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Medevac laws ensure vital medical care and should be retained

Submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019

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16 August 2019

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## Human Rights Law Centre

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## 1. Executive summary

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1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to make this submission to the Committee regarding the Migration Amendment (Repairing Medical Transfers) Bill 2019 (**the Bill**).
2. The Bill seeks to repeal amendments to the *Migration Act 1958* (Cth) which came into effect on 2 March 2019 after both Houses of Parliament passed the *Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2019*. That bill introduced the process for applying for medical transfer to Australia from a regional processing country known as the **Medevac laws**.
3. The HRLC works directly with people held in offshore detention, both through litigation about access to medical care and as a leading member of the Medical Evacuation Response Group, which assists people to make applications under the Medevac laws.
4. The Medevac laws must be retained for the following key reasons:

- (a) **Prior to the introduction of the Medevac laws, the Australian Government repeatedly and consistently ignored medical recommendations for transfer to Australia, placing the lives of men, women and children in the Australian Government's care at risk.**

People have died because of the Australian Government's failure to ensure appropriate medical care in its offshore detention regime.

- (b) **Because the Australian Government consistently refused to follow the advice of doctors about critically unwell people in its care, people have been repeatedly forced take court action to secure urgent medical transfers to Australia.**

The HRLC has represented many women, men and children who the Australian Government was refusing to transfer to Australia for medical care despite expert medical advice confirming serious risks to their lives.

People's medical conditions included psychosis, sepsis, encephalitis, resignation syndrome and pregnancy complications in which the life of the unborn child and mother were at grave risk.

Every single legal case has been successful in obtaining a medical transfer to Australia, highlighting the gravity of the risks the Australian Government was ignoring.

Forcing sick people to rely on the court system just to get medical care is a clearly inappropriate way to manage health needs. The Medevac laws provide a better process

to ensure people held by the Australian Government offshore can access the medical care they need.

- (c) **The Medevac laws provide a robust, orderly and timely process for sick refugees and people seeking asylum to access appropriate health care.**

The laws incorporate checks and balances while ensuring that sick people can access life-saving medical care when necessary.

5. Repealing the Medevac laws would remove a vital safeguard that helps to ensure an appropriate standard of medical care for the men and women who have now been held in offshore detention for over six years by the Australian Government.
6. If the current Bill to repeal the Medevac laws is passed, more lives will be risked or lost.

**Recommendation: The Bill to repeal the Medevac laws should not be passed.**

## 2. Before Medevac, medical recommendations were repeatedly ignored

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7. The Australian Government owes a duty of care to ensure refugees and people seeking asylum who are held in offshore detention receive appropriate medical treatment.<sup>1</sup> Numerous United Nations treaty bodies have similarly found the Australian Government continues to exercise effective control over these people and is responsible for their welfare.<sup>2</sup>
8. Despite this clear legal responsibility, the Australian Government has demonstrated that it cannot be relied upon to act on medical recommendations appropriately and in good faith when decisions about care are left entirely to Ministerial discretion.

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<sup>1</sup> For example, *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 established that the Australian Government owed a duty of care to a refugee to procure a safe and legal termination of her unwanted pregnancy after she was raped in Nauru. The Federal Court of Australia has also repeatedly found, and the Australian Government has accepted, that there is a *prima facie* case that a duty to provide appropriate medical care exists: see for example *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63; *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050; *DRB18 v Minister for Home Affairs* [2018] FCA 1163, *EHW18 v Minister for Home Affairs* [2018] FCA 1350.

<sup>2</sup> See for example: Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017) at [18]; Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) at [35]; Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) at [30].

9. Prior to the Medevac laws, the Australian Government repeatedly ignored recommendations for medical transfers from its own contracted doctors in Nauru and PNG.<sup>3</sup> The HRLC has represented many people in offshore detention whose treating doctors had recommended medical transfer only to have those recommendations ignored by the Australian Government, sometimes for several years.
10. The Australian Government's failure to provide access to appropriate medical care has led to tragic consequences. Twelve people died in offshore detention before the Medevac laws were passed.<sup>4</sup> Most of those deaths involved untreated physical or mental health conditions and included cases in which the Australian Government ignored medical advice recommending urgent transfer to Australia.<sup>5</sup>

**Case study: Hamid Khazaei**

In August 2014, Iranian refugee Hamid Khazaei died from sepsis at age 24, after a small cut to his foot became infected and was left untreated on Manus Island. The medical clinic on the island did not have the basic antibiotics he required and doctors urgently recommended that he be transferred to Australia for treatment. The Department and the Australian Border Force refused to do so. He was instead transferred to Port Moresby, where he suffered a major heart attack related to the infection, before he was finally transferred to Australia several days after doctors' recommendations. In Australia, he was declared brain dead and life support was turned off. In 2018, a Queensland Coroner found that Hamid's death was preventable and that the Australian Government held sole responsibility for the failures in medical care that led to his death.<sup>6</sup> If the Medevac laws had been in force in 2014, the Government could have been compelled to transfer Hamid to Australia as soon as practicable for life-saving treatment.

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<sup>3</sup> See eg Paul Farrell and Gina Rushton, "Every clinical decision questioned": Doctor accuses Border Force of exerting political influence on Nauru", *ABC News*, 31 October 2017, available at <https://www.abc.net.au/news/2017-10-31/every-clinical-decision-questioned-by-non-medic-on-nauru/9093070>; and see eg *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050.

<sup>4</sup> Ben Doherty, Nick Evershed and Andy Ball, "Deaths in offshore detention: the faces of the people who have died in Australia's care", *Guardian Australia*, 20 June 2018, available at: <https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care>.

<sup>5</sup> Coroner's Court of Queensland, *Findings of Inquest into the Death of Hamid KHAZAEI*, 30 July 2018, available at [https://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/577607/cif-khazaei-h-20180730.pdf](https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf).

### 3. Before Medevac, sick people were forced to take legal action to access medical care

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11. Prior to the introduction of the Medevac laws, the Australian Government's failure to transfer seriously unwell people held on Manus and Nauru to Australia for treatment meant that those people were forced to take legal action to access appropriate medical care.
12. Between December 2017 and February 2019, the HRLC and a coalition of not-for-profit organisations and law firms acting pro bono assisted people held offshore to bring 48 cases in the Federal Court of Australia, supported by expert medical opinions from doctors and medical specialists, to compel the Australian Government to transfer them to Australia for treatment.
13. The people forced to take court action had serious medical conditions including psychosis, sepsis, encephalitis, resignation syndrome and pregnancy complications in which the life of the unborn child and mother were put at risk.
14. Every single court case was successful in securing a transfer to Australia for medical care. Many more people were transferred for medical treatment by the Australian Government only after lawyers intervened and threatened court proceedings. In total, more than 340 people were transferred as a result of this legal action. The success of the legal action highlights the serious unmet medical needs of many people held offshore.
15. The HRLC acted in many cases where the Australian Government refused to transfer women, men and children who were at risk of death within days.

#### **Case study: Sam\***

In 2018, a paediatrician medically assessed Sam, a young boy in Nauru who was unable to eat and drink. After reviewing medical records and consulting with Sam via videoconference, the paediatrician advised that Sam was at risk of death within 48 hours unless he was urgently evacuated to a tertiary hospital which could provide the high level care he needed. There is no tertiary hospital in Nauru. The HRLC provided the Minister for Home Affairs and his lawyers with the paediatrician's report as soon as it was received.

Despite the clear medical recommendation, the Minister refused to transfer Sam within 48 hours. We were forced to commence a case in the Federal Court of Australia at 9.30pm on a Saturday night. The Court made orders requiring the transfer of the boy within the 48 hour time limit recommended by the paediatrician and he was subsequently brought to an Australian hospital for life-saving treatment unavailable on Nauru.

\* A pseudonym

16. Sam's case was typical of our experience running these court cases. Nearly every time we wrote to the Australian Government about a client in need of medical treatment, the Government either ignored our correspondence or delayed replying, sometimes for weeks. These delays repeatedly placed the lives of our clients at risk.
17. The time-critical nature of this work meant that pro bono lawyers, barristers and medical experts were working intensively around the clock to prepare detailed court applications and evidence.
18. The process placed significant strain on pro bono legal and medical resources and court resources. The Federal Court's Duty Judge was frequently called upon to hear matters on an urgent basis, including out of hours and on weekends.
19. **Leaving sick people to rely on pro bono legal assistance and the court system as the only means to access vital medical treatment is an inappropriate response to the medical crisis in offshore detention. Reform was clearly needed to ensure that decisions about medical transfers were properly informed by expert medical advice. The Medevac laws ensure this happens.**
20. If the Medevac laws are repealed, sick refugees would have no option but to return to the court process to access essential and often life-saving medical care that cannot be provided in Nauru and PNG. The outcome would be that:
  - (a) people's lives would again be placed at risk by the delays involved in legal action;
  - (b) not all people who need treatment would be able to access it, given the limits on pro bono legal resources and the dire need for medical care in offshore detention; and
  - (c) an inappropriate and unnecessary burden would be placed on the Australian legal system.

## 4. The Medevac laws are working

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21. Based on our experience representing people applying for medical transfer under the Medevac laws, we believe that the Medevac process is working more effectively than the previous system.
22. The HRLC played a leading role in establishing the Medical Evacuation Response Group (**Medevac Group**), a partnership of lawyers, doctors, caseworkers and counsellors working together to ensure the safe, orderly and effective submission of applications under the Medevac laws. The Medevac Group ensures that applications are triaged and assessed appropriately by doctors, with applicants' full and informed consent. The Medevac Group can then connect applicants with independent specialists to provide expert recommendations about whether the patient requires medical transfer.



### Number of Medevac approvals

23. At the time of writing, over 100 people in offshore immigration detention have been approved for transfer to Australia for medical treatment under the Medevac legislation. Approximately 90 of those have been transferred to Australia for medical care.
24. Only 22 applications have been refused by the Minister and referred to the Independent Health Advisory Panel (**Panel**). The Panel has overturned the Minister's decision eight times and agreed with the Minister's decision 14 times. The fact that the Panel has both accepted and overturned the Minister's decision in different cases shows that it is operating as an independent check on the process.

### Ministerial discretion, national security and character grounds

25. Prior to the Medevac laws, there were no legislative checks and balances imposed by Parliament on the Minister's broad discretion to decide whether or not to transfer sick men, women and children to Australia for medical treatment. Under the Medevac laws, Parliament has inserted vital safeguards into the exercise of that discretion, while creating specific carve outs for national security and character grounds, where the Minister's discretion remains broad.
26. Under the Medevac laws, Parliament has given the Minister an express right to veto a medical transfer on national security or specific character grounds in every case without exception, including where the Panel decides that a transfer is medically necessary. ASIO reviews every application for national security risk and provides advice to the Minister.
27. Despite this ability, to date, the Minister has not refused any person recommended for transfer under the Medevac provisions based on character or national security grounds.
28. Further, when people are transferred under the Medevac laws, they must remain in immigration detention while in Australia unless the Minister decides otherwise.
29. The Medevac provisions do not provide any incentive to travel to Australia by boat, because the laws only apply to people who were subject to regional processing from 19 July 2013 to 2 March 2019.

## 5. The Medevac laws should be retained

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30. The Committee should recommend that the Bill to repeal the Medevac laws should not be passed.
31. The Australian Government has repeatedly demonstrated that without the Medevac laws, it will ignore the advice of doctors and will fail to transfer people to Australia even where life-saving

medical care is urgently needed. The Government's inaction has led to tragic and preventable deaths in the past.

32. Prior to the introduction of the Medevac laws, sick refugees and people seeking asylum were forced to take legal action to access urgently needed medical treatment. This placed a significant burden on the Australian legal system and put peoples' lives at risk. Critically unwell people in the Australian Government's care should not be forced to rely on the courts to receive medical care.
33. The Medevac laws are working. The laws have ensured people who are extremely unwell have better access to vital medical care. Removing a fair, transparent and doctor-led process for accessing essential, and in many cases, life-saving medical care is illogical and unnecessary. Without the Medevac laws, we are extremely concerned that the Australian Government's failure to provide appropriate and timely medical care will result in more preventable deaths offshore.