Maurice Blackburn
Lawyers
Since 1919

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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 Sir/Madam,

Thank you for the opportunity to provide input to the Committee's examination of the provisions of the *Migration Amendment (Repairing Medical Transfers) Bill 2019* (the Bill).

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 31 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. Advice services are often provided free of charge as it is firm policy in many areas not to charge for the first consultation. The firm also has a substantial social justice practice that acts on a pro bono basis to better support access to justice in our community.

Recommendation

Maurice Blackburn's social justice practice has for many years conducted litigation and provided advice on the laws impacting people seeking asylum and refugees. Through our work we have developed knowledge and expertise on the conditions of detention, the laws and policies that apply to detention and the experiences of people in detention.

The practice has seen improvements in relation to the process for accessing health care for people seeking asylum and refugees on Manus and Nauru since the introduction of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (the Medevac legislation).

Based on our specialised knowledge and experience with these matters we urge **the Committee to recommend, unequivocally, that the Bill be rejected.**

Scope of submission

Our submission is based on the first-hand experience of Maurice Blackburn lawyers and staff representing, in a pro bono capacity, the urgent medical needs of people detained in off-shore facilities. We have acted for over 30 people who have been brought to Australia for medical treatment. The majority of our clients were on Nauru.

Our submissions in relation to the BIll are based on a practical understanding of the legal landscape before and after the introduction of the Medevac legislation.

The Committee's decisions and recommendations will impact the lives of people seeking asylum, our clients and our staff who support them.

To accept the Bill is to accept a return to the regime that provides no decision making framework, direction or legislative support for the timely provision of medical treatment.

Maurice Blackburn maintain that the Australian Government, having transferred children and adults to a third country, has an obligation to ensure they have access to medical care. The Medevac legislation provides a mechanism for the administration and consideration of health care needs in circumstances where treatment is otherwise unavailable.

To understand our position, it is necessary for our submission to address the following:

1. What, in our experience, the system was like prior to the Medevac legislation;

2. What, in our experience, the system is like now; and

3. The scope and limitations of the Medevac legislation.

These questions are addressed in detail below.

1. What, in our experience, the system was like prior to the Medevac legislation

<u>Medical facilities on Nauru and Manus Island</u>

Both Manus Island and Nauru are small islands with limited availability of medical professionals and facilities. For example there are no tertiary level hospitals, paediatric care facilities (other than the most basic) or medical specialists available on a regular, as needed, basis. Examples of medical equipment that is unavailable includes CT scans and MRI scanning facilities, psychiatric inpatient care, and child psychiatric support and care.

<u>Access to medical care and treatment on Nauru</u>

People seeking asylum and refugees on Nauru obtain medical care through contracted service providers and the Nauruan hospital, which only has the ability to meet basic medical needs. When specialist medical attention not available on Nauru is needed, the patient needs to be transferred to a country where the facilities, equipment and medical practitioners are available. This is the case for Nauruans and non-Nauruans alike. Prior to Medevac there was no clear process for this to occur.

<u>Transfer process pre Medevac</u>

Prior to the introduction of the Medevac legislation there was no system, oversight or due process to ensure the timely and often urgent transfer of children and adults for medical treatment.

Decisions about medical care were often subject to arduous and slow decision making processes with no transparency or accountability. For a number of our clients, the Government's own contracted treating doctors had recommended removal to Australia for treatment but the recommendation was not acted upon.[1]

Clients came to us when they were very ill. For all of our clients we started by obtaining as much information as possible about our clients' condition, diagnosis and recommended treatment. In all of our cases we corresponded with the Government's legal representatives in an endeavour to resolve the matter without the need to go to court.

For about half of our clients we were able to negotiate a transfer without the need for court proceedings. However, it should not be assumed that the process was straightforward or timely. We were still required to engage in the assessment of medical records, collection of medical evidence and lengthy written correspondence with Government lawyers.

In our matters where we commenced proceedings, we had already engaged in a significant amount of written correspondence with Government health service providers and lawyers. The lack of timely engagement by the Government via their health and legal representatives often, in our view, represented a real and life threatening risk to our clients. Time and time again, court proceedings had to be started to ensure that lives were not endangered by a lack of process to ensure timely engagement with acute medical issues.

Issuing proceedings is not without risk nor is it a simple step. Legal proceedings were only initiated when we felt we had run out of other options. These legal proceedings were costly, time consuming, absorbed large amounts of court resources and required hundreds of hours of pro bono work from our lawyers, paralegals and support staff. Counsel routinely had to be engaged and they too acted on a pro bono basis.

As of February 2019, Maurice Blackburn was aware of at least 52 Federal Court proceedings that were commenced in relation to the health and medical care provided to refugees and people seeking asylum on Manus and Nauru.[2] As part of the proceedings interlocutory orders were sought that children and adults be brought to Australia for urgent medical care in order to ensure that they did not suffer injury, further injury or death. A list of these Court proceedings is **attached** to these submissions.

Many of Maurice Blackburn's cases that went to court involved children, some as young as 6 months old. In all cases where we issued court proceedings our client was transferred to Australia either as a result of a court order or concession by the Government during proceedings to transfer.

We are aware of situations where, but for the intervention of pro bono lawyers and doctors and the Court, there was a very real risk of permanent injury, further self-harm or even death.[3] Moreover, it is clear that most of our clients will have ongoing physical and mental health problems arising from the lack of proper systems and processes to enable timely

[1] *DJA18 as lit rep for DIZ18 v Minister for Home Affairs [2018] FCA 1050*.
[2] The following written Federal Court decisions are some illustrations of the 50 or more matters that went to the Federal Court involving the need for an urgent medical injunctions: *DJA18 as lit rep for DIZ18 v Minister for Home Affairs [2018] FCA 1050; BAF18 as lit Rep for BAG18 V Minister for Home Affairs [2018] FCA 1060*; *AYX18 v Minister for Home Affairs [2018] FCA 283; ELF18 v Minister for Home Affairs [2018] FCA 1368; DWE18 as lit rep for DWD18 v Minister for Home Affairs [2018] FCA 1121; DRB18 v Minister for Home Affairs [2018] FCA 1163*; *EHW18 v Minister for Hoe Affairs [2018] FCA 1350*; *FRX17 as lit rep for FRM17 v Minister for Immigration and Border Protection* [*2018] FCA 63*; *EWR18 v Minister for Home Affairs [2018] FCA 1460*.
[3] *FRX17 as lit rep for FRM17 v Minister for Immigration and Border Protection* [*2018] FCA 63.*

diagnosis and treatment. Some may never recover properly because of the delay in treatment.

The need for the large scale intervention of the Courts and lawyers, in our view, turned the focus away from an understanding and assessment of an individual's health needs towards a reliance on an expensive, arduous, adversarial and litigious process. The focus should be on the fundamental health needs of asylum seekers and refugees as assessed by medical practitioners.

Resources

The adversarial and litigious system and the associated risks and costs of the matters prior to Medevac were and are significant.

Significant time was spent by legal teams often involving two or more lawyers, paralegals and legal assistants and counsel. A conservative estimate is that over 60 hours, and often more time, was spent preparing a single injunctive court proceeding.

In addition to the time spent by senior lawyers and support staff, expert evidence had to be collected from multiple medical practitioners in the form of medical reports and affidavits. Many of these practitioners had to take time out of their busy practices, out of standard hours, to provide reports. The cases also depended on the around the clock, pro bono support of the Victorian Bar. Many matters were heard out of hours and on weekends due to the urgent nature of the Court proceedings.

The legal costs incurred by the Government and its agencies[4] would have been substantial. It is incredibly inefficient to use a legal process to determine medical treatment. It involves paying for extraordinary amounts of lawyers' time as well as that of medical professionals. This clogs up the Court systems and places an adversarial process at the centre of what should be a discussion about health and medical need.

In a number of matters, costs orders were made against the Government at the interlocutory stage. In other matters the decision about costs was deferred; however, we expect that further costs orders could be made against the Government as the matters progress through the courts.

Negotiation or going to Court to obtain a medical transfer was arduous. Our lawyers, reported significant yet unnecessary obstacles in attempting to access medical care for clients:

- Communication with clients was often difficult. Aside from the usual difficulties associated with language barriers and gaining access to someone in an offshore detention facility, our staff reported that there is an extra layer of complexity when the client is ill, does not have access to high quality interpreting services and can only communicate by phone. The nature and severity of their illness will determine the level of complexity in communications. The lack of predictable rules around access made this unnecessarily difficult.

- In our experience, International Health and Medical Services (IHMS) often did not respond to requests for medical records in a timely fashion. We are not sure of the reasons for the delays in providing medical records.

[4] See, for example, https://www.theguardian.com/australia-news/2018/sep/29/australia-spent-320000-fighting-requestsfor-urgent-medical-transfers-of-asylum-seekers.

- Delays were common and often inexplicable. Government lawyers often said that they were unable to obtain instructions. There was no mandated, or even accepted turnaround time for responses from the Government.

The adversarial approach created further stress and anxiety for our clients. It was often unclear to us why some cases were forced to go through the court system as, once we got there, there was little or no evidence put opposing the injunction.

The pre-Medevac conditions were distressing for everyone involved – for patients (applicants), for their lawyers, for the Government's lawyers, doctors and healthcare professionals, and court staff. Most importantly, the health and lives of people on Nauru and Manus Island were put at unnecessary risk. We **attach** a copy of the decision in one of our matters in which the pre-Medevac process is described.

It is hard to imagine that most Australians would proudly own a system where the decisions about who gets medical attention are not made by doctors – but are instead subject to a process governed by lawyers and unelected government officials.

2. What, in our experience, the system is like now

The Medevac legislation has implemented a patient centred model.

Importantly, there is now a clearly articulated process in place for people to follow:

- The role of the medical profession is central in the decision making process around whether medical attention is needed and whether it is available on Nauru or Manus Island and whether transfer to Australia is needed. Doctors now make these decisions.

- There are clearly articulated timeframes (and time limits) for decision making. Timeliness in treatment is a major determinant in the likelihood of success in treatment and ongoing treatment requirements.

- Under Medevac, families are able to stay together during medical treatment. The beneficial impact of allowing for familial support on healing and recovery cannot be understated.

3. The scope and limits of the Medevac legislation

Medevac legislation only applies to a narrow cohort of people - being those in offshore detention at the time the legislation was passed. We do not agree with the Minister's assertions in his second reading speech for the Bill[5] that Medevac was used, nor could be used to 'bring them all here.'

Medevac legislation provides for a character test. The Act references section 501(7) of the Migration Act, providing the Minister with complete discretion on whether someone with a substantial criminal history should be transferred to Australia.

It is important for Committee members to remember that treatment through the Medevac provisions does not impact on Australia's offshore detention regime. Medevac simply

[5] Available from: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fce759aa1-47bf-467d-a58b-3bf640990032%2F0101%22

provides a process whereby people in offshore detention are able to access medical treatment and the result is only a temporary stay in Australia.

The Medivac legislation leaves untouched the provisions that provide for the mandatory detention of people brought to Australia for medical treatment and the Minister's discretions in relation how that detention is served.

Medevac legislation provides a process whereby people are to be brought to Australia for a temporary purpose (medical treatment). The legislation does not change the temporary legal nature of the transfer. The legislation specifically left that power untouched.

The Medevac legislation has resulted in a much more efficient, cost effective and patient centred system for assessing and attaining medical treatment.

Our submission

Our direct experience tells us that people on Nauru and Manus have not been receiving an acceptable level of medical care for their physical and psychological needs.

Some of our clients had chronic health conditions that were not properly treated, and as a result, escalated to an emergency condition. These included cases of diabetes, heart conditions, and mental health issues.

Some of our clients had urgent health conditions which escalated to unnecessarily worse outcomes as a direct result of delays in medical treatment. These included herpes encephalitis and osteomyelitis.

Some of our clients received no or inadequate treatment which led to an exacerbation of their condition, additional psychological distress and the possibility of permanent damage.

As peak bodies for the legal profession have argued,[6] ensuring the physical and psychological health of refugees in off-shore detention is not only medically and morally essential, it is central to Australia satisfying its international obligations.

The Medevac legislation has successfully provided clear guidelines for how sick people can and should be assessed for treatment. It provides necessary timeframes which did not exist before.

Importantly, the Medevac legislation provides a requirement for transparency in decision making. There are review processes in place for independent, expert reviews of Ministerial decisions, as well as setting clear processes for review by the Administrative Appeals Tribunal. This provides necessary transparency, accountability and due process which did not exist before.

Our Recommendations

1. We urge the Committee to recommend that this retrograde Bill be rejected.

2. If the Committee recommends that the Bill be passed, we urge the Committee to require that an alternative process be put in place which ensures:

[6] See for example https://www.lawcouncil.asn.au/media/media-releases/lawcouncil-backs-parliamentary-efforts-to-get-sick-asylum-seekers-off-nauru

- That decisions about medical treatment needs for those in off-shore detention are made by members of the medical profession;
- That the system, like any other health system, is patient-centred;
- That timeframes are clear and articulated to ensure prompt and efficient access to care;
- That decision making processes are transparent, and open to expert independent review.

My team and I would gladly accept an opportunity to share our direct experiences, and our legal expertise with the Committee.

Yours faithfully,

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