

Refugee Legal:

Submission to the Senate Legal and Constitutional Affairs Legislation Committee:

Migration Amendment (Repairing Medical Transfers) Bill 2019

Introduction

1. Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.¹ Since its inception over 30 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention. Refugee Legal is the largest provider of free legal assistance to such people in Australia and in the last financial year our total client assistance was over 13,800.
2. Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a longstanding member of the Administrative Appeals Tribunal (Migration and Refugee Division) Community Liaison Consultation Group, the peak Department of Home Affairs-NGO Dialogue and the Department of Home Affairs Protection Processes Reference Group.
3. Refugee Legal has substantial casework experience and is a regular contributor to the public policy discourse on refugee and general migration matters.
4. Prior to the introduction of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019 (the medevac laws)*, Refugee Legal had extensive direct experience assisting people held in Nauru and PNG for the past 15 years. Since the introduction of the medevac laws, Refugee Legal has represented a significant number of clients, approximately 60, in PNG and Nauru and has provided them with assistance to access this statutory scheme. Refugee Legal is also a key member of the Medical Evacuation Response Group (**MERG**), which assists people to make applications under the Medevac laws, and has played a leading role both in its establishment and in the ongoing work of MERG.
5. Refugee Legal welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the *Migration Amendment (Repairing Medical Transfers) Bill 2019 (the Inquiry)*. The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

¹ Refugee Legal (Refugee and Immigration Legal Centre) is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. Refugee Legal brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

Outline of Submissions

6. The *Migration Amendment (Repairing Medical Transfers) Bill 2019 (the Bill)* seeks to repeal amendments to the *Migration Act 1958 (the Act)* which came into effect on 2 March 2019; these amendments, also known as the ‘medevac laws’, allow critically unwell asylum seekers and refugees held in PNG and Nauru to apply for medical transfer to Australia where their medical needs, either physical or mental, are not being met offshore.
7. At the heart of this Bill is necessity – the vital necessity that seriously ill men and women have access to adequate medical and psychiatric care. We are deeply concerned by the repeal of this Bill; no reasonable justification has been put forward by the Australian Government for why the Bill should be repealed, and no evidence has been put forward that suggests that the Bill is no longer required. History, and our experience, has shown that the framework that existed prior to the medevac laws was wholly inadequate to address the urgent medical needs of asylum seekers and refugees in a way that was timely and medically driven.
8. We strongly submit that the medevac laws should remain in place for the following reasons:
 - 8.1. Prior to the introduction of the medevac laws, the health needs of many men and women in PNG and Nauru were not being adequately met, which resulted in serious neglect, harm and death;
 - 8.2. The medevac laws are an effective and robust statutory mechanism which places medical expertise at the heart of decision-making, and has allowed seriously ill men and women to access necessary medical treatment; and
 - 8.3. The necessity for the Bill remains.
9. We have provided a number of confidential case studies to illustrate these submissions and note that in each instance the stated facts have been de-identified and altered to preserve confidentiality.

Prior to the introduction of the medevac laws, the health needs of men and women in PNG and Nauru were not being met which result in serious harm

Medical Emergency

10. Other organisations are better placed to comment in detail on the medical needs of those in PNG and Nauru. To this end we commend to this Committee the two reports published in late 2018 by RCOA which focused on the situation of people on Nauru (jointly with the Asylum Seeker Resource Centre) and in PNG (jointly with Amnesty International).
11. These reports mirror our experiences working with clients in Nauru and PNG for a number of years; that is, that after six years of detention, with no durable solution, the physical and mental health of the majority of people continues to deteriorate dangerously; medical experts and the UNHCR continue to warn that lives are at risk. It is

within this context, that 12 people have died on Nauru and in PNG.² Many of those deaths were preventable.³

Existing Frameworks

12. We acknowledge the Department of Home Affairs' (**the Department**) view that 'standard medical processes already exist which provide for the transfer of transitory persons for temporary medical purposes.' This power is found in s 198B of the Act which states that 'an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia.' This provision proved itself to be wholly inadequate to meet the critical medical needs to asylum seekers and refugees. Unlike the medevac laws, s 198B does not provide:
 - a clear and transparent process for this power to be triggered;
 - a clear timeframe for consideration of transfers under s 198B;
 - a clear explanation of the types of medical conditions that will trigger transfer under s 198B; and/or
 - a medically driven regime that puts medical opinions front and centre.
13. The process under s 198B is not transparent and decisions are made by bureaucrats and politicians instead of medical professionals. There is no apparent independent review of the decisions made.
14. The failure of the Australian Government to actively and consistently use s198B to bring critically unwell people to Australia in a timely manner, despite these people being well known to the Government, meant that, prior to the introduction of the medevac laws, a person requiring medical treatment in Australia was forced to bring complex and resource-intensive proceedings in the Federal Court of Australia.
15. The Australian courts consistently found that the Australian Government owes a duty of care to ensure refugees and asylum seekers in offshore detention receive appropriate medical treatment.⁴ Approximately 340 people were transferred to Australia as a result of legal action.
16. These Court cases, which are extremely time and resource intensive, resulted in unnecessary costs and increased pressure on the Court system as a result of increased judicial review proceedings. In the Senate estimates hearing on 18 February 2019, the Department stated that from 1 July 2018 to 31 January 2019, \$1.373 million was spent in legal costs.
17. While processes existed prior to the medevac laws to transfer men and women to Australia for medical treatment, it is clear that many of these people were left in dire need of medical

² Ben Doherty, Nick Evershed and Andy Ball, "Deaths in offshore detention: the faces of the people who have died in Australia's care", *Guardian Australia*, 20 June 2018, available at: <https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care>.

³ Coroner's Court of Queensland, *Findings of Inquest into the Death of Hamid KHAZAEI*, 30 July 2018, available at https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf.

⁴ For example, *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483.

care despite this existing process. This is at the heart of why the medevac laws are necessary.

The medevac laws are an effective and robust statutory mechanism which places medical expertise at the heart of decision making and has allowed critically ill men and women to access necessary medical treatment

18. Based on our experience and representation of a significant number of clients who have accessed the medevac laws, we believe that the medevac laws have proven to be an effective and robust statutory mechanism. Crucial to the success of the medevac laws is that they ensure that expert independent medical assessment are central to the decisions made.
19. At the time of writing, over 120 people have been approved for transfer to Australia for medical treatment under the medevac laws, approximately 90 of whom have already been transferred to Australia. These are people with severe mental health issues and chronic physical health issues.
20. The medevac laws also established the Independent Health Advisory Panel (**the Panel**). Since March 2019, the Panel has overturned the Minister's decision only eight times. In the 14 other cases that have gone before the Panel, the Panel has affirmed the decision of the Minister and refused transfer. The actions by the Panel show it is an appropriate oversight mechanism and that it is necessary and appropriate that decisions of a medical nature are reviewed by an expert medical panel.
21. The Panel have also provided their first report under s 199A(2) of the Act which gives the Panel a monitoring, assessing and reporting function regarding the physical and mental health of transitory persons who are in Regional Processing Countries and the standard of health services provided to them. Again, this mechanism should provide critical oversight of the medical care being provided, which would not be available should the medevac laws be repealed.
22. We note the Government's concerns outlined in the Explanatory Memorandum that 'the medical transfer provisions have a very broad application with very limited scope for refusing transfers on security or character grounds.' We submit that this is a mischaracterisation of the current legislation. There is significant scope for refusal based on character grounds. Indeed, this power is held by the Minister personally. These refusals powers are consistent with other powers for cancellation and refusal in the Act. We further note that the Minister has not refused an application on national security grounds to date. We also note that, once a person arrived in Australia, there are a range of provisions which enable the Government to control movement and monitor someone, including detaining a person at an immigration detention centre within the detention network in Australia.
23. We also note the Government's concerns outlined in the Explanatory Memorandum that 'the timeframes to make decisions do not allow a sufficient amount of time to gather and consider all the relevant information.' It is our submission that these timeframes align with the medically urgent nature of the matters being considered. Further, we are aware that the Australian Government has had formal and informal notice for an extended period of time about the medical conditions of a large number of people held offshore. In

addition, given that the Australian Government has an established duty of care towards these people, they have significant oversight of cases and the relevant circumstances of individuals. In this context, we submit that the Government's assertion that the timeframes associated with the medevac laws make it difficult for the Government to gather and consider all the relevant information, are without foundation.

24. With regards to other 'significant issues' that the Government has raised in the Bill, such as issues around remuneration of the Panel or ability to return people offshore once medical treatment ends, we note that many of these issues could be addressed by amending relevant sections of the Act. These issues alone do not justify repeal.

The necessity for the Bill remains

26. We strongly believe that the medevac laws should remain. The medical emergency on Nauru and in PNG continues. We are aware through our work with clients that self-harm and attempted suicide are near daily occurrences in PNG and Nauru.

Conclusion

27. For each of the reasons set out above, Refugee Legal strongly recommends that the *Migration Amendment (Repairing Medical Transfers) Bill 2019* is not passed. As we have outlined, the medevac laws are an essential, effective and transparent mechanism to provide for the timely transfer of critically ill asylum seekers and refugee. Without the medevac laws, history suggests that vital medical care will not be provided in a timely manner. Without access to reasonable medical care, men and women, to whom Australia owes a duty of care, will suffer severe neglect, irreparable and life-threatening harm. The medevac laws have the capacity to assist in preventing further deaths offshore.

Refugee Legal:
Defending the rights of refugees
20 August 2019

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