Castan Centre for Human Rights Law
Monash University Faculty of Law

Submission to the Senate Legal and Constitutional Affairs Committee

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

Prepared by Dr Maria O'Sullivan

Senior Lecturer, Faculty of Law and

Deputy Director, Castan Centre for Human Rights Law

Monash University

With research assistance provided by Aisha Ismail

Teaching Associate, Politics and International Relations

School of Social Sciences, Faculty of Arts

Monash University

The Castan Centre for Human Rights Law welcomes the opportunity to make a submission in relation to the Migration Amendment (Repairing Medical Transfers) Bill 2019. The Castan Centre's mission includes the promotion and protection of human rights. It is from this perspective that we make this submission.

Part 1: Summary of Submission

The Castan Centre for Human Rights Law does not agree with the proposed Bill. The passage of this Bill would mean dismantling improvements made to the medical transfer process which were introduced earlier this year. [1] It will mean a reversion to the pre-2019 medical transfer regime which involved a complex bureaucratic process which does not give treating doctors sufficient participation in important transfer decisions. We argue that the decision whether or not to transfer a patient to a higher level of medical care is a **clinical one**, to be made on a **clinical basis.**[2] Therefore the current regime, introduced earlier this year, should be retained.

We also note that there is substantial evidence to demonstrate that the previous medical transfer process was problematic – both in terms of government decision making and the welfare of patients. We highlight this evidence in Part 2 below. We also wish to emphasise that the current medial transfer regime is **strongly supported by leading medical organisations in Australia**. We have set out these statements in Appendix 1 to this submission.

We also set out below our response to certain matters raised in the Explanatory Memorandum to the Bill:

[1] via Schedule 6 to the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (the Miscellaneous Measures Act).
[2] Similar statements have been made by other bodies and experts, for instance, see Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, 30 July 2018, 99 (para 409), https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf:

Return of transferred persons

The Explanatory Memorandum states a number of concerns with the current transfer arrangements. In particular, it notes that:

> … there is no provision for transitory persons who are brought to Australia under the medical transfer provisions to be removed from Australia or returned to a regional processing country once they no longer need to be in Australia for the temporary purpose for which they were transferred.

Whilst there is no **explicit provision** governing the return of this cohort of transitory persons, as a matter of normal statutory interpretation, the general removal provisions in Sections 198AD and 198AH of the Migration Act operate in relation to this cohort.

Sections 198AD and 198AH provide that an unauthorised maritime arrival brought to Australia from a regional processing country for a temporary purpose under section 198B must be removed from Australia and taken to a regional processing country **once they no longer need to be in Australia for the temporary purpose**.[3]

We also note that a transitory person who is brought to Australia for treatment is legally restricted in many ways. For instance, such a person is **not entitled to apply for a visa** unless the Minister permits them to do so.[4]

The fact that the Migration Act already provides for the return of medically transferred persons has in fact been clearly stated by the Secretary of the Department of Immigration, Mr Pezzullo in Senate Estimates:

> **2018-19 Estimates – Supplementary – 22 October 2018**
> **Mr Pezzullo:** Upon transference to Australia, and there's something in the order of over 600 people here on temporary transfers, **the law states quite clearly that when their period of treatment is concluded they're expected to return**. So we try to make that clear to people. We don't want to create a situation where people think that medical transference to Australia is a pathway to residency,

[3] Section 198AD authorises the taking of unauthorised maritime arrivals to a regional processing country. S198AH then applies section 198AD to certain transitory persons. Section 198AH(1A) provides that 'A transitory person is covered by this subsection if:

(a) the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and
(b) the person is detained under section 189; and
(c) *the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).'* (emphasis added).

[4] Migration Act 1958 (Cth), section 46B.

> because that could incentivise the kinds of perverse behaviours that I think you're alluding to, Chair.
> …
> **Mr Pezzullo:** So medical transfers are not a solution to the migration challenge or migration issue of one day finding these people permanent homes under our Migration Act. **Under the laws this parliament has passed they can't settle here in Australia.**

We submit that any concerns about the clarity of provisions relating to return of transitory persons can be addressed by amending the relevant sections of the Migration Act to make that matter clearer. It does not, however, justify repeal of the 2019 amendments. We would also make similar observations about the other 'significant issues' raised in the Explanatory Memorandum, which we are happy to discuss if called to give evidence before the committee.

Part 2: Detailed reasons for retaining the present medical transfer regime

Reason 1: Evidence of deficiencies in the pre-2019 medical transfer process

A number of coronial inquests have pointed to problems with the pre-2019 medical transfer process. For instance, the 2018 coroner's report into the death of Iranian asylum seeker Hamid Khazaei found his death was 'preventable'[5] and that 'a series of clinical errors, compounded by failures in communication that led to poor handovers and significant delays in his retrieval from Manus Island' contributed to Mr Khazaei's death.[6] The Coroner found 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. The evidence demonstrates that this process resulted in crucial information, i.e. the importance of getting Mr Khazaei on the flight at 1730 hours, being missed, or not passed on accurately or clearly enough. **The transfer process in this regard was confusing**. While I appreciate the justification for the involvement of different agencies in the process, there was clearly no central point of coordination to ensure consistency.[7]

A number of Australian medical experts have also given evidence in Federal Court cases attesting to the fact that there were significant problems with the pre-2019 medical transfer process. These doctors have noted the difficulty and inefficiency in the 'old' medical transfer system, which they attested resulted in significant delay in medical transfer and treatment.

[5] Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, 30 July 2018, 3 (para 14) https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf: 'Mr Khazaei's death was preventable. Consistent with the evidence of the expert witnesses who assisted the court in this matter I am satisfied that if Mr Khazaei's clinical deterioration was recognized and responded to in a timely way at the MIRPC clinic, and he was evacuated to Australia within 24 hours of developing severe sepsis, he would have survived.'

[6] Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, 30 July 2018, 3 (para 16) https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf: 'it would be possible to characterise the circumstances that led to Mr Khazaei's death simply as a series of clinical errors, compounded by failures in communication that led to poor handovers and significant delays in his retrieval from Manus Island'.

[7] Coroners Court of Queensland, Inquest into the death of Hamid Khazaei, 30 July 2018, 98 (para 404) https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf [emphasis added].

For instance, in Federal Court proceedings in the case *FRM17* in 2018, Dr Martin[8] said the OMR process would be inadequate to deal with a deterioration in the applicant's mental health. He said:

> In my role as senior medical officer I gained… a detailed understanding of the process for referral and consideration of patients requiring transfer to an offshore medical facility for treatment.… It is… my professional view **that there are not proper processes in place within the offshore detention system, both on Nauru and in Port Moresby, to efficiently escalate [the applicant's] care or provide an emergency medical evacuation should her condition deteriorate.**
>
> …
>
> 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.[9]**

Federal court judges have also expressed concerns about the **bureaucratic complexities and delays** associated with the previous system. For instance, in the 2018 case *EWR v Minister for Home Affairs,*[10] Justice Thawley of the Federal Court noted that:

> the applicants had no choice but to commence proceedings seeking the relief they did [in the Federal Court] in light of the fact **that the Minister did not respond to a single letter that had been written requesting the urgent transfer of the applicants from Nauru and indicating that proceedings would be commenced**. As has been noted earlier, those letters included detailed accounts of the conditions of the applicants and was supported by substantial medical evidence from treating doctors. The Minister also had access to the medical

[8] Dr Nick Martin is an Australian doctor who formerly practiced on Nauru including by directly providing services to patients through IHMS.
[9] *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 (9 February 2018) at [34]. See also concerns expressed by Dr Martin in *BAF18 as litigation representative for BAG18 v Minister for Home Affairs* [2018] FCA 1060 (11 July 2018).
[10] *EWR v Minister for Home Affairs [2018]* FCA 1460 (21 September 2018).

> records kept by IHMS which contained extensive records in respect of the medical conditions of the applicants, some of which have been set out above. As noted above, the failure by the Minister to respond to the letters written on behalf of the applicants over an extended period was left unexplained. The failure to communicate any substantive response to these letters fell short of what is expected of a model litigant.[11]

Other bodies have also raised concerns with the bureaucratic delays caused by the previous transfer regime. For instance, the **UN High Commissioner for Human Rights** has stated:

> … information received since 2014 suggest several reported cases of death resulting from the lack of access to health care including medical treatment at the offshore facilities. Many migrants suffer from deteriorating physical and mental health, which seem to have been the result of a lack of appropriate health care, exacerbated by the indefinite and prolonged confinement. A number of migrants also suffer from serious or chronic medical illnesses that require immediate medical attention but have been left untreated for months or even years. **Among the myriad of actors that provide services to the migrants, private security and other service providers have reportedly failed to facilitate access to health care in a number of instances**.[12]

Reason 2: Increased pressure on the Court system

A further problem with the pre-2019 medical transfer regime is the pressure this places on the court system.

Justice Mortimer of the Federal Court raised concerns about this in 2018 case, *ELF18:*

> There have now been **at least seventeen of these kinds of applications in this Court**. Often they are brought urgently because of the circumstances of the individuals concerned, and the need to move quickly once those circumstances become fully apparent to those who take on the responsibility of acting for these individuals, and those experts who agree to give opinions about what treatment is needed.[13]

As part of this, Justice Mortimer also raised concerns about problems faced by the applicant's legal representatives in gaining access to the applicant's medical records for the purpose of making an application to the court for a transfer.[14]

---

[11] *EWR v Minister for Home Affairs [2018]* FCA 1460 (21 September 2018), para 58.
[12] UN High Commissioner for Human Rights, Australia: UN experts urge immediate medical attention to migrants in its offshore facilities, Statement 18 June 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24709&LangID=E
[13] *ELF18 v Minister for Home Affairs [2018] FCA 1368* (3 September 2018), para 16.
[14] *ELF18 v Minister for Home Affairs [2018] FCA 1368* (3 September 2018), para 22: 'The patchiness and delays associated with getting the applicant's medical records hardly instils confidence in the management of the medical treatment of people such as the applicant...' Para 53: 'As I noted that evening, the respondents' response to this application, and their failure to take any proactive steps earlier in the week, placed the Court in

Reason 3: Costs incurred to the Commonwealth in dealing with litigation

One of the hallmarks of the previous system was that applicants often had to use the courts to obtain an order for transfer. The benefit of the present system is that the decision is in the hands of clinicians and is more likely to avoid unnecessary and costly litigation. On the issue of litigation costs, we note below some relevant quotes from Senate Estimates Transcripts (bold emphasis added)

On amount spent on medevac interlocutory proceedings:

> 2018-19 Estimates – Supplementary – 22 October 2018
> Senator McKIM: Mr Pezzullo, are you able to advise the committee, as you did last time we were discussing legal costs, how much the department has spent in court opposing applications to transfer people out of our offshore detention system here to Australia?
> …
> Ms de Veau: I think I have a figure for you now. It looks like in 2017-18 it was in the vicinity of $275,000. This is legal expenses in relation to medical transfer interlocutory proceedings. From July to September—so year to date to the end of September, first quarter—it looks like it's in the vicinity of $480,000. So that's a total of $753,000.
> …
> 2018-19 Estimates – Additional – 18 February 2019
> Senator McKIM: Thank you. How much money did the department spend fighting in the courts to prevent transfers of people from Manus Island and Nauru in the last financial year? We've addressed this before and the figures have been available, so I'm just after, I guess, an update, Ms de Veau.
> …..
> Ms de Veau: We have given it before, and for the current financial year—so, July 2018 to 31 January—the figure is $1.373 million...

Conclusions

The above evidence clearly indicates significant deficiencies in the previous medical transfer system and should be considered by the Committee in evaluating the present Bill which seeks to repeal the improvements introduced to this process earlier this year.

---

a difficult and invidious position. On the one hand, the evidence was overwhelming that the applicant's situation was very serious and there were real risks to her well-being, and perhaps to her life. Once suicidal ideation becomes a reality, the only responsible reaction is the one recommended by experts such as Dr Schmid and Dr Lloyd. Yet the respondents insisted that the Court should have the complete medical records, that they may wish to object to some of the evidence being relied upon and that in any event by their recent conduct they had alleviated the immediate risk to the applicant.'

APPENDIX 1 – STATEMENTS FROM MEDICAL ORGANISATIONS RE MEDICAL TRANSFER PROVISIONS

Media releases/statements from the following organisations were considered:

- Australian Medical Association (**AMA**)
- Royal Australian College of General Practitioners (**RACGP**)
- Royal Australian and New Zealand College of Psychiatrists (**RANZCP)**
- Royal Australasian College of Physicians (**RACP**)

RANZCP – Media Release – 'Australian Parliament urged to retain vital medical panel' – 25 July 2019 (available here)

The President of the Royal Australian and New Zealand College of Psychiatrists (RANZCP), Associate Professor John Allan, has urged the Australian Parliament to continue the Independent Health Advice Panel (IHAP) established earlier this year under the Medevac legislation.

….

Associate Professor John Allan said that the IHAP has an important role in monitoring, assessing and reporting on the health of the people detained and the standard of health services and care provided to them.

'Given the high number of presentations and admissions of asylum seekers and refugees for mental health reasons, we believe the panel is an imperative safeguard for the government, the people being held offshore, and the medical specialists and other health practitioners providing care offshore,' said Associate Professor Allan.

'It will also contribute to greater transparency around the quality of treatment and mental health care made available to these most vulnerable and marginalised of people.'

'With the panel just recently established, it would be very premature to suggest that it is either not needed or not working well before it has been properly tested,' said Associate Professor Allan.

…

The RANZCP calls on the Australian Parliament to maintain the Medevac legislation and allow the IHAP to fulfil its function. It also supports the referral of the Medevac repeal legislation for inquiry by the Senate's Legal and Constitutional Legislative Committee.

'We believe that universal access to safe and timely health care is a basic human right and, as such, should not be compromised for anyone.'

RACP – President's Message – 16 July 2019 (available here)

We've had major success in helping to delay the Australian Government's wind-back of legislation that had allowed medical evacuation of asylum seekers from Manus and Nauru.

Last week, representatives from the RACP and the Australasian College of Emergency Medicine met with Parliamentarians across the political spectrum to argue the case for the retention of the legislation and the Independent Health Advice Panel which provides medical oversight.

In a major development, the repeal legislation has now been referred to a Senate Committee for reporting on 18 October 2019, which means those asylum seekers needing medical treatment can continue to be evacuated until at least November 2019.

The RACP was specifically named in the referral motion, and we will of course be making a submission to the Senate Inquiry.

The Independent Health Advice Panel will also be reporting to Parliament on a three-monthly basis about the capacity of facilities and the physical and mental health of those on Manus and Nauru.

Medical College Presidents are united in opposing the Australian Government's push to repeal the Medevac legislation and we are advocating together on this issue.

AMA Media Release - President talks Medevac Bill with Home Affairs Minister - 12 July 2019 (available here)

One high-level appointment was with Home Affairs Minister Peter Dutton in what Dr Bartone described as a very respectful conversation about the health of asylum seekers.

Mr Dutton repeated the Government's intention to repeal the Medevac Bill, and Dr Bartone stressed the AMA's view that all asylum seekers and refugees in the care of the Australian Government should have access to quality health care.

The Government has subsequently introduced repeal legislation to the House of Representatives, but it will not pass the Parliament before late October because it has been referred to a Senate inquiry ¹rst.

"We are very clear about each other's issues and concerns and we will continue to have constructive dialogue in the weeks ahead," Dr Bartone said.

"The Government has a particular course of action – a particular way ahead – and we will remain engaged to ensure that at the end of the day we can hand-on-heart be clear about **our commitment to the ongoing, independent medical assessment and access to appropriate medical care of the refugees."**

Dr Bartone insisted there must be a robust process for the independent medical assessment of the health of asylum seekers and refugees in the care of the Australian Government.

AMA Media Release – AMA Supports Phelps Medivac Bill - 6 December 2018 (available here)

Having gained assurances on key amendments to the legislation in recent days, **the AMA supports the asylum seeker Urgent Medical Treatment Bill being promoted by Independent MP and former AMA President, Professor Kerryn Phelps**.

….

"We want a new national statutory body of clinical experts, independent of government, with the power to investigate and advise on the health and welfare of asylum seekers and refugees." [Quote from AMA President, Dr Tony Bartone]

AMA – Media Release – AMA demands urgent fix to humanitarian emergency in Nauru – 20 September 2018 (available here)

"The AMA has been calling for a more humanitarian approach, including independent assessment of health care arrangements, for many years now." [Quote by AMA President, Dr Tony Bartone]

RACGP News Article – 'Momentum behind refugee bill as GPs give their Support' - 12 February 2019 (available here)

GP and refugee health advocate Dr Sara Townend told newsGP **the bill simply aims to put medical decision-making back in the hands of doctors.**

'There is a lack of medical personnel involved in decision making. Most troublingly, the Government clearly states that Australia is to be used as a destination only in extreme circumstances,' she said.

RACGP News Article – 'Advocates applaud court decision on Medevac bill remote assessments' – 21 June 2019 (available here)

Dr Kate Walker, Chair of the RACGP Specific Interests Refugee Health network, agrees with the judge's decision, pointing out that in-person examinations are often not possible in onshore detention, especially in the cases of those held on Nauru.

'Those refugees and asylum seekers have had difficulty accessing the Medevac legislation because the Nauruan Government has prevented them from having phone or telemedicine access with Australian doctors,' she told newsGP.

'Therefore, they are unable to access potential medical evacuation through the legislation unless it's through written documentation of their medical records, as requested by Australian doctors from the healthcare they're already receiving in Nauru.'

…

Dr Walker agrees and highlighted that the Medevac legislation is about ensuring the provision of adequate healthcare for patients under Australian jurisdiction.

‘It’s about our duty of care to people who we have put in these places where there is inadequate medical care to meet their needs, and it’s only for those cases who are unable to be managed in the regional processing centre,’ she said.

‘**The legislation is about enabling them to have medical care, it doesn’t allow them to have permanent settlement.**

‘It is not about anything else but doctors’ opinions being used to triage the medical needs of people who are unwell and not getting the care they need.’