Federal Court, the Minister and the Commonwealth have conceded that they may owe people transferred offshore a duty of care to procure a reasonable and adequate standard of medical care, in an appropriate environment, which is appropriate to meet their needs, including their mental health needs.[2] While these concessions have been made only for the purposes of urgent court proceedings, they have been accepted as 'reasonable' by the Court, which has granted interlocutory relief on the grounds that refugee and asylum seeker applicants have established the existence of a duty of care on a *prima facie* basis.

Factors relevant to establishing this duty of care include: the fact that Australia forcibly transferred people to Nauru and PNG; the nature and degree of Australian involvement in the day-to-day operation of regional processing activities in Nauru and PNG; the extent to which Australia controls and has assumed responsibility for the provision of healthcare and other services in Nauru and PNG, including by contracting for and financing the provision of healthcare, participating in clinical decisions about the care and well-being of people offshore, and facilitating medical evacuations to Australia and elsewhere; and the degree of vulnerability and dependence of people transferred offshore on Australia for their very existence (including the fact that they have no means or ability to access medical treatment independently).

B. The medical provisions are necessary, reasonable and appropriate to assist the Australian Government in meeting its duty of care

The medical provisions are a necessary, reasonable and appropriate measure to assist the Government in meeting its duty of care with respect to the health and well-being of people transferred offshore. The Federal Court has noted that '[i]f the Commonwealth is to be involved in medical decisions, such as where a patient will be treated, it must do so competently'.[3] The medevac system helps the Government do just that. It ensures that there is a clear, transparent and effective process for people in need of transfer to be brought to the attention of the Minister, and for urgent medical decisions to be made by people with the requisite qualifications and expertise, within appropriate clinical timeframes. It minimises the risks of delay, uncertainty, and politicisation of medical decisions. It is a measure designed

[1] *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] 243 FCR 17.
[2] For an overview of these cases, see https://www.kaldorcentre.unsw.edu.au/medical-transfer-proceedings.
[3] *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050, per Murphy J at [13].

to save lives. It does so without compromising the ultimate power of the Minister to exclude any person who he or she deems to be a safety or security risk to the Australian public.

IHAP's monitoring and oversight functions (which are separate and independent from its role in reviewing transfer refusal decisions under the medevac system) are also reasonable, appropriate and well-adapted to the objective of monitoring the conditions and adequacy of healthcare in Nauru and PNG. According to UNHCR, in any arrangement for the transfer of asylum seekers between States, '[r]egular monitoring and/or review by the transferring State of the transfers and the conditions in the receiving State' is necessary to ensure the relevant international standards are met.[4]

In light of the above, it is our view that, far from 'undermining' the Government's regional processing arrangements,[5] the medical provisions are in fact an essential component of them, in that they may assist the Government in demonstrating that its policy and practice are consistent with its obligations under Australian and international law.

C. The previous system was inadequate, ineffective and ill-suited to preserving the life and well-being of people transferred offshore

The repeal of the medical provisions would revert to the previous system, under which there was no clear statutory guidance for how people in need of urgent medical care should be brought to the attention of the Minister, nor how decisions about such transfers should be made. There was no requirement that transfer decisions be made by people with appropriate medical qualifications, nor that they respond to identified clinical needs. Moreover, the only way to challenge a refusal to transfer a critically ill person to a place where they could receive vital medical care, or to urge a decision to be made with necessary haste, was through the courts. More than 50 matters have been brought before the Federal Court since 2016.[6] In every case, the Court agreed that the applicant required urgent medical treatment outside of Nauru or PNG, and, where necessary, made orders to that effect.

While these cases ultimately achieved an outcome for each applicant, the reliance on discretionary Ministerial powers and judicial intervention was inadequate, ineffective and ill-suited to responding to urgent medical needs and preserving the life and well-being of people transferred offshore. In this regard, we make the following observations.

First, there is a long and documented history of deteriorating physical and mental health, and preventable illness and deaths, caused generally by the conditions offshore and specifically by failures to provide appropriate healthcare in a timely manner.[7] This history indicates that the previous system was not adequate to meet Australia's obligations with respect to the health and well-being of people transferred offshore.

Second, the Federal Court cases reveal that senior Australian officials have been involved in making decisions about patient care which are contrary to medical advice, create undue delay, and expose children and adults to additional, avoidable harm and distress. For example, in one case involving a two-year-old girl who had a provisional diagnosis of meningo-encephalitis and was suffering from severe sepsis with a high risk of mortality, her evacuation from Nauru was delayed by several days due to a dispute about where she should be sent to. She was eventually sent to PNG, despite every doctor and specialist who recommended her medical evacuation recommending that she be taken to a tertiary hospital in Australia or a comparable country which could manage a paediatric emergency. In

[4] UNHCR, UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (May 2013) para 3(viii).
[5] Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019, 4
[6] For an overview of these cases, see https://www.kaldorcentre.unsw.edu.au/medical-transfer-proceedings.
[7] This history is too long to replicate here, but see, for example, Coroners Court of Queensland, *Findings of Inquest into the death of Hamid Khazaei* (30 July 2018) 3.

addition to this delay, the decision to send the child to PNG resulted in a failure to perform an MRI, making it more difficult for her treating doctors to understand whether she had suffered a brain injury and, if so, to what level. Murphy J ruled that these and other matters showed 'a failure to provide her with adequate healthcare', and that 'it is hard to see how the decision to medically evacuate the applicant to PNG rather than to Australia was motivated by healthcare considerations'.[8]

Third, the Federal Court cases reveal a pattern of delay and inaction on the part of the Government when it came to responding to requests for medical evacuation. In one case, for example, the Minister failed to provide any substantive response to five letters sent on behalf of critically ill refugees over a two-month period. In making an order for costs in that case, Thawley J noted that 'the applicants had no choice but to commence proceedings seeking the relief they did in light of the fact that the Minister did not respond to a single letter that had been written requesting the urgent transfer of the applicants from Nauru and indicating that proceedings would be commenced'.[9] Thawley J noted further that the Minister's failure to respond to the letters over an extended period was left unexplained, and fell short of what is expected of the Government as a model litigant.[10] Similarly, in other cases, the Federal Court has found that the Minister and the Commonwealth acted with 'prevarication', which 'appeared to support the applicant's allegations that his health and welfare needs were being neglected, or at least not given the attention and priority they required',[11] and that in some cases they did not appear to regard the provision of medical care as a sufficiently urgent or serious matter until required to do so by court proceedings.[12]

Finally, we note that the previous system involved significant costs and use of court resources. Migration matters already consume a disproportionate amount of the Federal Court's workload.[13] As a matter of public policy, it would be better for urgent medical assessments to be overseen by doctors and managed in accordance with the medevac system, rather than reverting to the previous system and tying up further Court resources.

These reasons demonstrate why it was necessary to introduce the medical provisions, and why they should not be repealed.

2 Response to arguments in favour of repealing the medical provisions

A. The quality of healthcare in Nauru and PNG

One argument put forward in support of repealing the medical provisions is that there is 'no medical emergency' in Nauru or PNG.[14] In response to this claim, we note that a number of organisations, including UNHCR, Médecins Sans Frontières (MSF) and others, have long reported very serious concerns about the adequacy and quality of healthcare available offshore.[15] We also note that the Federal Court ruled that the healthcare available offshore

[8] *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050 per Murphy J at [40] and [49].
[9] *EWR v Minister for Home Affairs* [2018] FCA 1460, per Thawley J at [58].
[10] ibid.
[11] *EHW18 v Minister for Home Affairs* [2018] FCA 1350, per Mortimer J at [48].
[12] *DRB18 v Minister for Home Affairs* [2018] FCA 1163, per Bromberg J at [40]; *ELF18 v Minister for Home Affairs* [2018] FCA 1368, per Mortimer J at [63].
[13] Federal Court of Australia, Annual Report 2017-2018 (5 September 2018) 32.
[14] Peter Dutton MP, *Migration Amendment (Repairing Medical Transfers) Bill 2019: Second Reading* (4 July 2019) 296.
[15] Documentary evidence and reporting on healthcare failings offshore is extensive. See, for example, UNHCR, *UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates* (12 October 2018); UNHCR, *UNHCR Appeals for Urgent Medical Intervention by Australia* (29 November 2018); MSF, *Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru* (December 2018); Refugee Council of Australia and Amnesty International, *Until When? The Forgotten Men on Manus Island* (November

was inadequate to meet the physical and mental health needs of critically ill people offshore in every application brought before it over a three year period. Finally, we note that, according to the Government's own data, 953 people had been brought to Australia by April 2019 to receive (or to accompany family members receiving) medical treatment that was not available offshore.[16] This was more than half the total regional processing cohort.

These reports and figures indicate that Nauru and PNG do not have the facilities or capacity to meet the critical health needs of a significant number of people. However, even if the quality of healthcare offshore were to improve, the medical provisions would continue to be a crucial part of Australia's regional processing arrangements, and should not be repealed.

The medevac system is not intended to be the first or primary mechanism by which Australia ensures it is meeting its obligations with respect to the health and well-being of people transferred offshore. The medevac system operates as a safety net. It only becomes relevant if and when: (i) adequate healthcare is not available locally in Nauru or PNG; and (ii) critically ill people are not otherwise identified and transferred to places where they can receive the necessary care. As such, the medevac system should be maintained as a safeguard against preventable harm, triggered only when these other two mechanisms fail.

B. The Government's power to decide who enters Australia, and to remove or return people to Nauru and PNG

The Government alleges that the medical provisions 'remov[e] the government's ultimate discretion to decide who enters Australia's borders' and therefore 'undermin[e] our strong border protection policies'.[17] The Explanatory Memorandum to the Bill also identifies the most notable issue with the medical provisions as the fact that 'there is no provision for transitory persons who are brought to Australia under the medical transfer provisions to be removed from Australia or returned to a regional processing country once they no longer need to be in Australia for the temporary purpose for which they were transferred'.[18] These are misconceptions.

First, the medevac system is only engaged when a person is in a regional processing country, that person requires medical or psychiatric assessment or treatment which he or she is not receiving in the regional processing country, and when it is deemed necessary to remove the person from the regional processing country so that they can receive that assessment or treatment. If Australia acts promptly to identify people with critical health needs and ensure they are appropriately met – be it in Australia or elsewhere – the medevac system will not come into play.

Second, even when the medevac system is engaged, the Minister retains the right to decide whether to approve or refuse each transfer to Australia, albeit subject to a statutory framework. In all cases, the Minister retains the right to refuse a person's transfer to Australia if he or she reasonably suspects that the person would pose a security threat, or if he or she knows that the person has a substantial criminal record and reasonably believes they would expose the Australian community to a serious risk of criminal conduct.[19]

Third, while the IHAP can review any decision to refuse a transfer, that Panel itself comprises the Chief Medical Officer of the Department and the Surgeon-General of the

2018); Royal Australasian College of Physicians, *Calls for Australian Government to end its policy of offshore processing* (undated).

[16] Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, *Estimates* (4 April 2019) 6 (Michael Pezzullo).

[17] Peter Dutton MP, *Migration Amendment (Repairing Medical Transfers) Bill 2019: Second Reading* (4 July 2019) 296.

[18] Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019, 4.

[19] *Migration Act 1958* (Cth), s 198D(3).

Australian Border Force, the Commonwealth Chief Medical Officer, and other doctors who are appointed by the Minister.[20]

Fourth, when a person is transferred to Australia from a regional processing country for the purpose of obtaining medical treatment, they enter Australia as a transitory person, brought here for a temporary purpose. This has been the case both for people transferred to Australia prior to the enactment of the medical provisions (who were brought to Australia under s 198B of the *Migration Act*), and for all people transferred to Australia after the enactment of the medical provisions (whose transfer may be pursuant to s 198B or s 198C). Transitory persons who are transferred to Australia for the temporary purpose of receiving medical treatment are unlawful non-citizens within the meaning of s 14 of the *Migration Act*. They do not have substantive visas, or any legal rights to remain indefinitely in Australia. They do not even have the legal right to apply for a visa,[21] and may be detained during their time in Australia.[22] The High Court expressly confirmed these matters in 2017 in the case of *Plaintiff M96A/2016*.[23]

Fifth, the *Migration Act* makes provision for the removal of medical transferees from Australia in two ways:

i. s 198AD provides that an officer must, as soon as reasonably practicable, take an unauthorised maritime arrival who is detained under s 189 to a regional processing country. Section 198AH makes it clear that s 198AD applies to a transitory person if they were brought to Australia from a regional processing country under s 198B for a temporary purpose (in this circumstance, medical treatment), they are detained under s 189, and they no longer need to be in Australia for the temporary purpose (whether or not the purpose has been achieved); and
ii. alternatively, s 198 governs the removal of unlawful non-citizens in all circumstances where s 198AD does not apply.[24] Removal under s 198 may be to any country, including a regional processing country. A dedicated subsection, s 198(1A), provides that an officer must remove any unlawful non-citizen who was brought to Australia under s 198B for a temporary purpose 'as soon as reasonably practicable' after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

The provisions establishing these removal pathways – sections 198AH(1A)(a) and 198(1A) – do not expressly apply to people brought to Australia under s 198C. However, they could plausibly be interpreted to do so by necessary implication. Alternatively, if the Government remains concerned about its power to remove people from Australia following medical treatment, there are better ways to address this concern than to repeal the medical provisions in their entirety. For example, the Government could amend sections 198AH(1A)(a) and 198(1A) to provide expressly that they extend to unauthorised maritime arrivals who are brought to Australia for temporary purposes under s198B *and s 198C*.

Finally, the only way in which a medical transferees can gain a right to remain in the Australian community is if the Minister exercises his or her discretion to allow them to apply for a visa, and then decides to grant them that visa.[25] The Minister has no obligation to do or consider doing either of these things.

[20] *Migration Act 1958* (Cth), s 199B.
[21] *Migration Act 1958* (Cth) s 46B(1).
[22] *Migration Act 1958* (Cth) ss 189(1), 196(1).
[23] *Plaintiff M96A/2016 v Commonwealth of Australia* [2017] HCA 16, [18].
[24] *Plaintiff M96A/2016 v Commonwealth* [2017] HCA 16, [14]-[18].
[25] The Minister may choose to grant a visa in the 'public interest', pursuant to s 195A, or may choose to lift the bar that precludes a transitory person from applying for a visa, pursuant to s 46A(2).

C. Respecting the sovereignty of Nauru and PNG

The Explanatory Memorandum to the Bill asserts, without explanation, that the medical provisions 'impinge on the sovereignty of Papua New Guinea and Nauru'. The basis for this assertion is not clear. As a matter of public international law, the medical provisions do not raise *any* issues injurious to the sovereignty of another State.

'Sovereignty' refers to the fact that each State has *prima facie* exclusive authority within its territory – i.e., that the State 'is not subject, within its territorial jurisdiction, to the governmental, executive, legislative or judicial jurisdiction of a foreign state or to foreign law other than public international law'.[26] While the sovereignty of Nauru and PNG prevents Australia from imposing its own laws and exercising government functions in the territories of those States without their consent, it does not prevent Australia from entering into cooperative arrangements with those States for regional processing (as it has done for the past seven years), and neither does it extinguish Australia's obligations under both Australian and international law.

The medical provisions add clarity, transparency, and accountability to the way in which transfer decisions are made at the Australian end. They do not purport to confer on the Minister any obligation or power to interfere in the domestic affairs of Nauru or PNG, or 'impinge' on their sovereignty in any other way. Moreover, to the extent that the issue of medical transfers has been a source of tension between Australia and Nauru (and possibly PNG), it is worth noting that this tension pre-dated the introduction of the medical provisions. Indeed, it arose under the previous system (involving the institution of proceedings in the Federal Court) – the precise system to which this Bill seeks to revert.[27]

In 2016, the Federal Court rejected a similar argument after the Minister submitted that it was not appropriate for the Federal Court to impose a duty of care on the Commonwealth with respect to a refugee in Nauru, because doing so might interfere with its relations with other sovereign States, which was a matter for the executive government.[28] In that case, as now, the Minister failed to clarify how the imposition of a duty of care would impact upon Australia's relations with other States. In any case, the submission was rejected by the Court, with Bromberg J stating that he 'would expect that the Commonwealth is subject to a duty of care in many situations which have the capacity to touch on relations with sovereign states' and that '[t]here can be no general rule against the existence of a duty of care owed by the Commonwealth simply because the existence of the duty may give rise to a possibility of some impact on Australia's relations with other sovereign states'.[29]

If Nauru and/or PNG continue to express concern about the impact of regional processing on their domestic processes and procedures, the answer should not be to scale back the protections and safeguards available to people at imminent risk of irreparable physical or mental harm. The answer should instead be a diplomatic one, resolved at the political level between States. If a resolution which ensures Australia is not in breach of its obligations under domestic and international law cannot be reached, the arrangements may cease to be tenable. That is a risk inherent in Australia's choice to implicate other States in its immigration and asylum policies.

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[26] Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia for Public International Law*, vol 10 (North Holland, 1987) 408 ('Sovereignty').
[27] Earlier this year, a senior Australian Border Force employee gave evidence to the Federal Court that Nauru had 'expressed concern and frustration in relation to litigation in Australia that "results in pressure being brought to bear upon the Government of Nauru to allow its processes and procedures to be subverted"', and that it had done so 'in increasing frequency in the latter half of 2018', i.e., before the medical provisions were introduced in 2019: CCA19 v Minister for Home Affairs [2019] FCA 939 at [57]-[58].
[28] *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] 243 FCR 17 at [267].
[29] *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] 243 FCR 17 at [273].

C. Final comments on the importance of the monitoring and oversight functions

In presenting the Government's reasons for seeking to repeal the medical provisions, the Explanatory Memorandum to this Bill and the Minister's second reading speech focus on the medevac system, making almost no mention of the IHAP's monitoring and oversight functions, which would also be abolished if this Bill were passed. This oversight is unfortunate, as these functions are crucial to ensuring Australia meets its obligations with respect to the health and well-being of people transferred offshore. Independent oversight is a vital part of responsible and accountable governance. If, contrary to the above submissions, this Bill is to be passed, we would recommend at a very minimum that the IHAP's monitoring and oversight functions be retained.

Yours sincerely,