Law Council
OF AUSTRALIA

Migration Amendment (Repairing Medical Transfers) Bill 2019

Senate Legal and Constitutional Affairs Legislation Committee

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Law Institute of Victoria, the Law Society of New South Wales, the Migration Law Committee and the Constitutional Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section, and its National Human Rights Committee for their assistance with the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in respect of its inquiry (**the Inquiry**) into the Migration Amendment (Repairing Medical Transfers) Bill 2019 (**the Bill**). The Bill addresses the provisions added to the *Migration Act 1958* (**the Act**) by Schedule 6 of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) (**the Amendment Act**), which commenced on 1 March 2019. Those provisions are generally referred to as the '**Medevac Law**'. The Bill's objective is to repeal the Medevac Law and ensure that people transferred under its provisions can be removed from Australia.

2. The Law Council does not support the repeal of the Medevac Law. It considers that under Australian law, as well as international law, the Commonwealth of Australia has responsibility for the health and safety of asylum seekers transferred to other countries for offshore processing and assessment. Since regional processing was reinstated in 2012, concerns have been consistently raised about the impacts of these arrangements on the physical and mental health of refugees and asylum seekers. These impacts have become more profound as the period of time has lengthened.

3. The Law Council believes that there is a need for efficient and effective transfer processes which enable access to health assessment and treatment, based on giving appropriate weight to the views of qualified and objective medical professionals, as a key element of decision-making, reflecting Australia's common law and international obligations discussed above.

4. The Medevac Law provides for a legislative framework in which doctors can indicate that people should be transferred to Australia for medical assessment and treatment which they would otherwise be unable to receive. Such decisions occur under the oversight of an independent panel of some of Australia's most respected medical practitioners (**the Panel**). The Minister can prevent a transfer where he or she reasonably suspects that a transfer would be prejudicial to security, or where the person has a substantial criminal record and he reasonably believes that the transfer would expose the community to a serious risk of criminal conduct. In such circumstances, Australia's responsibility for the health and safety of the relevant person still exists. Therefore, the Law Council considers that all efforts must be taken to ensure that full medical assessment and treatment is made available to individuals offshore.

5. Individuals transferred under the Medevac Law are subject to detention as unlawful non-citizens throughout the period of their transfer in Australia. The Minister ultimately retains the discretion as to whether a person is detained in the community or in a detention centre (or, to grant a visa). This means that any potential risk posed to the Australian community posed by such a person will be mitigated in practice. Indeed, even prisoners in Australia who have been convicted of the most serious crimes are, entirely appropriately, provided with access to health care as necessary.

6. The Medevac Law provides no pathway to permanent residency in Australia. It provides no legal immigration status in Australia, save by the discretion of the Minister. Whilst in Australia, the Act provides for a bar on visa applications by transitory persons who are unlawful non-citizens[1], as well as by unauthorised maritime arrivals. The Minister may lift the bar if he or she thinks it is in the public interest to do so, but this is a non-compellable, discretionary power. Given this legislative framework, the Law

[1] Or transitory persons who hold bridging visas or temporary protection visas, or prescribed temporary visas.

Council queries whether the Medevac Law undermines Australia's management of its borders.

7. The Law Council recognises that there is a general discretionary power to bring transitory persons to Australia temporarily, which has been used in the past. However, prior to the commencement of the Medevac Law, the only means of compelling the transfer of an asylum seeker requiring medical treatment was to commence injunctive proceedings in court. Such proceedings were unnecessarily adversarial, time and resource-intensive. The Medevac Law avoids the significant amount of resources that were previously expended by the pro bono legal community, the Government and the Federal Court of Australia in dealing with claims for medical transfer on behalf of refugees and asylum seekers. It provides a more efficient process achieving the same result, and avoids potentially life-threatening delays.

8. The Law Council further recognises that there may be ambiguity in Medevac Law provisions concerning powers of removal and return. While it is clearly intended to enable temporary medical transfers only, there is an argument that the law does not provide for transitory persons who are transferred to Australia for medical reasons 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. It may also be arguable that Medevac Law transferees can be removed and returned under the law as it stands. Parliament may wish to remove any ambiguities in this area by making some minor technical amendments to the Act as noted in this submission. It is unnecessary to repeal the Medevac Law for such purposes.

9. The Law Council considers that the Panel should be appropriately remunerated for its important functions. To this end, it recommends that the Senate should request the House of Representatives, if the House thought it appropriate, to put in a standing appropriation for the purpose of providing appropriate remuneration to the Panel.

10. The Law Council considers that figures to date suggest that the Medevac Law has been implemented in a balanced and measured way. As it has operated for only a short period, its repeal would be too premature to allow a final and accurate assessment of its effectiveness.

11. Finally, while, the Medevac Law overcomes the existing adversarial approach to medical transfers and at this stage of its operation appears to appropriately increase access to necessary health care, it does not of itself provide durable solutions to the situation of refugees transferred to regional processing centres. Such solutions are urgently needed. The Law Council calls upon the Australian Government to work with other Asian-Pacific countries to establish a cooperative and transparent approach in response to regional flows of asylum seekers, which upholds their human rights and is consistent with Australia's international legal obligations.

Introduction

12. The Law Council, as the peak body of the Australian legal profession, is non-partisan. In accordance with its mandate and constitution,[2] it has focused its examination of the Bill on particular key issues affecting the rule of law in the public interest,[3] and the administration of justice and development and improvement of law throughout the Commonwealth.[4]

13. In broad terms, the Bill is concerned with the processes by which certain refugees and asylum seekers who transferred by Australia to Nauru or Papua New Guinea through its regional processing arrangements prior to 1 March 2019 may be transferred temporarily back to Australia to receive medical or psychological assessment or treatment.

14. The Bill forms part of the Australian Government's suite of border management measures and its impact is directed toward refugees and asylum seekers who have sought Australia's protection.

15. The Law Council notes that the Medevac Law has not previously been subject to Committee review or formal public consultation.[5] Accordingly, while the objective of the Bill is centred on the repeal of the Medevac Law, the Law Council emphasises the importance of full consideration of the context to, justification for, and operation of the Medevac Law itself, in addition to questions associated with its discontinuation. The Law Council also welcomes the initial scrutiny of the Bill undertaken by the Senate Standing Committee for the Scrutiny of Bills (**the Scrutiny Committee**).[6]

Key pre-existing provisions of the Act

16. Current provisions of the Act which existed prior to the commencement of the Medevac Law (**pre-existing provisions**) include a general discretionary power to bring transitory persons to Australia temporarily. Subsection 198B(1) states:

> *(1) An officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia*.

17. A 'temporary purpose' is not defined by the Act[7] but has been interpreted by the Department of Home Affairs (**the Department**) in practice to include medical transfers.

18. A 'transitory person', as defined by subsection 5(1) of the Act, includes a person who was taken to a regional processing country[8] (**RPC**) under section 198AD. Accordingly,

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[2] Law Council of Australia, 'Constitution of Law Council of Australia Limited' (Adopted 16 April 2003, last amended 1 December 2018), <https://www.lawcouncil.asn.au/resources/corporate-documents/constitution-of-law-council-of-australia-limited>.
[3] Ibid cl 2.1(a).
[4] Ibid cl 2.1(f).
[5] Although the Amendment Act was referred for the consideration of the Parliamentary Joint Committee on Human Rights, this was undertaken prior to the inclusion by amendment of Schedule 6. See: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 6 of 2018, 26 June 2018), 49.
[6] Senate Standing Committee for the Scrutiny of Bills, 'Scrutiny Digest 3 of 2019' (24 July 2019), 23.
[7] The Medevac Law subsequently added *Migration Act 1958* (Cth) (*Migration Act*) sub-s 198B(4), which confirms that a 'temporary purpose' may, among other things, include medical or psychological treatment or assessment, or the accompaniment of a person in need of such treatment where that person is a member of the same family unit or the accompaniment is recommended by a medical practitioner.
[8] *Migration Act* sub-s 198AB(1) permits the Minister to designate that a country is a regional processing country. To date, two countries have been designated: Papua New Guinea and the Republic of Nauru.

all transitory persons were unlawful non-citizens[9] who arrived in Australia as unauthorised maritime arrivals[10] (**UMAs**), or were intercepted at sea[11] prior to their transfer to an RPC.

19. Upon being brought to Australia under section 198B of the Act (unless accompanied by the grant of a visa), a person transferred to Australia from an RPC once again becomes an unlawful non-citizen and must be detained under section 189:

> *(1) If an officer knows or reasonably suspects that a person in the migration zone … is an unlawful non-citizen, the officer must detain the person*.

20. A person detained under section 189 must remain in detention until (inter alia) he or she is removed from Australia under section 198[12] or granted a visa.[13] However, a transitory person who is in Australia and is a UMA is barred from applying for a visa,[14] unless the Minister decides to lift the bar in the 'public interest'.[15]

21. Two pre-existing provisions relate to removal from Australia of persons transferred for a temporary purpose under section 198B.

22. Subsection 198(1A) requires that:

> *In the case of an unlawful non-citizen who has been brought to Australia under 198B for a temporary purpose, an office must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for the temporary purpose (whether or not that purpose has been achieved)*.

23. This provision applies to any unlawful non-citizen brought to Australia under section 198B, including transitory persons, and provides the requirement that the person be removed.

24. The second provision effectively provides the destination to which the transitory person must be removed. Section 198AD applies to a UMA who is detained under section 189. Under subsection 198AD(2):

> *An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country*.[16]

25. Section 198AH addresses when a person is covered by section 198AD. Under subsection 198AH(1A), a transitory person is covered by section 198AD if they are a UMA who is brought to Australia under section 198B from an RPC for a temporary purpose, detained under section 189, and no longer need to be in Australia for the temporary purpose, whether or not the purpose has been achieved.

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[9] Under *Migration Act* ss 5, 13-14, an unlawful non-citizen is a non-citizen in the migration zone who does not hold a visa.
[10] Ibid s 5AA.
[11] *Maritime Powers Act* (Cth), pt 3, divs 7-8.
[12] Or s 199, which provides for the removal of non-citizens' dependants upon request.
[13] *Migration Act* paras 196(1)(a) and (d).
[14] Ibid sub-s 46B(1). Transitory persons in Australia who hold bridging visas, temporary protection visas or prescribed temporary visas are also barred from making valid applications: s 46B(1).
[15] *Migration Act* sub-s 46B(2).
[16] Exceptions are where there is a Ministerial determination to that effect (s 198AE), where there is no RPC (s 198AF), or where there is non-acceptance by an RPC (s 198AG).

26. Accordingly, the pre-existing provisions of the Act provide a power for a person who was brought to Australia for a temporary purpose under section 198B to be returned.

The Medevac Law

Rationale for the Medevac Law

27. The Medevac Law was designed to complement, rather than replace, the pre-existing powers under the Act to transfer refugees and asylum seekers temporarily to Australia. It responds specifically to situations of medical and psychological need as assessed by medical practitioners.

28. The Medevac Law was motivated by concerns[17] for the mental and physical health of refugees and asylum-seekers in regional processing countries—and particularly children—in light of their limited access to adequate medical and psychiatric services. Additionally, the Medevac Law responds to concerns that the Department has unduly delayed or rejected medical transfer applications made under pre-existing provisions. Its aim is to provide an expedient, objective process to determine whether transfers were required.[18]

29. On the basis of independent expert medical assessments,[19] the Law Council acknowledges that the medical needs of individuals within this cohort are real.

30. The increased uncertainty experienced by this cohort remains an ongoing problem and, as recently as this week, part of the cohort based at Manus Island is expected to be transferred to Port Moresby.

Content of the Medevac Law

31. The principal provisions of the Medevac Law are contained in Subdivisions C and D of Division 8 of Part 2 of the Act.

32. Overall, it should be noted that the operation of the Medevac Law is generally limited to transitory persons (including legacy minors) who were present in an RPC upon the commencement of the Amendment Act.[20] Accordingly, the Medevac Law generally applies to a finite cohort of people rather than future arrivals.

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[17] Dr Kerryn Phelps stated: 'As a doctor I cannot go on seeing people, knowing that people are suffering on Australia's watch in indefinite offshore detention … I think it's incredibly important that we put this matter back into the hands of the medical profession and the government gets out of the way.' Quoted in Stephanie Dalzell, 'Kerryn Phelps flags bill to get children off Nauru, but she needs at least one Government MP to back it' *ABC News* (29 November 2018), <https://www.abc.net.au/news/2018-11-29/kerryn-phelps-crossbench-mps-senators-children-nauru/10566626>.

[18] Alex Reilly, 'Peter Dutton is whipping up fear on the medevac law, but it defies logic and compassion' *The Canberra Times* (Opinion, 26 June 2019), https://www.canberratimes.com.au/story/6238958/medevac-fearmongering-defies-logic-and-compassion/?cs=14264.

[19] See, for example: Médecins Sans Frontières, *Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru* (December 2018), <https://www.msf.org.au/sites/default/files/attachments/indefinite_despair_3.pdf>; and United Nations High Commissioner for Refugees, 'Medical Expert Mission Papua New Guinea 10 to 16 November 2017' (18 December 2017), <https://www.unhcr.org/en-au/publications/legal/5a3b0f317/unhcr-medical-expert-mission-to-papua-new-guinea-10-16-november-2017.html>.

[20] That is, on 1 March 2019: *Migration Act* paras 198D(1)(a), 198E(2)

Legacy Minors

33. First, the Medevac Law provides for all children within its scope (**Legacy Minors**)[21] to be transferred to Australia, save where:

    - the Minister 'reasonably suspects' that so doing would be prejudicial to security within the meaning of the *Australian Security Intelligence Organisation Act 1979* (**ASIO Act**);[22] or
    - where the Minister knows the person has a substantial criminal record[23] and 'reasonably believes' their transfer would expose the community to a 'serious risk of criminal conduct.'[24]

34. If the Minister approves the transfer of a Legacy Minor, section 198C(1) states that an officer must bring them to Australia for the temporary purpose of medical or psychiatric assessment or treatment.[25]

35. Relevantly, the Law Council understands that all remaining asylum seeker/refugee children were transferred out of Nauru by late February 2019, and that only adult male asylum seekers/refugees are now living in Papua New Guinea.[26]

Relevant Transitory Persons

36. Second, the Medevac Law relates to adults (in practice) within its scope (**Relevant Transitory Persons**).[27] The Medevac Law provides that 'two or more treating doctors'[28] may notify the Secretary of the Department that a Relevant Transitory Person:

    - requires medical or psychological assessment or treatment; and
    - the person is not receiving appropriate medical or psychiatric assessment or treatment in the RPC; and
    - it is necessary to remove that person from the RPC for appropriate medical or psychiatric assessment or treatment.[29]

37. The Minister must approve the transfer unless one of three reasons for refusal exist. The first two of these are that:

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[21] *Migration Act* para 198D(1)(a).
[22] Ibid para 198D(3)(a). If an adverse security assessment is in force under the ASIO Act, that fact is included as a ground on which the Minister may form a reasonable suspicion. Sub-s 198D(3A) requires ASIO to advise the Minister within 72 hours of his notification that a given individual is a Legacy Minor *if the transfer of the person to Australia may be prejudicial to security within the meaning of the [*ASIO Act*] (including because an adverse security assessment in respect of the person is in force under that Act) and if that threat cannot be mitigated* [emphasis added].
[23] As defined by the *Migration Act* sub-s 501(7). A person has a substantial criminal record if (*inter alia*) they have been: sentenced to a term of imprisonment of 12 months or more; sentenced to two or more terms of imprisonment where the total of those terms is 12 months or more; or detained in a facility or institution due to unsoundness of mind or insanity or unfitness to plead.
[24] *Migration Act* para 198D(3)(b).
[25] Ibid sub-s 198C(1).
[26] Refugee Council of Australia, 'Offshore processing statistics', 8 April 2019, <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/>.
[27] *Migration Act* sub-s 198E(2).
[28] A 'treating doctor' is a medical practitioner who is registered or licensed to provide medical or psychiatric services in a RPC or in Australia; and has assessed the transitory person either remotely or in person: sub-s 198E(7).
[29] Ibid sub-s 198E.

- he or she reasonably suspects that doing so would be prejudicial to security within the meaning of the ASIO Act;[30] or
- knows that the person has a substantial criminal record[31] and reasonably believes the transfer would expose the community to a serious risk of criminal conduct.[32]

38. If approved, then under section 198C(2), an officer must bring the Relevant Transitory Person to Australia for the temporary purpose of medical or psychiatric assessment or treatment.[33]

39. The third basis on which the Minister may also decline the transfer of a Relevant Transitory Person is if he or she reasonably believes the transfer is not necessary on medical grounds.[34] To review such instances and monitor the physical and mental health of transitory persons more broadly, the Medevac Law establishes an Independent Health Advice Panel (**the Panel**).[35] In such cases, the Panel must conduct a further clinical assessment (whether in person or remotely) and either recommend that the Minister's decision to decline the transfer be confirmed, or uphold the original recommendation that the person's transfer be approved.[36] The Minister must abide by the Panel's conclusion except in case of security or criminal conduct risks.[37]

Family members and accompanying persons

40. Third, the Medevac Law also provides for the temporary transfer of family members and certain accompanying persons of transitory persons temporarily brought to Australia, or family members of minors in Australia.[38] The Minister must also approve their transfer unless the above security or criminal conduct grounds apply.[39]

41. As noted above, any transitory person who is brought to Australia from an RPC once again becomes an unlawful non-citizen and must be detained under section 189 of the Act. This detention must continue until the time of removal from Australia or until the Minister determines that immigration detention is no longer required.[40]

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[30] Ibid para 198E(4)(b). The terms are substantially identical to those applied to Legacy Minors and, likewise, include consideration of an averse security assessment that may be in force, and require ASIO to advise the Minister within 72 hours if the transfer would be prejudicial to security within the meaning of the ASIO Act and if that threat cannot be mitigated (sub-s 198E(4A)).
[31] As defined by the *Migration Act* sub-s 501(7): As discussed above, a person has a substantial criminal record if (*inter alia*) they have been: sentenced to a term of imprisonment of 12 months or more; sentenced to two or more terms of imprisonment where the total of those terms is 12 months or more; or detained in a facility or institution due to unsoundness of mind or insanity or unfitness to plead.
[32] *Migration Act* para 198E(4)(c).
[33] Ibid sub-s 198C(2).
[34] Ibid para 198E(4)(a).
[35] Ibid div 8, sub-div D, ss 199A-199E.
[36] Ibid sub-s 198F(2).
[37] Ibid sub-s 198F(5). The security and criminal conduct grounds are as worded above.
[38] Ibid s 198G; sub-ss 198C(3)-(5).
[39] Ibid sub-s 198G(3).
[40] Ibid ss 189; 196; 198C (Note).

Establishment of the Panel

42. As noted above, the Panel is established under the Medevac Law.[41] Its objective is to monitor, assess and report on the physical and mental health of transitory persons who are in RPCs and the standard of health services provided to them.[42]

43. The Panel is comprised of at least eight members in total and includes the Department Chief Medical Officer, the Commonwealth Chief Medical Officer, and nominees of the Australian Medical Association, Royal Australian and New Zealand College of Psychiatrists, and the Royal Australasian College of Physicians.[43] A person is not entitled to remuneration in respect of their position as a member of the Panel.[44]

Key provisions of the Bill

Repeal and removal

44. The principal effects of the Bill are to repeal the Medevac law and clarify the power to remove from Australia and return to a RPC any persons transferred under it.

45. Sections 198C to 198J are repealed from Subdivision C of Division 8 of Part 2 of the Act, and Subdivision D of Division 8 of Part 2 is repealed in its entirety. Additionally, the Bill removes the definitions of 'legacy minor', 'relevant transitory person' and 'treating doctor' from sub-section 5(1).

46. With regard to the removal of transferred persons from Australia, the Bill amends section 198 of the Act to extend the removal power contained in that section expressly to cover an unlawful non-citizen transferred to Australia for a temporary purpose under section 198C (Medevac Law). This expands the current provision, which applies to those brought to Australia under section 198B (the pre-existing general power).

47. With regard to the destination to which transferred persons may be removed, the Bill amends section 198AH expressly to cover a UMA brought to Australia from an RPC under section 198C (Medevac Law). As discussed above, section 198AH determines which transitory persons fall within the scope of section 198AD. Section 198AD creates the requirement to take a UMA to a RPC.

Application provisions

48. Item 15 of Schedule 1 to the Bill states that subsection 7(2) of the *Acts Interpretation Act 1901* (Cth) (**the Acts Interpretation Act**) does not apply to the repeal of the 'medical transfer provisions'.[45] Subsection 7(2) of the Acts Interpretation Act provides, *inter alia*, that the repeal or amendment of an act or part of an act does not:

> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or*
>
> *…*

[41] Ibid sub-s 199B(1).
[42] Ibid sub-s 199A(2).
[43] Ibid s 199B.
[44] Ibid s199B.
[45] As defined by Sub-item 51(3) of Schedule 1 to the Bill.

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.

49. Consequently, the Bill may operate retrospectively in respect of any rights, privileges, obligations or liabilities incurred under the Medevac Law. Similarly, it may operate retrospectively with regard to any investigations or legal proceedings arising from the Medevac Law, save where such legal proceedings have resulted in the delivered or reserved judgement of a court, and that judgement sets aside, or declares invalid, a decision made under the medical transfer provisions.

50. Statements of the purpose and effect of these provisions are provided by the Explanatory Memorandum,[46] however no explanation is given of their necessity.

Human rights implications

Duty of care to provide appropriate health care; right to the enjoyment of the highest attainable standard of physical and mental health

51. The Explanatory Memorandum states that 'Australia's human rights obligations are essentially territorial', and further argues that:

> *In general, the Government's position is that Australia does not exercise the degree of control necessary in regional processing countries to enliven Australia's international obligations*.[47]

52. The Law Council disagrees with this position. Its view is that under Australian law, as well as international law, the Commonwealth of Australia has responsibility for the health and safety of asylum seekers transferred to other countries for offshore processing and assessment. Australia's responsibility for the health and safety of asylum seekers transferred to other countries derives from:

- the Commonwealth's common law duty of care;[48] and
- international law, namely:
    - the joint and several responsibility of States for internationally wrongful acts;[49] and

[46] Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth), [34]-[39].
[47] Ibid Attachment A 'Statement of Compatibility with Human Rights', 9.
[48] *Plaintiff S99 v Minister for Immigration and Border Protection* [2016] FCA 483 (Bromberg J).
[49] To establish whether Australia has engaged in an internationally wrongful act (including determining that Australia has breached its international obligations), the nature of the relationship between the State and its organs or agents must be examined and acts or omissions assessed by reference to Australia's obligations at international law, including human rights treaties to which Australia is party. Australia may also be jointly or severally responsible for an internationally wrongful act committed by an offshore processing country if it can be demonstrated that it:(a) aided or assisted an offshore processing country in committing an internationally wrongful act; (b) directed and exercised control over the offshore processing country's commission of an internationally wrongful act; or (c) coerced an offshore processing country to commit an internationally wrongful act. See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002); and further discussion below.

- the extraterritorial application of refugee and human rights treaties to which Australia is party and Australia's effective control of its regional processing centres.[50]

53. Further, the United Nations High Commissioner for Refugees (**UNHCR**) has provided guidance in regard to the responsibilities of states involved in bilateral or multilateral arrangements for the extraterritorial processing of asylum claims, stating that:

> *a State has jurisdiction, and consequently is bound by relevant international refugee and human rights law obligations if it has de jure and/or effective de facto control over a territory or persons. This includes situations were a State exercises jurisdiction outside its territory, including either at sea or on another State's territory*.[51]

54. With respect to the common law duty of care, the Law Council notes that in *Plaintiff S99/2016 v Minister for Immigration and Border Protection*[52] (**Plaintiff S99**), Bromberg J held that the Commonwealth had a duty of care to the applicant—a female asylum seeker who had been transferred from Australia to Nauru—who required neurological and gynaecological treatment that was not available in Nauru or Papua New Guinea. To determine whether a duty of care existed, Bromberg J considered the 17-step 'salient features' approach set out by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar*[53] and held that:

> *[O]n balance, there are sufficient characteristics displaced answering the criteria for intervention by the tort of negligence. Accordingly, the applicant has established a duty of care owed to her by the respondents [the Minister for Immigration and Border Protection and the Commonwealth of Australia] that they will exercise reasonable care in the discharge of the responsibility that they assumed to procure for her a safe and lawful abortion*.[54]

55. The principles articulated in Plaintiff S99 were applied in the subsequent Federal Court cases of *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (**FRM17**),[55] and *AYX18 v Minister for Home Affairs*.[56] In these two matters, the Court held that the Commonwealth had a duty of care to provide appropriate mental health care to the applicants, both of whom were children who had been transferred to Nauru under Australia's offshore processing regime. The Court further ordered the respondents (respectively the Minister for Immigration and Border Protection, and the Minister for Home Affairs) to remove the applicants from Nauru to a place where they could receive appropriate specialist mental health care treatment.

56. These decisions of the Federal Court are consistent with various findings of, and statements by, from international bodies concerning Australia's international

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[50] Australia's extraterritorial obligations arise under various human rights treaties to which Australia is party, such as art 2(1) of the ICCPR and art 2(1) of the CAT; see also Human Rights Committee, *Munaf v Romania*, Communication No. 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009) (***Munaf v Romania***) [14.2] and the jurisprudence cited therein. This case provides that the relevant question to determine whether the State's obligations apply extraterritorially is whether the State has 'power or effective control' over an individual to whom the State has obligations to respect and ensure that person's rights.

[51] United Nations High Commissioner for Refugees, 'Bilateral and/or Multilateral Arrangements for Processing Claims for International Protection and Finding Durable Solutions for Refugees' (Position Paper, 20 April 2016) [8(b)], n5.

[52] [2016] FCA 483.

[53] [2009] NSWCA 258.

[54] *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, [276].

[55] [2018] FCA 63.

[56] [2018] FCA283.

obligations. A report presented to the UN Human Rights Council in April 2017 by the UN Special Rapporteur on the Human Rights of Migrants confirmed that Australia's responsibilities under the *Optional Protocol to the Convention Against Torture*[57] extend to individuals held in regional processing centres funded by the Australian Government:

> *All persons who are under the effective control of Australia – because, inter alia, Australia transferred them to regional processing centres, which are funded by Australia, and with the involvement of private contractors of Australia's choice – enjoy the same protection from torture and ill-treatment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[58]

57. This statement was affirmed by the UN Human Rights Committee (**UN HRC**) in its concluding observations on the sixth periodic report of Australia, published in November 2017,[59] with reference to the threshold standard of 'power or effective control' for jurisdiction, set out in UN HRC General Comment 31 of 2004:[60]

> *The [UN HRC] considers that the significant levels of control and influence exercised by the State party over the operation of the offshore regional processing centres, including over their establishment, funding, and service provided therein, amount to such effective control*.[61]

58. Under international human rights law, Australia has extraterritorial human rights obligations where it has effective control over territory, persons or the situation.[62] The Law Council considers that this threshold is met in the case of regional processing countries—as the UN HRC has stated—and that Australia must comply with human rights obligations with regard to refugees and asylum seekers in these countries. The Law Council notes that article 12 of the *International Covenant on Economic, Social and Cultural Rights*[63] (**ICESCR**), to which Australia is a party, recognises the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

59. The Law Council further notes that, in its General Comment 14,the UN Committee on Economic, Social and Cultural Rights (**UN CESCR**) provided guidance on the interpretation of this article, stating that:

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[57] UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, UN Docs A/RES/57/199 (9 January 2003), ratified by Australia 21 December 2017.
[58] UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on his mission to Australia and the regional processing centres in Nauru* (24 April 2017), 35th session, agenda item 3, UN Docs A/HRC/35/25/Add.3, 73.
[59] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (9 November 2017), 121st session, agenda item 5, UN Docs CCPR/C/AUS/CO/6, 35.
[60] UN Human Rights Committee, *General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant* (26 May 2004), 80th session, UN Docs CCPR/C/21/Rev.1/Add. 13, 10.
[61] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (9 November 2017), 121st session, agenda item 5, UN Docs CCPR/C/AUS/CO/6, 35.
[62] *Munaf v Romania*.
[63] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind.[64]

Ongoing, joint responsibility for people transferred to RPCs

60. Seeking asylum is legal in both international[65] and Australian law,[66] and asylum seekers and refugees have committed no illegal action by virtue of coming to Australia by boat for the purpose of seeking asylum. The Parliamentary Library has summarised the legal position in Australia as follows:

    Asylum seekers irrespective of their mode of arrival, like others that arrive in Australia without a valid visa, are classified by Australian law to be 'unlawful non-citizens'. However, the term 'unlawful' does not mean that asylum seekers have committed a criminal offence. There is no offence under Australian law that criminalises the act of arriving in Australia or the seeking of asylum without a valid visa.[67]

61. Further, Australia has positive legal obligations toward asylum seekers and refugees which arise from its membership of the *Convention relating to the Status of Refugees* (**Refugee Convention**),[68] including (among others) protection from *refoulement*,[69] freedom of movement,[70] and family reunification.[71]

62. The transfer of asylum seekers and refugees to an RPC does not, of itself, relieve Australia of these obligations. Rather, Australia and the RPC Government bear joint responsibility to ensure that international human rights and refugee law obligations are met.[72]

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[64] UN Committee on Economic, Social and Cultural Rights, *General Comment no. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (11 August 2000), 22nd session, UN Docs E/C. 12/2000/4, 30.
[65] Article 14(1) of the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) records the recognition by the international community of a universal right to 'seek and enjoy in other countries asylum from persecution'. Article 33 of the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), established what has arguably become a norm of customary international law that a State must not expel or return (*refouler*) a refugee to a place of persecution.
[66] *Migration Act* s 228B defines 'circumstances in which a non-citizen has no lawful right to come to Australia' but does not create any offence. Separately, Australia retains the subclass 866 (Protection) visa, which allows an applicant in Australia to seek asylum, subject to conditions set out in the *Migration Regulations*.
[67] Parliamentary Library, 'Asylum Seekers and Refugees: What are the Facts?', *Research Paper Series, 2014-15* (Updated 2 March 2015) 4 <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1415/asylumfacts>.
[68] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).
[69] Ibid art 33.
[70] Ibid art 26 (freedom of movement), 28 (travel documents, to be read in conjunction with *International Covenant on Civil and Political Rights* art 12(2)).
[71] Ibid Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, cl IV B.
[72] It is generally recognised in international law that 'a State has jurisdiction, and consequently is bound by relevant international refugee and human rights law obligations if it has *de jure* and/or effective *de facto* control over a territory or persons. This includes situations were a State exercises jurisdiction outside its territory, including either at sea or on another State's territory.' See United Nations High Commissioner for Refugees, 'Bilateral and/or Multilateral Arrangements for Processing Claims for International Protection and Finding Durable Solutions for Refugees' (Position Paper, 20 April 2016) [8(b)], n5 <https://www.refworld.org/docid/5915aa484.html>.

Health situation - offshore processing

63. As has been noted by the Australian Human Rights Commission, since regional processing was reinstated in 2012, concerns have been consistently raised about the impacts of these arrangements on the physical and mental health of refugees and people seeking asylum.[73] As well as physical health concerns, 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 had a 'profoundly negative impact'[74] on the mental health outcomes of people subject to third country processing.

64. In 2016, UNHCR visited Manus Island and Nauru accompanied by three expert medical consultants who undertook mental health surveys of the asylum seekers and refugees residing there. Eighty-eight per cent of people surveyed on Manus Island were suffering from a depressive or anxiety disorder and/or post-traumatic stress disorder.[75] Of those people surveyed in Nauru, 83 per cent suffered from post-traumatic stress disorder and/or depression.[76] The UN Committee Against Torture has previously recognised Australia's offshore detention policies as causing 'serious physical and mental pain and suffering'.[77]

65. More recently, the mental health situation on Manus Island has been reported as a worsening and 'unprecedented health crisis',[78] with 26 refugees reported to have self-harmed since the federal election, and the local hospital on Manus Island 'struggling to cope with the influx of cases'.[79] United Nations (**UN**) experts, including the Special Rapporteur on the Human Rights of Migrants, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Special Rapporteur on the Right to Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health have urged Australia to immediately provide appropriate health care to more than 800 asylum seekers and other migrants who have been held in the country's offshore facilities for the past five years without durable solutions, and to transfer those identified as requiring urgent medical attention to Australia.[80] The UN experts are:

> *.. deeply concerned that the integrity of these individuals, including their mental health, has been deteriorating with fatal consequences. There have been multiple reports of self-harm and suicide attempts.*[81]

66. The experts have further remarked that:

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[73] Australian Human Rights Commission, *Asylum seekers, refugees and human rights: Snapshot Report (2nd edition)* (2017), 37 <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/asylum-seekers-refugees-and-human-rights-snapsho-0>
[74] Ibid.
[75] Ibid, citing UNHCR, Submission No 43 to the Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into 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*, 12 November 2016 (**UNHCR Submission**), 10 [33].
[76] Ibid, citing UNHCR Submission, 13 [41].
[77] Committee against Torture, *Concluding Observations: Australia*, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014), [17].
[78] Holly Robertson, 'Manus Island in 'unprecedented crisis' as refugee self-harm surges after Australian election', *ABC News* (online), 29 May 2019, <https://www.abc.net.au/news/2019-05-29/growing-surge-in-refugee-self-harm-since-australian-election/11156064>.
[79] Ibid.
[80] UN Human Rights Office of the High Commissioner, 'Australia: UN experts urge immediate medical attention to migrants in its offshore facilities' (media release), 18 June 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24709&LangID=E>.
[81] Ibid.

These individuals are subject to years of effective confinement in Australia's custody, based solely on their migration status. The situation of their indefinite and prolonged confinement, exacerbated by the lack of appropriate medical care amounts to cruel, inhuman and degrading treatment according to international standards …Australia should look for long-term solutions for these migrants while solutions cannot be found in the offshore facilities.

In its reply, Australia claimed, "no one is denied appropriate health care". However, 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.

Australia has the ultimate responsibility for migrants who are transferred to its offshore facilities and should remedy the situation without any delay to prevent any further harm to these individuals, including devastating impacts on their physical and mental integrity, and loss of life.[82]

67. This underlines the need for efficient and effective transfer processes which enable access to appropriate health assessment and treatment, reflecting Australia's common law and international obligations discussed above.

68. The Law Council considers that the Medevac Law provides a clear and transparent legislated pathway for refugees and asylum seekers living on Nauru and Manus Island to be transferred to Australia where it is necessary to remove them for appropriate medical or psychiatric assessment or treatment, in circumstances where such assessment or treatment would not otherwise be available to them.

Practical considerations

Costly and inefficient use of resources

69. The Medevac Law avoids the significant amount of resources (which could be elsewhere better allocated) that were previously expended by the legal community, the Government and the Federal Court of Australia in dealing with claims for medical transfer on behalf of refugees and asylum seekers.

70. Prior to the commencement of the Medevac Law, medical evacuations from RPCs took place under the general power provided by section 198B of the Act, as set out above.

71. However, the only means of compelling the transfer of an asylum seeker requiring medical treatment was to commence injunctive proceedings in court, or to indicate an intention to do so. Such applications for injunctive relief were generally brought before the Federal Court of Australia, incurring significant expense in the form of court resources and Government legal fees.

[82] Ibid.

72. The Law Institute of Victoria (**LIV**) advises that it is aware of 52 injunctive proceedings of this type having been commenced in the period prior to the commencement of the Medevac Law.[83] In all 52 of these cases, the LIV advises that transfer of the applicants and their support persons to Australia subsequently took place.[84]

73. While these proceedings were interlocutory and not final, the Law Council understands that all the applicants were able to establish a *prima facie* case, and that the harm likely to be suffered by them (notably, medical consequences of the refusal or delay of transfer) outweighed the cost or injury which the Commonwealth would suffer if the injunction were granted.[85] In many cases, this process involved the evaluation of medical evidence provided both by the applicants and the respondents. In a number of cases, the applications were made by or on behalf of children facing urgent medical or psychiatric needs and whose transfers were, at least initially, opposed by the Government.[86]

74. In addition, the LIV advises that tens of other similar proceedings were resolved between the parties prior to the issue of formal proceedings, but only after a significant expenditure of time and resources by the legal representatives of both the applicants and the Government.

75. The Law Council submits, in light of the medical needs demonstrated in these cases, and mindful of their outcomes, that the adversarial approach in relation to transfers under the pre-existing general power in section 198B of the Act was unnecessarily time and resource intensive for applicants, the courts and the Government. Significant resources of the Federal Court were required and, in some cases, the precarious medical situation of applicants necessitated special sittings out of hours, including late at night. The process also called upon thousands of hours of pro bono assistance provided by the legal sector. As noted by the LIV:

> *The process for effecting transfers prior to the Medevac legislation was arduous, costly and reliant upon thousands of hours of pro bono assistance provided by the legal sector. The preparation of these matters required lengthy affidavits, the obtaining and reviewing of copious amounts of medical material and a significant amount of work in liaising with and obtaining expert material from independent medical practitioners.*
>
> *LIV members report that it was standard practice for legal practitioners to engage in correspondence with the government or their legal representatives for at least 24 hours, and often considerably longer, prior to issuing formal legal proceedings in one of these matters.*
>
> *Despite the significant amount of resources relied upon by the government to oppose these applications, formal Court Orders to transfer the asylum seeker*

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[83] The first case, *FRX17 as litigation representative for FRM17 v Minister for Home Affairs and Anor* [2018] FCA 63, was commenced on 22 December 2017. The balance of cases then spanned the period between 1 March 2018 and 7 February 2019.

[84] In cases such as *DZQ18 as litigation representative for DZP18 v Minister for Home Affairs and Anor* VID932/2018, formal orders were made by the court to effect the transfer. In other cases, the parties agreed on a timeline for transfer after proceedings were commenced.

[85] The principles applicable in such cases are set out, for example, by Bromberg J in *BAF18 as litigation representative for BAG18 v Minister for Home Affairs* [2018] FCA 1060, [6]-[8].

[86] For example, *AYY18 as litigation representative for AYX18 v Minister for Home Affairs* [2018] FCA 283, which related to a 10 year old boy suffering a chronic, major depressive disorder linked to past trauma and his circumstances on Nauru. Perram J ordered that the boy be transferred as soon as reasonably practicable to a specialist inpatient child and adolescent psychiatric unit. No such unit was available on Nauru.

in question, or an agreement between the parties to the same effect, were reached in each matter in which court proceedings were issued.

76. The Government is also reported to have incurred significant legal costs in opposing transfers under section 198B, despite the outcome in all cases—either by court order or by agreement of the parties—being the transfer of the applicant in question.[87]

77. In practice, the Medevac Law has arguably promoted efficiencies in the medical evacuation process through providing a legislated pathway for medical evacuations to occur, subject to appropriate safeguards. A repeal of the Medevac Law would potentially reimpose these time, resource and financial costs, for refugees and asylum seekers, the Government and, ultimately, the Australian taxpayer. This would mean delays in urgently required medical assessment and treatment for individuals, and the broader diversion of limited justice and legal resources which are needed elsewhere.

Avoidance of further harm and importance of giving weight to qualified and objective medical assessment

78. Many of the applicants in claims for medical transfer, prior to commencement of the Medevac Law, were children with serious medical conditions or adults living with complex physical and/or mental illness.

79. One such case was FRM17. The applicant in that case was a young girl suffering from a severe mental illness, respiratory distress, and chest and abdominal pains resulting from ingestion of unknown amounts of medication. She had attempted suicide. A medical practitioner in Nauru had determined that there was no specialist child mental health facility on the island into which the applicant could be admitted for assessment and treatment.

80. Following an urgent hearing, the Federal Court ordered the child's transfer from Nauru to a place where she could receive the appropriate treatment. She was ultimately brought to Australia for that purpose.

81. A second, widely known case is that of Hamid Khazaei. Mr Khazaei, a young Iranian man, was transferred by Australia to Manus Island in September 2013. He became ill in August 2014, after sustaining a small lesion on his leg. He presented to the medical clinic within the Manus Island Regional Processing Centre on 23 August 2014; however, subsequent coronial findings in his case indicate that the clinic had no appropriate antibiotics, no system to track and review his clinical status, and it failed to recognise his deterioration.[88] By 26 August 2014, 'he needed to be transferred to a critical care facility in Australia',[89] but Mr Khazaei was instead transferred to the Pacific International Hospital (**PIH**) in Port Moresby, which 'at that time lacked an intensive care unit'.[90] The coronial inquest found that:

> *The significant delay in responding to his critical care needs at the PIH led to cardiac arrest after which Mr Khazaei's condition became irretrievable*.[91]

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[87] Helen Davidson, 'Australia spent $275,000 fighting requests for urgent medical transfers of asylum seekers' *The Guardian* (online, 29 September 2018), <https://www.theguardian.com/australia-news/2018/sep/29/australia-spent-320000-fighting-requests-for-urgent-medical-transfers-of-asylum-seekers>.
[88] Coroners Court of Queensland, *Inquest into the death of Hamid KHAZAEI*, 2014/3292 (30 July 2018), [15].
[89] Ibid.
[90] Ibid [7].
[91] Ibid [15].

82. Although Mr Khazaei was transferred by air to Brisbane on 27 August 2014, there was by that time nothing that could be done. He was pronounced dead on 5 September 2014.

83. Among substantial findings regarding the case, the principal conclusion of the coronial inquest was that 'Mr Khazaei's death was preventable'[92] and contributed to by clinical errors, and delays, including an initial failure by Australian immigration officials to grant a medical request for transfer to Australia.

84. The Law Council considers that cases such as FRM17 and that of Hamid Khazaei illustrate the importance of attributing appropriate weight to qualified and objective medical assessment as a key element in decision-making in relation to medical matters. The vulnerability of such applicants also highlights the risks of potential further harm where protracted legal disputes result in delayed access to necessary treatment.

85. The Medevac Law provides a distinct and formalised process whereby a decision to transfer for medical purposes is treated as a medical decision. The Law Council is concerned that the repeal of the Medevac Law will mean a return to unnecessary delay in decision-making and the need for protracted legal disputes, which will place vulnerable asylum seeker adults and children at a greater risk of ongoing harm while awaiting the outcome of the legal application in Australia.

Justification and purpose

86. The Explanatory Memorandum, in discussing the background and purpose of the Bill, highlights as its main concern that the Medevac Law has no provision for transitory persons brought to Australia under the Medevac Law to be removed or returned to an RPC.[93]

87. Additionally, the Explanatory Memorandum states that the Medevac Law:

- undermines the Australian Government's regional processing arrangements;
- provides 'very limited scope for refusing transfers on security or character grounds';[94]
- does not allow sufficient time for full consideration of all relevant information;
- impinges on the sovereignty of RPC governments; and
- does not provide for remuneration of the Panel.

88. In his second reading speech, Minister Dutton focused primarily upon perceived threats to the integrity of the Australian migration system:

> *[The Medevac Law] has only served to weaken Australia's border protection policies by effectively removing the ability of the government to decide who comes to Australia.*

[92] Ibid [14].
[93] Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth), 4.
[94] Ibid.

The government has significantly less powers to prevent the transfer of a person with bad character under [the Medevac Law]… than under any other process. In fact, the Minister actually has more power to stop individuals coming on a tourist visa than to stop those with bad character that seek to be transferred under [the Medevac Law].[95]

Integrity and risk management

89. The Law Council begs to differ with the Minister's characterisation of the Medevac Law in these terms.

90. First, the Medevac Law provides no access to permanent residency, nor any pathway to permanent residency in Australia. As discussed above, it provides no legal immigration status in Australia (save by the discretion of the Minister). Individuals transferred under the Medevac Law are transferred temporarily only, and subject to detention as unlawful non-citizens throughout the period of their transfer in Australia. The Minister ultimately retains the discretion as to whether a person is detained in the community or in a detention centre.

91. Whilst in Australia, the Act provides for a bar on valid visa applications by transitory persons, including those who are unlawful non-citizens (or the holder of a bridging or prescribed temporary visa).[96] The Minister may lift the bar if he thinks it is in the public interest,[97] but the power is personal and non-compellable.[98]

92. Second, the Minister may decline any transfer on the grounds described above, relating to security and/or criminal conduct risks.

93. The comparison of powers to decline—on character grounds—an application for a tourist visa, as against those available to decline a transfer under the Medevac Law, is problematic. As discussed above, Australia is subject to international refugee and human rights obligations, as well as an established common law duty of care to provide for the health care of those it has transferred to RPCs. Australia rarely, if ever, owes the same obligations to applicants for tourist visas. As such, it is appropriate that the security and criminal conduct grounds for the Minister to refuse of a transfer are tightly and carefully framed, having regard to the urgent and pressing health needs of the persons in question.

94. In his second reading speech, the Minister also states that 'there are currently people in PNG and Nauru who are charged with crimes against children, are being

[95] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 37 (Peter Dutton, Minister for Home Affairs).
[96] *Migration Act* s 46B(1). There is also a bar on visa applications by UMAs who are in Australia, and are unlawful non-citizens, or hold bridging or temporary protection visas, or temporary prescribed visas under section 46A.
[97] Ibid s 46B(2).
[98] Ibid ss 46B(3), 46B(7). The Law Council understands that of those transferred, a number have been released by the Minister using his personal non-compellable power under section 197AB of the Act into the community as it has been considered medically better than a person remaining in detention (whether in a hotel (where many transferees have been placed) or more formalised immigration detention). This has had a significant improvement in transferees' mental health and reflects the problems with this Bill in the first place.

investigated for the supply of illicit drugs…' (emphasis added).[99] The Law Council notes that it is a general principle of the rule of law that a person who has been charged or is under investigation is entitled to the presumption of innocence until such time as they are either convicted or acquitted by a court of competent jurisdiction. Nevertheless, any potential risk posed to the Australian community by such a person will be mitigated in practice by the requirement that they remain in detention during the period of the transfer. Indeed, even prisoners in Australia who have been convicted of the most serious crimes are, entirely appropriately, provided with access to health care as necessary. Any associated risks are managed accordingly.

Power to return medical transferees

95. On 20 February 2019, the ABC reported the Attorney-General stating that he had received new legal advice regarding the (then proposed) Medevac Law, to the effect that it did not provide the ability to return transitory persons who are transferred for temporary medical treatment purposes.[100] According to the Attorney-General, the amendments were not linked back to the relevant section of the Act, which grants power to return asylum seekers once they have been treated. He stated that, in effect, people may be brought from Manus Island and Nauru, where they are not in detention, to Australia where, without lawful authority to send them back, they would face mandatory and indefinite detention.

96. Notwithstanding this, the Explanatory Memorandum states 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.*[101]

97. For removal to be mandated by existing paragraph 198(1A), the transitory person must have 'been brought to Australia under section 198B for a temporary purpose" *[emphasis added]*). If the person is brought under section 198C and not section 198B, then the argument may be that the power to return them is not enlivened. Paragraph 198(1A) does not refer to section 198C (which enables transfers under the Medevac Law). See also subsection 198(1B) which refers to the child of a non-citizen who is 'brought to Australia under section 198B'.

98. Similarly, section 198AD requires an officer, as soon as reasonably practicable, to take a UMA to whom the section applies from Australia to a RPC. Subsection 198AH(1A) clarifies that section 198AD applies to transitory persons if:

- the person is a UMA 'who is brought to Australia from a RPC under section 198AB for a temporary purpose'; and
- the person is detained under section 189; and
- the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved) (emphasis added).

[99] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 37 (Peter Dutton, Minister for Home Affairs).
[100] Henry Belot and Matthew Doran, 'Government claims new legal advice shows loophole in medical transfer legislation' *ABC News* (20 February 2019), <https://www.abc.net.au/news/2019-02-21/coalition-claims-new-advice-shows-medevac-legislation-loophole/10831906>.
[101] Explanatory Memorandum, 4.

99. Again, subsection 198AH(1A) does not refer to section 198C (which enables transfers under the Medevac Law). The Explanatory Memorandum states that:

> *Currently, there is no reference to section 198C in sections 198AD and 198AH. This means that there is no power for the Minister to return a person who was transferred to Australia under section 198C to a RPC.*[102]

100. It is arguable, on the basis of orthodox statutory interpretation principles, that the intention of the Medevac Law was that transfers under the Medevac Law be conducted 'under section 198B', as well as under section 198C.

101. However, Parliament may elect to remove any ambiguity regarding the ability to remove and return transitory people who are temporarily transferred, once they no longer need to be in Australia for the temporary purpose of medical assessment and treatment, by making some minor technical amendments. This would mean that:

- existing subsection 198(1A) would be amended to read that 'In the case of an unlawful non-citizen who has been brought to Australia under section 198B or section 198C for a temporary purpose'; and
- existing paragraph 198(1B)(a) of the Act would be amended to read: 'an unlawful non-citizen who is not an unauthorised maritime arrival has been brought to Australia under section 198B or section 198C for a temporary purpose';
- existing paragraph 198AH(1A)(a) of the Act would be amended to read that: 'the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B or section 198C for a temporary purpose'.

102. The Law Council considers that these minor and specific amendments could be implemented in isolation from the remainder of the Bill. The potential ambiguity identified in the Explanatory Memorandum in no way necessitates the repeal of the entire Medevac Law.

103. However, the Law Council is concerned that returning people with dire health needs to situations which have been recognised as contributing to 'serious physical and mental pain and suffering' and with inadequate health facilities, may create further harm. This highlights the need for long-term, durable solutions to be implemented for this cohort and for all of those remaining on RPCs.

Floodgates argument

104. Further, the numbers of transfers since the Medevac Law was enacted would appear to diminish concerns that the legislation would open the 'floodgates'[103] and result in significantly more asylum seekers and refugees being transferred to Australia to receive treatment. It has been recently reported in Parliament that as at 24 July 2019, the Government had approved approximately 90 transfers to Australia on medical grounds, and 20 cases had been referred to the Panel.[104] Of the cases

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[102] Ibid, [20].

[103] Max Kowlowski, 'Medevac panel approves two cases in four months, despite 'floodgate' fears', *The Age* (online), 23 June 2019 <https://www.canberratimes.com.au/story/6235329/medevac-panel-approves-two-cases-in-four-months-despite-floodgate-fears/>.

[104] Commonwealth, Parliamentary Debates, House of Representatives, 24 July 2019, 40-41 (Susan Templeman).

referred to the Panel, the Panel had upheld the Minister's decision not to transfer the individual on 13 occasions and overturned the Minister's decision not to transfer on seven occasions.[105]

105. These figures indicate that the Medevac Law has been implemented in a balanced and measured way. This is unsurprising noting that the Panel consists of some of Australia's most highly qualified and respected medical professionals.

106. The Law Council further considers that given that Medevac Law has only been in operation for a short period. Its repeal would be too premature to allow a final and accurate assessment of its effectiveness.

Inadequate time for consideration of all relevant information

107. As noted above, the Explanatory Memorandum also raises as a justification for the Bill that the Medevac Law allows inadequate time for consideration of all relevant information.

108. The Medevac Law does provide strict timeframes for decision-making. For example:

- if two or more treating doctors notify the Secretary that a person is a relevant transitory person, the Secretary must notify the Minister as soon as practicable;[106]
- the Minister must then make a transfer decision no less than 72 hours after being notified;[107]
- within 72 hours of the Minister being notified, ASIO is also required to advise the Minister if the transfer of the person to Australia may be prejudicial to security;[108]
- if the Minister rejects a transfer on medical grounds, the Panel must conduct a further clinical assessment of the person and inform the Minister of its recommendations within 72 hours;[109]
- the Minister must then reconsider and decide whether to confirm the refusal or approve the transfer within 24 hours.[110]

109. However, these timeframes are also designed to enable a timely response to a possibly urgent and deteriorating health situation experienced by a person in need. The Medevac Law is intended to address such emergency medical needs. As such, these timeframes are necessary and proportionate and may save lives.

110. The Law Council further notes that many of the cohort targeted by the Medevac Law are likely to have been in the RPC for substantial periods of time and most, if not all, have undergone detailed assessment of their claims to asylum (including consideration of personal history, character and the integrity of claims). This process, combined with the period of time individuals have been known by the authorities, should have provided a clear picture of any security or criminal threat a person may pose, as well as their likely health situation.

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[105] Ibid.
[106] *Migration Act*, s 198E(1).
[107] Ibid, s 198E(3A).
[108] Ibid, s 198(4A).
[109] Ibid, s 198F(2).
[110] Ibid, s 198F(4A).

111. If, however, it can be demonstrated that in clearly defined and exceptional circumstances, a short extension of time is necessary for the Minister, ASIO, or the Panel to respond, the Law Council considers that it would be preferable for the legislation to provide for such a brief extension, rather than repealing the Medevac Law outright. However, insufficient evidence has been provided that more than seven days would be required in practice to reach a final decision. During the original Parliamentary debate on the Medevac Bill, the relevant timeframes were extended to strike an appropriate balance in this regard.

Government sovereignty

112. The Explanatory Memorandum also states that the Medevac Law impinges on the sovereignty of RPC Governments.

113. As noted above, the Law Council considers that Australia has specific responsibilities towards individuals in RPCs given:

- the Commonwealth's established common law duty of care;
- the extraterritorial application of refugee and human rights treaties to which Australia is a party – including the right to the enjoyment of the highest attainable standard of physical and mental health - and its effective control of regional processing centres; and
- Australia's joint and several responsibility to ensure that international human rights and refugee law obligations are met.

114. Where arrangements are entered into between Australia and other States for the purpose of determining the protection claims of those seeking asylum in Australia, or for resettlement of those found to be owed protection, such arrangements must adhere to the full range of international human rights Conventions to which Australia is a party. These obligations cannot be transferred by Australia to other States. Australia remains responsible for ensuring that people are treated in accordance with the international obligations that Australia has assumed.

115. When arrangements have been entered into between Australia and other States for the purpose of processing protection claims and providing resettlement, Australia also remains responsible for ensuring that rule of law principles and human rights obligations are adhered to under any such arrangements.

116. The Explanatory Memorandum is unclear as to why the Medevac Law impinges on the Nauruan Government's or Papua New Guinean Government's' sovereignty whereas the exercise of the general transfer power under subsection 198B(1) of the Act does not. The Law Council further notes that the Australian Government has been able to agree a range of measures under the terms of its regional processing arrangements with both governments to date, which do not appear to have raised sovereignty concerns.

117. Further, the Law Council suggests that greater sovereignty impacts may be raised by the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019,[111]

[111] The Law Council recommends against the passage of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019. See: Law Council of Australia, Submission No 20 to the Senate Legal and Constitutional Affairs Legislation Committee, *Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 [Provisions]* (16 August 2019), <https://www.aph.gov.au/DocumentStore.ashx?id=4786138d-afbe-45ea-87bf-40ce03ab177c&subId=668745>.

which is also before Parliament. This Bill, if passed, will prevent UMAs or transitory persons who were at least 18 years of age and were taken to a RPC after 19 July 2013 from making a valid application for an Australian visa of any kind. In effect, it is likely to pass the long-term responsibility for the welfare of this cohort, including the responsibility to provide durable solutions to recognised refugees, to other countries. The Law Council does not support the passage of this Bill.

Remuneration of the Panel

118. The Explanatory Memorandum raises that the Medevac Law does not provide for remuneration of the Panel.

119. The Law Council considers that this should not be a reason to repeal the Medevac Law. Instead, it agrees with the Government's concerns that the Panel should be remunerated. It is important that its members are appropriately remunerated given their important functions.

120. Section 53 of the Australian Constitution relevantly states that:

> *Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.*
>
> *The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.*
>
> *The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.*
>
> *The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.*
>
> *Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.*

121. Should the Senate wish to recommend that the Panel be renumerated, it could request the House of Representatives, if the House thought it appropriate, to put in place a standing appropriation for the purpose of providing remuneration to the Panel. The Law Council considers that this would be an appropriate (and Constitutionally valid) course of action.

Retrospectivity

122. As noted above, the Bill may operate retrospectively in respect of any rights, privileges, obligations or liabilities incurred under the Medevac Law. Similarly, it may operate retrospectively with regard to any investigations or legal proceedings arising from the Medevac Law, save where such legal proceedings have resulted in the

delivered or reserved judgement of a court, and that judgement sets aside, or declares invalid, a decision made under the medical transfer provisions.

123. The Explanatory Memorandum does not provide an explanation of the necessity of these provisions.

124. The Law Council's position is that it is a key tenet of the rule of law that the law must be both readily known and available, and certain and clear. This means that laws which create civil penalties should not be retrospective in their application. It agrees with the Scrutiny Committee that the lack of justification provided for this measure is a cause for concern.[112]

Conclusion

125. The Law Council considers that the Medevac Law represents an important step toward compliance by Australia with its legal and ethical obligations toward asylum seekers and refugees it has transferred to RPCs. Further, the Law Council observes that the Medevac Law alleviates the need for adversarial, time-consuming and costly litigation by providing a clear and objective mechanism for the assessment of medical transfers, subject to appropriate independent medical oversight.

126. Accordingly, the Law Council recommends against the passage of the Bill. However, it does recommend amendments to the Act to ensure that members of the Panel are appropriately remunerated.

127. Finally, the Law Council observes that, while the Medevac Law does not itself provide durable solutions to the situation of refugees transferred to RPCs, it facilitates certain human rights and, to that extent, contributes to the wellbeing of those people. However, by entrenching an adversarial approach and reducing access to necessary health care, the Bill represents a step further away from effective and sustainable solutions.

128. The Law Council therefore recommends that long-term, durable solutions be implemented as a matter of urgency for individuals who are transferred under the Medevac Law and for all those remaining in RPCs. It further reiterates its call, set out in its Policy Statement on a regional cooperative approach to asylum flows, to the Australian Government to work with other countries in the Asia-Pacific region to establish a cooperative and transparent approach in response to the flow of asylum seekers into and within the region, including by:

- addressing the protection and material needs of asylum seekers and recognised refugees in the region; and
- upholding the human rights of all people within the territory and subject to the jurisdiction of countries in the region.

129. Any such approach must be consistent with Australia's international legal obligations and developed in consultation with the UNHCR and the IOM, having regard to their mandates and expertise.[113]

[112] Senate Standing Committee for the Scrutiny of Bills, 'Scrutiny Digest 3 of 2019' (24 July 2019), 23.
[113] Law Council of Australia, 'Policy Statement: Proposal for Australia's role in a regional cooperative approach to the flow of asylum seekers into and within the Asia-Pacific region' (October 2017), [3], <https://www.lawcouncil.asn.au/docs/cbd313b0-dab9-e711-93fb-

130. The Law Council stands ready to support the development of such a cooperative response.

131. The Law Council's recommendations are set out below.

Recommendations

Recommendations:

- **The Law Council recommends that the Bill not be passed. However, the Law Council recommends that the Senate should request the House of Representatives, if the House thought it appropriate, to put in a standing appropriation for the purpose of providing appropriate remuneration to the Panel.**
- **The Law Council further recommends that:**
  - **long-term, durable solutions be implemented as a matter of urgency for individuals who are transferred under the Medevac Law and for all those remaining in RPCs;**
  - **the Australian Government work with other countries in the Asia-Pacific region to establish a cooperative and transparent approach in response to the flow of asylum seekers into and within the region, including by:**
    - **addressing the protection and material needs of asylum seekers and recognised refugees in the region; and**
    - **upholding the human rights of all people in the region; and**
  - **this approach must be consistent with Australia's international legal obligations and developed in consultation with UNHCR and IOM, having regard to their mandates and expertise.**

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