UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

# Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019

## Senate Legal and Constitutional Affairs Legislation Committee

## Submission by the Office of the United Nations High Commissioner for Refugees

## August 2019

## I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee in respect of its inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019 (the Bill).

2. The Bill would amend the *Migration Act 1958* (Cth) (the Act) to repeal the statutory framework introduced by Schedule 6 of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (hereafter the "medical provisions"). The medical provisions establish two important measures relevant to the healthcare available to refugees and asylum-seekers transferred to Nauru and Papua New Guinea under Australia's offshore transfer arrangements:
   - A streamlined, statutory framework to support access to necessary medical or psychiatric treatment or assessment in Australia where it is recognised that such treatment or assessment is not accessible in Nauru or Papua New Guinea;[1]
   - The monitoring and oversight function performed by the Independent Health Advice Panel.[2]

3. UNHCR considers that these measures enhance transparency and predictability in the provision of healthcare in critical situations. In particular, it is appropriate that Australian law contain safeguards for the protection of the refugees and asylum-seekers subject to the offshore transfer arrangements, reflecting the position that cooperative bilateral and/or multilateral arrangements should enhance the capacity of the States concerned to provide protection to refugees, and should not represent an attempt of any State to divest itself of responsibility or limit jurisdiction and responsibility under international law.[3]

4. Measures of the kind established by the medical provisions are all the more necessary in light UNHCR's observations of the shortfalls in protection standards in respect of both Papua New Guinea and Nauru. The resulting conditions have led to the deterioration of the health of refugees and asylum-seekers throughout the life of

[1] *Migration Act 1958* (Cth) ss 198C-198J.
[2] *Migration Act 1958* (Cth) ss 199A-199E.
[3] UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum seekers*, May 2013, para. 4.

the offshore transfer policy, and this deterioration can be expected to continue to until long-term solutions are achieved. UNHCR recommends that the Bill not be passed.

## II. UNHCR'S AUTHORITY

5. UNHCR provides these comments as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.[4] As set out in its Statute, UNHCR fulfils its international protection mandate by, inter alia, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[5] UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 *Convention relating to the Status of Refugees,*[6] according to which State parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees […] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the 1967 *Protocol relating to the Status of Refugees*.[7]

6. Australia is a party to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol relating to the Status of Refugees* (together, the Refugee Convention).

## III. THE MEDICAL PROVISIONS IN THE CONTEXT OF AUSTRALIA'S OFFSHORE TRANSFER ARRANGEMENTS

7. The physical transfer of asylum-seekers from Australia to Papua New Guinea and Nauru does not extinguish Australia's legal responsibility for their protection. Australia is jointly responsible (with Nauru and Papua New Guinea, respectively) for ensuring that the treatment of all asylum-seekers and refugees transferred to those countries is compatible with each State's respective obligations under the Refugee Convention and other applicable international human rights instruments. While international law does not prohibit bilateral transfer arrangements involving asylum-seekers where relevant standards under international law are met, the primary responsibility for providing protection rests with the State from which asylum is sought.

8. The transferring State is consequently under an obligation to ensure that conditions in a State to which asylum-seekers are transferred under such bilateral transfer

[4] *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 ("Statute"). In addition, UNHCR has a global mandate in relation to the identification, prevention and reduction of statelessness and for the international protection of stateless persons.
[5] Ibid para. 8(a).
[6] *Convention relating to the Status of Refugees*, UNTS No. 2545, Vol. 189, p. 137, opened for signature 28 July 1951, [1954] ATS 5 (entered into force for Australia 22 April 1954).
[7] *Protocol relating to the Status of Refugees*, UNTS No. 8791, Vol. 606, p. 267, opened for signature on 31 January 1967, [1973] ATS 37 (entered into force for Australia 13 December 1973).

arrangements are in accordance with relevant standards.[8] Protections against arbitrary detention and access to adequate healthcare and other services are factors that bear upon both the appropriateness and legality of such arrangements.[9] Transferring States also remain subject to the obligation of *non-refoulement*, and retain responsibility for other obligations under, and violations of, international refugee law and human rights law in certain circumstances.[10]

*(a) Framework for transfers to Australia for medical or psychiatric treatment or assessment*

9. The medical provisions should not be understood as a comprehensive response to medical needs, or the primary means by which Australia should ensure the health and wellbeing of people transferred to Nauru or Papua New Guinea. Rather, the safeguards established by the medical provisions complement other measures that may provide for refugees and asylum-seekers to enjoy the rights to which they are entitled under the Refugee Convention and other relevant international instruments. These other measures include variously the general power to facilitate timely transfers to Australia and the local provision of adequate healthcare and other services, pending the realisation of durable solutions.

10. Under the medical provisions, the obligation to return a person to Australia for medical reasons only arises to the extent that these other measures are ineffective or unavailable. The existing framework requires a person to be transferred to Australia for medical reasons only where this is considered necessary by the relevant Minister or the Independent Health Advice Panel.[11] The Independent Health Advice Panel may also make recommendations about the treatment of individuals without recommending that they be transferred to Australia.[12] The role of treating doctors, as contemplated by section 198E of the Act, is limited to the purpose of bringing serious medical situations to the attention of the Secretary of the Department of Home Affairs in order for them to come to the attention of the Minister. As such, the mechanism for transfers to Australia that is established by the medical provisions is narrowly targeted at supporting timely access to necessary medical or psychiatric treatment or assessment that is not otherwise available in Nauru or Papua New Guinea. This supports each State's ability to meet its obligations relating to access to healthcare arising from relevant international instruments.

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[8] UNHCR, *Position paper: Bilateral and/or Multilateral Arrangements for Processing Claims for International Protection and Finding Durable Solutions for Refugees*, April 2016, para. 7; UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum seekers*, May 2013, para. 4.
[9] UNHCR, *Position paper: Bilateral and/or Multilateral Arrangements for Processing Claims for International Protection and Finding Durable Solutions for Refugees*, April 2016, paras. 8-9*; UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum seekers*, May 2013, para. 3.
[10] UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum seekers*, May 2013, para. 4. See generally UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007; UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing,* November 2010.
[11] *Migration Act 1958* (Cth) ss 198E-198F. The Independent Health Advice Panel is constituted by the person(s) occupying the positions of Chief Medical Officer of the Department of Home Affairs and the Surgeon-General of the Australian Border Force, and other qualified medical professionals appointed by the Minister under s 199B(2). Ministerial decisions are also subject to merits review in accordance with s 198H.
[12] *Migration Act 1958* (Cth) s 199C(e).

11. The return of refugees and asylum-seekers to Australia in connection with healthcare needs has been a regular feature of the offshore transfer policy since its inception.[13] At 31 January 2019 – prior to the introduction of the medical provisions – there were 890 people in Australia who had been returned to Australia from Nauru or Papua New Guinea (or children born in Australia to parents who had been). However, throughout the life of the offshore transfer policy, UNHCR has observed that the administration of the power to return people to Australia in serious medical situations has been affected by a low level of transparency and predictability. This has undermined confidence in critical healthcare decisions and led to multiple cases in which delayed or inadequate treatment has had tragic consequences. It has also brought about the separation of some refugees from their family members. The medical provisions address this difficulty by anchoring in legislation a robust process guided by clear standards.

*(b) Framework for monitoring and oversight*

12. The Bill's impact on medical care and health outcomes is not limited to its effect on the timeliness of transfers to Australia. The Bill would also abolish the monitoring and oversight function performed by the Independent Health Advice Panel.[14] The legislation provides that this function may be performed by way of a range of activities aimed at assessing the standard of health services and support available to refugees and asylum-seekers in Nauru and Papua New Guinea, with periodic reports provided to the Minister and to Parliament. While the effectiveness of the work of the Independent Health Advice Panel will become clearer with time, this statutory oversight function is consistent with the requirement that Australia regularly monitor and review relevant conditions in Nauru and Papua New Guinea to ensure they meet international standards.[15] By abolishing this function, the Bill would permit weaker governance and accountability in respect of the provision of health services.

13. To describe those provisions that would be repealed by the Bill as the "medical transfer provisions" tends to minimise the importance of this monitoring and oversight function, which is independent of the legal mechanism for transfers to Australia.

## IV. HEALTHCARE NEEDS IN NAURU AND PAPUA NEW GUINEA

14. The number of people remaining in Papua New Guinea and Nauru who may require transfer to Australia under the medical provisions is determined primarily by the seriousness of their medical needs and the prevailing standard of services locally available to them. UNHCR's observations about the structure and operation of the medical provisions are applicable irrespective of those questions, as it would

[13] Section 198B of the *Migration Act 1958* (Cth) establishes a broad power to bring a person transferred to a *regional processing country* to Australia.
[14] *Migration Act 1958* (Cth) Subdivision D of Division 8 of Part 2 (ss 199C-199E). This function is independent of the Panel's obligation to review refusal decisions under s 198F.
[15] UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum seekers*, May 2013, p. 3.

be appropriate for these safeguards to remain in place even if far-reaching improvements were to mean that few individuals qualified for transfer to Australia.

15. It is nonetheless pertinent to describe the prevailing health context as the background against which consideration of the Bill takes place. UNHCR has conducted regular monitoring visits to Papua New Guinea and Nauru since the inception of the offshore transfer policy in 2012. These have included inspections of accommodation, detention facilities and medical facilities in Nauru, Manus Island and Port Moresby. During UNHCR's April 2016 visit to Manus Island, medical experts surveyed 181 refugees and asylum-seekers and found that 88 per cent were suffering from a depressive or anxiety disorder and/or post-traumatic stress disorder.[16] A survey conducted during a visit to Nauru in the same period similarly indicated a prevalence of greater than 80 per cent.[17] These are among the highest recorded rates of any surveyed population.[18] UNHCR has observed on subsequent visits that the physical and psychological health of the remaining asylum-seekers and refugees has deteriorated since that time. UNHCR has shared its findings and recommendations with each of the States involved.

16. The health situation for refugees and asylum-seekers in both countries has been caused by a complex range of factors. Although many refugees have health needs that pre-dated their arrival in Australia – including health needs associated with the experience of persecution in their countries of origin – the cumulative impacts of protracted detention, inadequate psychosocial and mental health support, family separation and a lack of foreseeable long-term solutions to their situation of forced displacement have generated a profound sense of hopelessness and insecurity, and have led to the deterioration of the health of the vast majority of refugees and asylum-seekers since their transfer to Nauru and Papua New Guinea in 2013 and 2014.

17. Despite efforts that have led to isolated improvements in the provision of care in some circumstances, UNHCR is aware of many cases in which locally-available services continue to be inadequate. The deteriorating health situation in both countries has led to significant risks of irreparable harm and loss of life. Despite an urgent imperative for medical evacuations in a substantial number of cases, transfers to Australia were previously subject to protracted delays. The risks associated with delays in the administration of urgent medical transfers have been vividly demonstrated throughout the life of the policy. The report of the Queensland State Coroner in relation to the death of Hamid Khazaei demonstrates that insufficiently transparent and accountable procedures for acting upon serious health concerns can have life-threatening and tragic consequences.[19]

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[16] See UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees on the Inquiry into the 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 Referred to the Senate Legal and Constitutional Affairs Committee*, 12 November 2016, p. 10.
[17] Ibid p. 13.
[18] Ibid pp. 10-11; 32.
[19] Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, Findings of Inquest, 30 July 2018.

## V. ASYLUM-SEEKERS AND REFUGEES IN AUSTRALIA

18. The Bill would explicitly authorise the forcible return (to Nauru or Papua New Guinea, and to countries of origin) of refugees and asylum-seekers who have been transferred to Australia under the medical provisions, irrespective of whether the purpose of their transfer to Australia has been achieved.[20] Australia has international legal obligations in respect of these refugees and asylum-seekers, including *non-refoulement* obligations. UNHCR continues to urge that asylum-seekers and refugees presently in Australia should not be returned to Nauru or Papua New Guinea.

## VI. CONCLUDING REMARKS

19. The legislative framework for Australia's offshore transfer policy contains few safeguards for the protection of the people to whom it applies. The Bill would abolish two of the most significant of these safeguards.

20. The health of the refugees and asylum-seekers in Nauru and Papua New Guinea will continue to deteriorate in the absence of a long-term solution to their situation of forced displacement. Until durable solutions are found outside those countries, both regular monitoring of health services and timely access to necessary medical care are safeguards that enhance confidence in efforts to address the health needs of those who remain.

21. Accordingly, UNHCR recommends that the Bill not be passed.

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[20] *Migration Act 1958* (Cth) ss 198AH; 198AD.