



**Australian  
Human Rights  
Commission**

# Migration Amendment (Repairing Medical Transfers) Bill 2019

Submission to the Senate Legal and Constitutional Affairs  
Legislation Committee

21 August 2019

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# 1 Introduction

1. The Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) in relation to the Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth) (the Bill) introduced by the Australian Government.
2. The Commission welcomes the opportunity to make a submission in relation to this Bill.
3. This submission deals with the provisions of the Bill that would amend the *Migration Act 1958* (Cth) (Migration Act) to remove the framework for the transfer of refugees and asylum seekers from regional processing countries to Australia for the purposes of medical or psychiatric assessment or treatment (the medical transfer provisions). The medical transfer provisions, which are summarised below, were introduced by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth).
4. The Explanatory Memorandum indicates that the key objective of the Bill is to ensure that ‘the integrity and efficacy of the regional processing framework not be undermined’.<sup>1</sup> It also states that ‘standard medical processes already exist which provide for the transfer of transitory persons for temporary medical purposes from regional processing countries’.<sup>2</sup>
5. Transferring asylum seekers to third countries does not release Australia from its obligations under international human rights law. The Commission considers that the removal of the medical transfer provisions by this Bill would be inconsistent with Australia’s international human rights obligations, specifically the right to the highest attainable standard of physical and mental health.
6. The Bill would significantly limit the right to health for refugees and asylum seekers subject to regional processing arrangements in Papua New Guinea (PNG) and Nauru without appropriate justification, and does not appear to be a necessary, reasonable or proportionate means of achieving the Bill’s objectives.

7. The Commission considers that the introduction of this Bill may be inconsistent with a number of Australia's core obligations to fulfil the right to health and would constitute a retrogressive measure that is contrary to Australia's obligation of progressive realisation of economic, social and cultural rights including the right to health.
8. For this reason, the Commission recommends that the Bill not be passed.

## **2 Background**

### **2.1 Regional processing arrangements**

9. Since 2012 it has been the policy of successive Australian governments to transfer asylum seekers who arrive in Australia by boat to a regional processing centre (RPC) in a regional processing country for processing. Nauru and PNG are designated as regional processing countries.<sup>3</sup> The RPC in PNG is located on Manus Island.
10. On 19 July 2013, the then Prime Minister, the Hon Kevin Rudd MP, announced that offshore processing arrangements would apply to all asylum seekers who arrived in Australia by boat, and that they had no prospect of being resettled in Australia.<sup>4</sup>
11. The Migration Act provides that 'unauthorised maritime arrivals' must be removed from Australia and taken to a regional processing country.<sup>5</sup> Such persons, as well as their children, are defined in the Act as 'transitory persons'.<sup>6</sup>

### **2.2 Medical transfer provisions**

12. The medical transfer provisions, referred to above, were introduced by Schedule 6 of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth), which came into force on 2 March 2019.
13. They established a statutory decision-making framework for the transfer of refugees and asylum seekers in PNG and Nauru to Australia for the

temporary purpose of receiving medical or psychiatric assessment or treatment in certain circumstances.<sup>7</sup>

14. The key elements of the medical transfer provisions are as follows:
  - Two or more treating doctors must believe it is necessary to remove the person from a regional processing country for appropriate medical or psychiatric assessment or treatment (except in the case of children or family members).<sup>8</sup>
  - Family members can accompany people transferred to Australia.<sup>9</sup>
  - All transfers, including for children and family members, must be approved by the Minister.<sup>10</sup>
  - The Minister must decide to approve or refuse the transfer no later than 72 hours after being notified. If the Minister does not decide within 72 hours, they will be taken to have approved the person's transfer.<sup>11</sup>
  - The Minister can refuse a transfer on medical grounds, on security grounds, or because the person has a substantial criminal record and the Minister reasonably believes that the person would expose the Australian community to a serious risk of criminal conduct.<sup>12</sup>
  - If the Minister refuses a transfer on the ground that the Minister believes the transfer is not medically necessary, this decision will be subject to review by the Independent Health Advice Panel (IHAP).<sup>13</sup>
15. Both before and after the enactment of the medical transfer provisions, the Australian Government has been able to bring 'transitory persons' to Australia for a temporary purpose under section 198B of the Migration Act. A person brought to Australia under section 198B must be removed as soon as reasonably practicable after they no longer need to be in Australia for this purpose, whether or not it has been achieved.<sup>14</sup>
16. The Commission notes that, prior to the enactment of the medical transfer provisions, the Act did not define or provide any guidance on what may be

captured by the term 'temporary purpose'. The medical transfer provisions amended section 198B to the effect that a temporary purpose may include 'medical or psychiatric assessment or treatment'.<sup>15</sup>

### **3 Human rights obligations outside of Australia**

17. Under international law, Australia has human rights obligations outside of its territory when it exercises 'effective control' over people or territory.<sup>16</sup>
18. Whether Australia exercises 'effective control' in relation to asylum seekers and refugees subject to regional processing arrangements in Nauru and on Manus Island has been considered in detail by two Parliamentary Committees.
19. The Parliamentary Joint Committee on Human Rights (PJCHR) considered the package of legislation which re-established offshore processing for asylum seekers who arrived in Australia after 13 August 2012.<sup>17</sup>
20. The PJCHR noted that Australia's involvement in the arrangements relating to the detention, upkeep and provision of services to those transferred to Nauru and Manus Island was significant.<sup>18</sup>
21. On the question of effective control, the PJCHR concluded as follows:

The committee notes that the evidence demonstrates that Australia could be viewed as exercising 'effective control' of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru.<sup>19</sup>
22. The Senate Legal and Constitutional Affairs References Committee considered whether the Commonwealth had effective control of the regional processing centre on Manus Island. It concluded:

The committee considers that the degree of involvement by the Australian Government in the establishment, use, operation and provision of total funding for the centre clearly satisfies the test of effective control in international law ...<sup>20</sup>

23. The Commission considers that transferring asylum seekers to third countries does not release Australia from its obligations under international human rights law. Australia must ensure adequate safeguards are in place in those countries to ensure that the human rights of the people transferred are upheld.<sup>21</sup>

## **4 Provision of health care in PNG and Nauru**

24. The Commission and other independent bodies, such as the United Nations High Commissioner for Refugees (UNHCR), have documented the adverse human rights impacts of third country processing. The Commission's concerns have focused on the physical and mental health of refugees and people seeking asylum, including families and children.<sup>22</sup> The Commission has expressed serious concerns about the health and wellbeing of refugees and asylum seekers, particularly children, detained in regional processing countries.<sup>23</sup>
25. Limited health care services and poor conditions of detention—including hot and humid conditions, inadequate sanitation and hygiene facilities, overcrowding in accommodation, presence of parasites and vermin and (in Nauru) proximity to phosphate mining—have been highlighted as key factors leading to physical illness amongst people held at regional processing centres.<sup>24</sup>
26. In relation to mental health, the combination of prolonged indefinite detention, delays in the processing of asylum claims, difficult living conditions, concerns about physical safety and uncertainty about the future have reportedly had a profoundly negative impact on the mental health outcomes of people subject to third country processing.<sup>25</sup>
27. There have also been reports of limited healthcare services on Manus Island and Nauru. In 2017, the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) reiterated its concern about 'the limited health-care services available to asylum seekers transferred by [Australia] to the regional processing centres' and 'the high levels of self-

harm and suicide among them'.<sup>26</sup> The Committee recommended that Australia

take effective steps to ensure refugees and asylum seekers are able to exercise their right to the highest attainable standard of health, with particular attention to mental health services.<sup>27</sup>

28. Medecins Sans Frontieres (MSF) provided mental health care on Nauru for 11 months between November 2017 to October 2018 and reported that

the Nauruan health system is ill-equipped to manage the current mental health crisis on the island. The system is under-resourced, with no inpatient facilities at the Republic of Nauru hospital and insufficient mental health staffing.<sup>28</sup>

29. The Nauruan government instructed MSF to cease its activities in Nauru in October 2018, and MSF is no longer providing mental healthcare services on Nauru.<sup>29</sup>
30. The UNHCR most recently visited Manus Island on a monitoring mission from 9 to 13 January 2018. Following this mission, the UNHCR reported that the Lorengau General Hospital, which provides all emergency services on Manus Island, has no anaesthetist, surgeon or psychiatrist.<sup>30</sup>

## **5 Right to health and related rights**

31. The right to health is recognised in several international legal conventions to which Australia is a party.
32. Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides:

The State Parties to the present Covenant recognise the right of everyone to uphold the right to the highest attainable standard of physical and mental health.<sup>31</sup>



33. The right to health is closely related to and dependent on the realisation of other human rights, which address integral components of the right to health, including:

the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.<sup>32</sup>

34. The right to health must be understood as ‘a right to the enjoyment of a variety of *facilities, goods, services and conditions* necessary for the realisation of the highest attainable standard of health’.<sup>33</sup>

35. While article 12(1) of ICESCR provides a definition of the right to health, article 12(2) provides a non-exhaustive list of States parties’ obligations arising from the right to health, including taking steps necessary to create ‘conditions which would assure to all medical service and medical attention in the event of sickness’.<sup>34</sup>

36. Children have the right to the highest attainable standard of physical and mental health and access to healthcare services, including appropriate pre- and post-natal healthcare for their mothers under article 24 of the *Convention on the Rights of the Child* (CRC).<sup>35</sup> They also have the right to survival and development under article 6(2) of the CRC,<sup>36</sup> and this can only be implemented in a holistic manner through the enforcement of all other provisions in the CRC, including rights to health, adequate nutrition and adequate standard of living and a healthy and safe environment.<sup>37</sup> Particular attention should be paid to the most vulnerable groups of young children, including refugee and asylum-seeking children.<sup>38</sup>

37. The UNCESCR has explained the nature and content of the obligations in article 12 of ICESCR in General Comment No 14. The UNCESCR has stated that the right to health is

an inclusive right extending not only to *timely and appropriate health care*, but also to the underlying determinants of health, such as access to safe and portable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions ...<sup>39</sup>

38. States must respect, protect and fulfil the right to health. The obligation to protect requires states to prevent third parties from interfering with this right.<sup>40</sup>
39. While the right to health requires progressive realisation, ICESCR also imposes some obligations of *immediate* effect. These include that the right to health must be:
  - exercised without discrimination of any kind—article 2(2)
  - fulfilled through taking deliberate, concrete and targeted steps towards the full realisation of the right—article 2(1).<sup>41</sup>
40. States parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights in ICESCR, including essential primary health care.<sup>42</sup> As well as this obligation, in relation to the right to health, the UNCESCR's view is that core obligations include, among others, to ensure:
  - access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups
  - access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water.<sup>43</sup>
41. A number of other obligations under ICESCR are of 'comparable priority', including the obligation to provide reproductive, maternal (pre-natal as well as post-natal) and child health care.<sup>44</sup>
42. Under article 4 of ICESCR, the right to health can only be subject to limitations that are both:
  - determined by law, only in so far as this may be compatible with the nature of these rights
  - solely for the purpose of promoting the general welfare in a democratic society.<sup>45</sup>

43. Any limits on the right to health must be proportionate, the least restrictive alternative, of limited duration and subject to review.<sup>46</sup> However, the UNCESCR states that ‘a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations ... which are non-derogable’.<sup>47</sup>
44. There is a strong presumption that *retrogressive* measures taken against the right to health are prohibited under ICESCR.<sup>48</sup> If deliberately retrogressive measures are taken, the UNCESCR has stated:
- [T]he State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.<sup>49</sup>
45. In addition to obligations under international human rights law, the Commission notes that Australia may have a duty of care to asylum seekers and refugees in Nauru or on Manus Island under domestic law, which includes a duty of care in relation to the provision of appropriate and timely health care.<sup>50</sup>

## **6 Access to timely and appropriate health care**

46. As outlined in more detail above, the Bill would remove the statutory framework under which the Australian Government currently makes some decisions regarding the transfer of refugees and asylum seekers subject to offshore processing arrangements to Australia for medical or psychiatric treatment or assessment.
47. The Statement of Compatibility with Human Rights acknowledges that the Bill engages the right to health, but concludes that the measures in the Bill remain consistent with the right to health because they will not affect the existing provisions for the temporary transfer of transitory persons under section 198B of the Act.<sup>51</sup>
48. The Minister for Home Affairs stated:

[W]hile this [B]ill removes one medical transfer pathway ... , there will remain the existing process to manage medical transfers. Transferees requiring medical treatment not available in a regional processing country will be able to be transferred to a third country or indeed Australia for assessment or treatment.<sup>52</sup>

49. More broadly, the Statement of Compatibility indicates that a key objective of this Bill is to ensure that the 'integrity and efficacy of the regional processing framework not be undermined and that decision-making power is returned to Government'.
50. While acknowledging that the Department has transferred refugees and asylum seekers from Nauru and PNG for medical treatment in Australia under section 198B, the Commission considers that the explanatory materials fail to establish the compatibility of the Bill with the right to health.
51. There is significant evidence that raises concerns about the provision of health care for refugees and asylum seekers in PNG and Nauru, as outlined above in section 5.
52. The Commission considers that removal of the medical transfer provisions may prevent refugees and asylum seekers subject to regional processing arrangements from accessing timely and appropriate health care in accordance with Australia's obligations under article 12 of ICESCR.
53. The Commission acknowledges that temporary medical transfers to Australia from PNG and Nauru can occur pursuant to section 198B. However, the Commission is concerned by evidence that temporary medical transfer decisions under section 198B do not necessarily occur in a timely manner and may not be appropriately informed by independent medical opinion.
54. Before the passage of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act*, this Committee considered the Department's medical transfer procedures in offshore processing centres under section 198B and recommended that the Department urgently review them. The Committee stated:

The committee was very concerned by the evidence of serious concerns from Australian medical organisations about the provision of health care services to refugees and asylum seekers in Nauru and PNG. A number of medical organisations suggested that the capacity of medical personnel to provide appropriate care in Nauru and PNG is severely affected by the remote locations of the [regional processing centres], the limited health infrastructure, *the delays in transferring people for medical treatment, and the requirement to seek departmental approval to transfer a patient.*<sup>53</sup>

55. There have been significant numbers of successful applications before the Federal Court for urgent interlocutory injunctions to require the transfer of asylum seekers and refugees from Nauru and PNG to Australia in order to receive appropriate health care.<sup>54</sup> These cases illustrate various problems in relation to the decision-making process for temporary medical transfers when relying only on the process available under section 198B.
56. Under that process, in the event that health services in Nauru and PNG, such as International Health and Medical Services (IHMS) or local health providers, assess that a person cannot be treated in Nauru or PNG, a non-statutory process for seeking outside medical assistance can be engaged, referred to in these cases as the Overseas Medical Referral (OMR) process.<sup>55</sup>
57. Dr Nick Martin, a former Senior Medical Officer for IHMS stationed on Nauru, has provided detailed evidence in relation to the OMR process:

Because the clinic and hospital on Nauru are not equipped to deal with complex cases, a system has been put in place by the Australian Government for the transfer or, in urgent cases, evacuation of asylum seekers requiring urgent medical treatment. Under this system IHMS staff would make medical recommendations using a 'request for medical movement' form. This form would describe the patients' conditions and give medical deadlines by which to fly the patients out.

From my time working within this system, I have formed the view that the IHMS medical transfer system is inefficient and driven by political and not medical concerns. While on Nauru, evacuation deadlines which either my staff or I recommended were frequently not met and at times appeared to be ignored by the Australian government and patients were often in

constant pain as their conditions worsened. Follow-up requests by myself or my staff would also not be met with substantive responses.

Clinical decisions and recommendations which were made by IHMS medical staff were referred to and often questioned by non-medical staff. To the best of my recollection, there were six serious cases where asylum seekers had been waiting for months beyond medically recommended time frames without treatment during my tenure on Nauru. In one case I am aware of an asylum seeker had been waiting for 12 months for medical transfer when the recommended treatment time was one month.<sup>56</sup>

58. In the case of *FRX17*, Murphy J did not consider that ‘the OMR process is adequate or likely to be sufficiently swift to adequately protect against the risk of suicide’<sup>57</sup> in circumstances where a child required urgent inpatient psychiatric treatment that was not available on Nauru.
59. The case of *DJA18* provides an example of circumstances in which IHMS recommended urgent medical evacuation to a tertiary level hospital in Australia, and notwithstanding this recommendation the Australian Border Force (ABF) evacuated the child from Nauru to Port Moresby International Hospital (PIH), which did not have the appropriate capability to treat a child with herpes encephalitis, a serious and life-threatening neurological condition.<sup>58</sup> In *DJA18*, Murphy J stated 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’.<sup>59</sup>
60. In *ELF18*, Mortimer J expressed concern that it was possible the applicant’s circumstances were not taken seriously until the matter was before the Court.<sup>60</sup> Justice Mortimer stated:

One might have thought some closer attention would have been paid to her predicament long before ... I was satisfied the Minister, in particular, through his department, and the agencies and contractors such as the Australian Border Force and IHMS, should have been aware that steps needed to be taken to protect the applicant both at the level of her personal safety and in relation to her considerable health needs.<sup>61</sup>
61. The issue of medical transfers from regional processing countries pursuant to section 198B was also recently considered by the Queensland Coroner in

the inquest into the death of Hamid Khazaei. The Coroner made the following findings:

The evidence highlighted a transfer process which allowed for inconsistent information to be passed on through multiple persons and channels. Each person asserted they had an important part to play in the transfer process but each had fundamentally different perspectives and differing imperatives.

It appeared that the medical staff were working primarily to clinical imperatives while the DIBP officers were working primarily to bureaucratic and political imperatives to keep transferees on Manus Island, or in PNG.<sup>62</sup>

62. In circumstances where an asylum seeker or refugee is not able to receive adequate health care in PNG or Nauru, the Commission considers it is the responsibility of the Australian Government to ensure access to timely and appropriate healthcare in Australia, unless there is a medical reason why another destination is more appropriate. Failure to do so may result in breaches of Australia's obligations to uphold the right to health, as well as its duty of care responsibilities under domestic law.
63. The Commission is not satisfied that the OMR process and temporary transfers pursuant to section 198B ensure Australia's compliance with the right to health under the ICESCR. The Commission is particularly concerned by the evidence discussed above in paragraphs 53–61 that suggests medical transfer decisions under this framework do not always occur in a timely manner or in line with medical advice.
64. The Commission considers that the medical transfer provisions establish a statutory decision-making framework that ensures refugees and asylum seekers who are unable to access the healthcare that they require in Nauru and PNG are able to access timely and appropriate healthcare in Australia, in compliance with Australia's international obligations in relation to the right to health.
65. In particular, the Commission considers that the medical transfer provisions ensure that such decisions are informed by independent medical opinion, and that these decisions are made in a timely manner.<sup>63</sup>

66. The Commission notes that under the medical transfer provisions, the Minister retains oversight of all transfers.<sup>64</sup> The Minister can refuse a transfer on security or medical grounds. Where the Minister refuses a transfer on security grounds, this decision is not subject to merits review. Where the Minister refuses a transfer on medical grounds, this decision will be reviewed by the IHAP.<sup>65</sup>
67. Removal of the medical transfer provisions would reduce access to timely healthcare for refugees and asylum seekers and amount to a retrogressive measure when considering Australia's obligations to respect, protect and fulfil the right to health.
68. While the objective of ensuring the integrity of Australia's regional processing framework may be legitimate, the Commission considers that the reduction in the protection of the right to health caused by the removal of the medical transfer provisions is not necessary, reasonable or proportionate to achieve this objective. The Government has not provided evidence that the medical transfer provisions undermine Australia's regional processing framework.
69. Those who have been brought to Australia for medical treatment remain subject to regional processing arrangements. Irrespective of whether they have been brought to Australia for medical treatment under section 198B or under the medical transfer provisions, they remain 'transitory persons'<sup>66</sup> for the purposes of the Act. Transitory persons are not able to make a valid application for a visa in Australia, unless the Minister determines that it is in the public interest for them to do so, and 'lifts the bar' by written notice to allow a transitory person to make a valid application for a visa.<sup>67</sup>
70. A State cannot justify limiting the core obligations of the right to health in any circumstances. These core obligations include ensuring the satisfaction of minimum essential levels of the right to health, including ensuring the provision of essential primary health care, as well as ensuring access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalised groups. The Commission considers that the introduction of this Bill may breach these core, non-derogable, obligations.



71. As noted above, the Commission also considers that the removal of the medical transfer provisions is not justified in the circumstances and would amount to a retrogressive measure that is contrary to Australia's obligation of progressive realisation of the right to health.
72. As set out in General Comment No 14, there is a presumption that retrogressive measures are prohibited under ICESCR. This means that particularly compelling justification is required to establish the validity of a measure that reduce the extent to which an economic, social and cultural right is already provided for. The Commission does not consider that such a justification has been provided.
73. For these reasons, the Commission recommends that the Bill not be passed.

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- <sup>1</sup> Explanatory Memorandum, Migration Amendment (Repairing Medical Transfer) Bill 2019 (Cth), 4, 9.
- <sup>2</sup> Explanatory Memorandum, Migration Amendment (Repairing Medical Transfer) Bill 2019 (Cth), 4.
- <sup>3</sup> See *Migration Act 1958* (Cth) s 198AB.
- <sup>4</sup> The Hon Kevin Rudd MP (Prime Minister), 'Australia and Papua New Guinea Regional Settlement Arrangement' (Media release, 19 July 2013). At <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/2611769%22>>.
- <sup>5</sup> *Migration Act 1958* (Cth) s 198AD.
- <sup>6</sup> *Migration Act 1958* (Cth) s 5(1).
- <sup>7</sup> See *Migration Act 1958* (Cth) ss 198B-199E.
- <sup>8</sup> *Migration Act 1958* (Cth) ss 198E(1)-(2).
- <sup>9</sup> *Migration Act 1958* (Cth) ss 198C(3)-(4).
- <sup>10</sup> *Migration Act 1958* (Cth) ss 198E(3)-(6).
- <sup>11</sup> *Migration Act 1958* (Cth) ss 198E(3A), 198E(5).
- <sup>12</sup> *Migration Act 1958* (Cth) ss 198E(4)(a)-(c).
- <sup>13</sup> *Migration Act 1958* (Cth) s 198F.
- <sup>14</sup> *Migration Act 1958* (Cth) ss 198(1A), 198AD, 198AH.
- <sup>15</sup> *Migration Act 1958* (Cth) s 198B(4).
- <sup>16</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136; *Al-Skeini v United Kingdom* [2011] Eur Court HR 1093; UN Human Rights Committee, *Replies to the List of Issues (CCPR/C/AUS/Q/5) to be taken up in connection with*

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- the consideration of the Fifth Periodic report of the Government of Australia (CCPR/C/AUS/5)*, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009) [16]–[17].
- <sup>17</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Ninth Report of 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and other related legislation*, 19 June 2013. At <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2013/2013/92013/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2013/2013/92013/index)>.
- <sup>18</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Ninth Report of 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and other related legislation*, 19 June 2013, 37-43 [2.54]. At <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2013/2013/92013/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2013/2013/92013/index)>.
- <sup>19</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Ninth Report of 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and other related legislation*, 19 June 2013, [2.55]. At <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports/2013/2013/92013/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2013/2013/92013/index)>.
- <sup>20</sup> Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Incident at Manus Island Detention Centre from 16 February to 18 February 2014*, 11 December 2014, [8.33]. At <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Manus\\_Island/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report)>.
- <sup>21</sup> Australian Human Rights Commission, *Asylum seekers, refugees and human rights: Snapshot Report 2<sup>nd</sup> edition* (Report, March 2017) 32 - 40. At <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/asylum-seekers-refugees-and-human-rights-0>>.
- <sup>22</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Inquiry, November 2014). At <[https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten\\_children\\_2014.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf)>; Elizabeth Elliott and Hasantha Gunasekera, *The health and well-being of children in immigration detention: Report to the Australian Human Rights Commission – Monitoring Visit to Wickham Point Detention Centre, Darwin, NT* (Report, 2016). At <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration>>; Australian Human Rights Commission, 'Media statement – Children on Nauru' (Media release, 23 October 2018). At <<https://www.humanrights.gov.au/about/news/media-statement-children-nauru>>.
- <sup>23</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Inquiry, November 2014). At <[https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten\\_children\\_2014.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf)>; Elizabeth Elliott and Hasantha Gunasekera, *The health and well-being of children in immigration detention: Report to the Australian Human Rights Commission – Monitoring Visit to Wickham Point Detention Centre, Darwin, NT* (Report, 2016). At <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration>>.

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- <sup>31</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.

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- <sup>32</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 2 [11]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>.
- <sup>33</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 3 [9]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>.
- <sup>34</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12(2)(d).
- <sup>35</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24.
- <sup>36</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 6(2).
- <sup>37</sup> United Nations Committee on the Rights of the Child, *General Comment No 7: Implementing child rights in early childhood*, 40<sup>th</sup> sess, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) [10]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f7%2fRev.1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f7%2fRev.1&Lang=en)>.
- <sup>38</sup> United Nations Committee on the Rights of the Child, *General Comment No 7: Implementing child rights in early childhood*, 40<sup>th</sup> sess, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) [24]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f7%2fRev.1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f7%2fRev.1&Lang=en)>.
- <sup>39</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 3 [11]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>.
- <sup>40</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security (article 9)*, 39<sup>th</sup> sess, UN Doc E/C.12/GC/19 (4 February 2008) 10–11 [34]–[37].
- <sup>41</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 9 [30]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>.
- <sup>42</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 3: The nature of State parties' obligations*, 5<sup>th</sup> sess, UN Doc E/1991/23 (1990) [10]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en)>.

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- <sup>43</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 12-13 [43]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>.
- <sup>44</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 12-13 [44]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>.
- <sup>45</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) article 4.
- <sup>46</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 9 [29]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>.
- <sup>47</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 14 [47]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>.
- <sup>48</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 9 [32]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>.
- <sup>49</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) 9 [32]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en)>; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 3: The nature of State parties' obligations*, 5<sup>th</sup> sess, UN Doc E/1991/23 (1990) [9]. At <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en)>.
- <sup>50</sup> *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, [276-277]; Senate Legal and Constitutional Affairs References Committee, *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, 175 [7.43]. At <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/NauruandManusRPCs/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report)>.

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- <sup>51</sup> Explanatory Memorandum, Migration Amendment (Repairing Medical Transfer) Bill 2019 (Cth), 13.
- <sup>52</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 296 (Peter Dutton, Minister for Home Affairs). At <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fce759aa1-47bf-467d-a58b-3bf640990032%2F0101%22>>.
- <sup>53</sup> Senate Legal and Constitutional Affairs References Committee, *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, [7.32]. At <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/NauruandManusRPCs/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report)>.
- <sup>54</sup> 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; *ELF18 v Minister for Home Affairs* [2018] FCA 1368, 15.
- <sup>55</sup> See for example *FRX16 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63, [32]-[34].
- <sup>56</sup> *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63, 18, [37].
- <sup>57</sup> *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63, 27, [70].
- <sup>58</sup> *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050.
- <sup>59</sup> *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* [2018] FCA 1050, [13].
- <sup>60</sup> *ELF18 v Minister for Home Affairs* [2018] FCA 1368, 15 [15].
- <sup>61</sup> *ELF18 v Minister for Home Affairs* [2018] FCA 1368, 10-11, [43].
- <sup>62</sup> Inquest into the death of Hamid Khazaei, Coroners Court of Queensland, Findings of Inquest, 30 July 2018, [403]-[404]. 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)>.
- <sup>63</sup> Under the medical transfer provisions, two or more treating doctors must believe it is necessary to remove the person from a regional processing country for appropriate medical or psychiatric assessment or treatment (except in the case of children or family members) and the Minister must decide to approve or refuse the transfer no later than 72 hours after being notified.
- <sup>64</sup> *Migration Act 1958* (Cth) ss 198D(2A), 198E(3A).
- <sup>65</sup> *Migration Act 1958* (Cth) s 198F.
- <sup>66</sup> *Migration Act 1958* (Cth) s 5(1).
- <sup>67</sup> *Migration Act 1958* (Cth) s 46B.