AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
www.alhr.org.au

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the provisions of the Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions]

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current inquiry into the provisions to the proposed *Migration Amendment (Repairing Medical Transfers) Bill 2019* (**the Bill**).

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1. Summary

1.1. ALHR strongly opposes any measures to either repeal or reduce the scope of the Medevac legislation, including via the Bill.

1.2. The Medevac legislation seeks to ensure that people who are currently subject to Australia's offshore processing regime and who are assessed as requiring medical treatment by two or more doctors are temporarily transferred to Australia so they can access the treatment they need. Such transfers are necessary in cases where the medical treatment required is not available in the country where the person is located offshore.

1.3. The current offshore processing framework has created unsafe conditions for the people who are subject to it, many of whom have been offshore for more than six years. Twelve people have lost their lives, including eight people who have died as a result of suicide and inadequate healthcare.[1] The conditions have caused significant mental and physical harm to individuals,[2] and have been resolutely condemned on the international stage.[3]

1.4. The Medevac legislation is a vital part of ensuring Australia complies with its binding international obligations under the *United Nations Convention Relating to the Status of Refugees* and the *Protocol Relating to the Status of Refugees* (***Refugee Convention***) and international human rights law.

1.5. Under international law, Australia remains responsible for the people it subjects to offshore processing and for that reason, it is incumbent on the Australia government to ensure that individuals subject to the offshore processing arrangements have access to adequate medical care. The Medevac legislation creates a framework where the people best placed to assess the medical treatment a person needs - medical professionals - do so in an orderly and timely manner and advise the Federal Government accordingly.

1.6. Despite the fact that the Federal Government had the power to facilitate the types of medical transfers contemplated by the Medevac legislation before the legislation came into force, the Federal Government repeatedly failed to transfer people in serious need of medical treatment. Before the legislation, these people had to

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[1] Border Crossing Observatory, *Australian Border Deaths Database* (Web Page) https://arts.monash.edu/border-crossing-observatory/research-agenda/australian-border-deaths-database.

[2] Médecins Sans Frontières mental health project, Nauru, '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 2018).

[3] Letter from Dainius Puras, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Saeed Mokbil, Chair-Rapporteur of 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, Felipe González Morales, Special Rapporteur on the human rights of migrants, and Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, to Australia (Reference: AL AUS 4/2019), 2 April 2019 https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24482

commence costly and protracted Federal Court proceedings and obtain Court Orders to compel the Federal Government to facilitate the transfer.

1.7. Since the Medevac legislation came into force on 2 March 2019, it has contributed to ensuring that people in serious need of medical attention are considered in an orderly, timely and safe fashion.

2. The Federal Government's concerns about the effect of the Medevac legislation

2.1. We note the Federal Government has raised a number of concerns about what it considers the effect of this legislation, including that it:

(a) 'opens the floodgates' to people seeking to be transferred to Australia on fabricated medical claims;

(b) will cause people in Australia to be displaced from medical services they need;

(c) will allow dangerous people to enter Australia; and

(d) will 'restart the boats'.

2.2. Each of the concerns are not well founded, lack any empirical evidence base and are inadequate grounds for either repealing or otherwise reducing the scope of the Medevac legislation. We address each of these concerns individually in more detail below.

2.3. The Medevac legislation will not 'open the floodgates' to people with fabricated medical claims

2.3.1. The Medevac legislation creates a framework that is underpinned by the clinical opinion of medical professionals. This prevents it from being exploited by people with fabricated medical claims.

2.3.2. The Medevac legislation creates a robust framework whereby potential claims are assessed in line with standard Australian medical practices. For a person to be eligible for a transfer under the Medevac legislation, two treating doctors must:

(a) form the opinion that a person:

(i) requires medical or psychiatric assessment or treatment;

(ii) is not receiving appropriate medical or psychiatric assessment or treatment in the regional processing country in which they are located; and

(iii) needs to be removed from that regional processing country in order to access the appropriate medical or psychiatric assessment or treatment;[4]

[4] *Migration Act 1958* (Cth) s 198E(2)(b).

and

(b) notify the Secretary, who in turn must notify the Minister as soon as practicable.[5]

2.3.3. The Minister personally must make a decision within 72 hours of being notified by the Secretary.[6] The Minister can refuse the transfer if he does not believe the transfer is necessary.[7] In the event the Minister decides to refuse the transfer on that basis, the Minister must notify the Independent Health Advice Panel (**IHAP**) as soon as practicable.[8] The IHAP, which is comprised of medical professionals,[9] then has an additional 72 hours to conduct a further assessment of the potential transferee's medical claims, inform the Minister of its findings and make a recommendation as to whether the person should be transferred or not.[10] If the IHAP recommends that the person's transfer be approved, the Minister cannot refuse the transfer on medical grounds.[11]

2.3.4. ALHR submits that it is unreasonable and unfounded to suggest that a robust system of medical assessment led by medical professionals would facilitate people to come to Australia on fabricated medical claims. This is borne out by the number of people who have come to Australia under the Medevac legislation since it came into force on 2 March 2019, as well as the small percentage of rejections upheld by the IHAP.

2.3.5. In June 2019 it was reported that the Federal Government approved 31 medical transfers in the four months between the Medevac legislation coming into force and 21 June 2019.[12] Within that same time period, the Government rejected only nine applications from refugees and people seeking asylum. Of that nine, the IHAP only overturned two of rejections and upheld the other seven.

2.3.6. According to more recent figures reported by the Refugee Council of Australia in July 2019, approximately only 50 people have been approved for transfer since the Medevac legislation came into force.[13]

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[5] *Migration Act 1958* (Cth) s 198E(1).

[6] *Migration Act 1958* (Cth) ss 198E(3A); 198E(6).

[7] *Migration Act 1958* (Cth) s 198E(4)(a).

[8] *Migration Act 1958* (Cth) s 198F(1).

[9] *Migration Act 1958* (Cth) s 199B directs the composition of the Independent Health Advice Panel. In particular, the Panel consists of the Chief Medical Officer of the Department and Surgeon-General of the Australian Border Force, the Commonwealth Chief Medical Officer and at least six other people. Of that six, one person must be nominated by each of the President of the Australian Medical Association, the Royal Australian and New Zealand College of Psychiatrists and the Royal Australiasian College of Physicians. At least one of the six must also have expertise in paediatric health.

[10] *Migration Act 1958* (Cth) s 198F(2).

[11] *Migration Act 1958* (Cth) s 198F(5).

[12] Max Koslowski, 'Medevac panel overturns two cases in four months, despite 'floodgate' fears', *Sydney Morning Herald* (online, 23 June 2019) https://www.smh.com.au/politics/federal/medevac-panel-overturns-two-cases-in-four-months-despite-floodgate-fears-20190622-p5208u.html

[13] Email from Refugee Council of Australia to e-newsletter recipients, 12 July 2019.

2.3.7. It is therefore clear that the Medevac legislation is operating as intended, in an orderly and timely manner. The number of approvals and medical transfers to Australia since the legislation commenced evidences that the legislation is working as intended. There is no evidence to suggest that the legislation has in any way 'opened the floodgates' to spurious claims.

2.4. The Medevac legislation will not displace Australians from medical services

2.4.1. Prime Minister Scott Morrison and Home Affairs Minister Peter Dutton have both suggested that the transfer of refugees to Australia for medical care under the new medevac process would 'displace' Australian citizens from medical services.[14] It is unclear how Australia's healthcare system is so frail so as to be unable to absorb approximately 50 patients over the course of four months.

2.4.2. Australian Institute of Health and Welfare statistics indicate that in 2016-17, 695 public hospitals in Australia provided 62,000 hospital beds. This is equivalent to about 2.5 public hospital beds for every 1,000 people.[15] The latest available data shows that in 2016-17 there were more than 11 million admissions to hospitals, 6.6 million of which were admissions to public hospitals.[16]

2.4.3. Any such claim is also undermined by St Vincent's Health Australia's statement: 'This is a baseless claim. Public hospitals can accommodate the health needs of asylum seekers without disadvantaging anyone. St Vincent's is happy to make its hospitals available to provide care to asylum seekers without affecting waiting lists.'[17]

2.4.4. Australia's healthcare system is structured to allow for fluctuations in demand for hospital services. 'If there were 1,000 extra admissions on top of the 6.6 million that we had in 2016-17, you would not be able to measure it, it is too small.'[18] The acting chief executive of the Australian Healthcare Hospitals Association, Dr Linc Thurecht agrees with Mr Duckett and has noted that Australia's hospitals are accustomed to dealing with increases in demand and even an influx of 1,000 transferees could be accommodated without Australians being displaced from hospital waiting lists.[19]

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[14] Helen Davidson, 'Morrison backs Dutton claim refugees' medical care will 'displace' Australians', *The Guardian* (Online, 1 March 2019) https://www.theguardian.com/australia-news/2019/mar/01/morrison-backs-dutton-claim-refugees-medical-care-will-displace-australians

[15] Australian Institute of Health and Welfare, 'Hospital Resources 2016-17: Australian hospital statistics' (Report, 27 June 2018) https://www.aihw.gov.au/reports/hospitals/ahs-2016-17-hospital-resources/contents/summary; Andrew & Renata Kaldor Centre for International Refugee Law, 'The medevac law: Medical transfers from offshore processing to Australia' (Factsheet, 5 March 2019) https://www.kaldorcentre.unsw.edu.au/publication/medevac-law-medical-transfers-offshore-detention-australia.

[16] Australian Institute of Health and Welfare, 'Admitted patient care 2016-17: Australian hospital statistics' (Report, 24 May 2018) https://www.aihw.gov.au/reports/hospitals/ahs-2016-17-admitted-patient-care/contents/table-of-contents.

[17] @StVHealthAust (St Vincent's Health Australia) (Twitter, 28 February 2019, 4:03pm AWST) https://twitter.com/StVHealthAust/status/1101030173254705153.

[18] RMIT ABC Fact Check, 'The Government says Australians will lose out on medical help if refugees are brought here for treatment. Is that correct?' *ABC News* (Online, 14 June 2019) https://www.abc.net.au/news/2019-03-15/fact-check-dutton-refugees-hospital-beds/10900474.

[19] Ibid.

2.4.5. The Medevac legislation has been in operation for four months and it is clear there has not been an influx anywhere near the order of 1,000 patients. Claims that Australians will be displaced from medical care are baseless.

2.5. The Medevac legislation will not cause dangerous people to come to Australia and pose a risk to the Australian community

2.5.1. The Medevac legislation will not cause dangerous people to come to Australia because the Minister still retains the power to prevent a transfer on such grounds.

2.5.2. The Minister has the power to refuse the transfer of a person on the grounds that the Minister either:

(a) 'reasonably suspects that the transfer of the person to Australia would be prejudicial to security';[20] or

(b) 'knows that the person has a substantial criminal record … and the Minister reasonably believes the person would expose the Australian community to a serious risk of criminal conduct.'[21]

2.5.3. This power extends to people within the potential transferee's family unit.[22] The Minister also retains this power even if the IHAP makes a finding that the transfer is medically necessary and makes a recommendation to the Minister to approve the transfer.[23]

2.5.4. While it has been suggested that the Medevac legislation will allow dangerous criminals to be transferred to Australia, the fact is that the legislation as currently in operation provides clear power to the Minister to stop them where they would pose a risk to the community.

2.5.5. Further, as has been noted by the Kaldor Centre for International Refugee Law, the legislation incorporates the definition of security in the *Australian Security Intelligence Organisation Act 1979* (Cth).[24] A transfer will be prejudicial to security if it jeopardises the protection of the Australian community from serious threats, including: espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on the defence system and foreign interference. When the Minister is advised that a medical transfer has been recommended, ASIO will have 72 hours to advise the Minister that the transfer may be prejudicial to security in a way that cannot be mitigated."[25] ALHR submits that these provisions provide thorough, effective and proportionate safeguards.

[20] *Migration Act 1958* (Cth) s 198E(4)(b).
[21] *Migration Act 1958* (Cth) s 198E(4)(c).
[22] *Migration Act 1958* (Cth) s 198G(3).
[23] *Migration Act 1958* (Cth) s 198F(5).
[24] Australian Security Intelligence Organisation Act 1979 (Cth) s.4
[25] The Kaldor Centre for International Refugee Law Op. cit.

2.6. The Medevac legislation will not restart the boats

2.6.1. The legislation only affects people who have already been transferred to Nauru and Papua New Guinea under Australia's offshore processing regime. It would not offer an opportunity to come to Australia to anyone who subsequently attempts to seek asylum by boat.

2.6.2. A briefing from the Department of Home Affairs officials also contradicts this fear, stating that '[potential maritime arrivals] will probably remain sceptical of smuggler marketing and await proof that such a pathway is viable, or that an actual change of policy has occurred, before committing to ventures.'[26]

2.6.3. Given the Medevac legislation is very clearly limited to the current cohort of individuals subject to offshore processing, there is no logic to the proposition that the legislation would incentivise future arrivals to Australia.

3. Human rights implications of the Bill

3.1. ALHR notes the Bill's Statement of Compatibility with Human Rights states that the Bill is compatible with the human rights and freedoms set out in the international human rights instruments ratified by Australia.

3.2. However, ALHR has serious concerns about the human rights implications of the Bill repealing the Medevac legislation, in particular that it:

(a) undermines the right to health; and

(b) does not address ongoing concerns about the risks of torture and other cruel, inhuman or degrading treatment.

3.3. ALHR also considers that Australia owes human rights obligations to people subject to offshore processing because of Australia's effective control of this group of people.

3.4. Right to health

3.4.1. Australia has international human rights law obligations to 'respect, protect and fulfil the right of everyone to the enjoyment of the highest attainable standard of physical and mental health',[27] including taking steps to create conditions which ensure

[26] Alex Reilly, 'Peter Dutton is whipping up fear on the medevac law, but it defies logic and compassion' *The Conversation* (Article, 25 June 2019) https://theconversation.com/peter-dutton-is-whipping-up-fear-on-the-medevac-law-but-it-defies-logic-and-compassion-119297; Katharine Murphy, 'Nine facts about the medical evacuation bill', *The Guardian* (online, 13 February 2019) https://www.theguardian.com/australia-news/2019/feb/13/nine-facts-about-the-medical-evacuation-bill.

[27] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR) art 12; Dainius Puras, Special Rapporteur, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc A/HRC/38/36 (10 April 2018) 6 [22].

access to medical service and attention.[28] In particular, this includes 'refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services'.[29]

3.4.2. As described above, the Medevac legislation creates a robust assessment system led by medical professionals and defines practical time limits which ensures that access to medical services is provided in an orderly and timely manner. For that reason, the Medevac legislation as it stands plays an integral role in fulfilling these obligations because it is part of a framework which ensures that people subject to offshore processing have equal access to health services, including access to the medical services that they need and that are not available in Papua New Guinea or Nauru.

3.4.3. Indeed, more than 50 reported instances of self-harm and suicide on Manus Island in recent months is illustrative of the dire mental and and physical health of individuals.[30].

3.4.4. In June 2019 United Nations experts including: the Special Rapporteur on the human rights of migrants; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on the right to everyone to the enjoyment of the highest attainable standard of physical and mental health; and members of 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**,** urged the Australian Government to immediately provide appropriate health care to the people detained offshore, noting:

> *"information received since 2014 suggest several reported cases of death resulting from the lack of access to health care including medical treatment at the offshore facilities. Many migrants suffer from deteriorating physical and mental health, which seem to have been the result of a lack of appropriate health care, exacerbated by the indefinite and prolonged confinement. A number of migrants also suffer from serious or chronic medical illnesses that require immediate medical attention but have been left untreated for months or even years. Among the myriad of actors that provide services to the migrants, private security and other service providers have reportedly failed to facilitate access to health care in a number of instances."*[31]

3.4.5. This current state only serves to underline the importance of the robust procedure for medical transfers that is provided by the Medevac legislation.

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[28] ICESCR art 12(2)(d).

[29] Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The Right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* UN ESCOR, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000) 10 (34).

[30] Natalie Whiting, 'Manus Governor demands action from Australia as Behrouz Boochani says self-harm has spiked' *ABC News* (13 June 2019) https://www.abc.net.au/news/2019-06-13/manus--self-harm-crisis-escalates-as-governor-calls-for-help/11199258.

[31] United Nations Office of the High Commissioner for Human Rights, 'Australia: UN experts urge immediate medical attention to migrants in its offshore facilities' (Media Release, 18 June 2019) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24709&LangID=E.

3.5. Torture and other cruel, inhuman or degrading treatment

3.5.1. Australia has absolute non-deroagable international human rights law obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment.[32] Deprivation of liberty or detention can violate these obligations, particularly when it is not reasonable, necessary and proportionate in an individual's circumstances.[33] The longer the situation lasts and the less affected people can do to influence their circumstances, the more likely the prohibition against ill-treatment has been violated.[34] It is well established that detention based solely on migration status, particularly in order to deter irregular migration, to influence the withdrawal of asylum claims or to induce voluntary repartriation, can amount to torture.[35]

3.5.2. ALHR notes that people subject to offshore processing do not have the freedom of movement envisaged by international human rights law. They cannot leave their regional processing country without permission, including to seek medical treatment which is otherwise not available to them in Nauru or Papua New Guinea.

3.5.3. United Nations experts have recently stated that individuals subject to Australia's offshore processing regime are:

> "subject to years of effective confinement in Australia's custody, based solely on their migration status. The situation of their indefinite and prolonged confinement, exacerbated by the lack of appropriate medical care amounts to cruel, inhuman and degrading treatment according to international standards."[36]

3.5.4. It is incumbent on Australia to facilitate access to necessary medical treatment in an orderly and timely manner via the Medevac legislation to prevent against conditions which can give rise to ill-treatment in breach of international human rights law obligations.

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[32] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT) art 2, 16; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) art 7, 9.

[33] Human Rights Committee, *General comment No. 35 Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014); Nils Melzer, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/37/50 (23 November 2018) [25]-[26].

[34] Nils Melzer, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/37/50 (23 November 2018) [27].

[35] Nils Melzer, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/37/50 (23 November 2018) [28].

[36] United Nations Office of the High Commissioner for Human Rights media release, "Australia: UN experts urge immediate medical attention to migrants in its offshore facilities" 18 June 2019 at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24709&LangID=E

3.6. Effective control

3.6.1. If a State has 'effective control' over the treatment of people whom it has transferred to another country, then the State must continue to treat those people in a way compatible with that State's international human rights law obligations.[37]

3.6.2. ALHR agrees with the UNHCR's longstanding position that the physical transfer of people seeking asylum to an offshore processing country does not extinguish Australia's legal responsibilities towards the people affected by the transfer arrangements,[38] and respectfully disagrees with the assertion in the Bill's Statement of Compatibility with Human Rights that 'Australia does not exercise the degree of control necessary in regional processing countries to enliven Australia's international obligations'.

3.6.3. The Australian Government's actions demonstrate that it maintains effective control over the people who have been transferred to Nauru and Papua New Guinea. This group of people are in Nauru and Papua New Guinea as a direct result of Australia's offshore processing policies. Australia has been closely involved in the refugee status determination process and continues to fund the services which are supposed to support this group of people.[39] Further, Australia has taken responsibility for negotiating with the United States to resettle refugees from within this cohort, as well as rejecting resettlement offers from New Zealand.

3.6.4. ALHR acknowledges that Australia does not have sole responsibility for the treatment of asylum seekers and refugees in Papua New Guinea and Nauru. Papua New Guinea and Nauru are also jointly responsible for ensuring that these people's treatment does not violate their own international obligations. However, joint responsibility does not reduce Australia's international human rights law obligations. This includes ensuring that people seeking asylum and refugees in Papua New Guinea and Nauru receive necessary medical treatment as required and in a timely manner, as facilitated by the Medevac legislation.

4. Recommendations

4.1. The Bill should not be passed and should be withdrawn in its entirety

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[37] Human Rights Committee, *General Comment No. 21 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [10]; *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

[38] UNHCR, 'UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013' [16]. See also UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (May 2013) para 3(vi). Although those rights were listed with respect to transfer arrangements, the UNHCR further explains at para 4 that the transferring State retains responsibility for international refugee and human rights law obligations where the reception and/or processing of people seeking asylum in the receiving State is effectively under the control or direction of the transferring State.

[39] Natalie Whiting, 'Australia and PNG agree to extend contracts for Manus Island asylum seeker services' *ABC News* (29 June 2019) https://www.abc.net.au/news/2019-06-26/australia-and-png-agree-to-limited-extension-manus-contracts/11249702.

5. Conclusion

5.1. ALHR respectfully submits that any measures which seek to either repeal or reduce the scope of the Medevac legislation, including via the Bill, are unfounded. The Bill should not be passed and should be withdrawn in its entirety.

5.2. Since it came into force, the Medevac legislation has played an integral role in Australia's compliance with international human rights law obligations by ensuring that people under Australia's control have access to necessary medical care when they need it.

5.3. Additionally, the fears raised about the risks posed by the Medevac legislation are unsubstantiated and are not supported by the evidence yielded in the time since the Medevac legislation came into force.

6. ALHR is happy to appear before the Committee or to provide any further information or clarification in relation to the above if the Committee so requires.

Yours faithfully

Kerry Weste
President
Australian Lawyers for Human Rights

ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.