



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Mr Jonathan Smithers  
Chief Executive Officer  
Law Council of Australia  
DX 5719 Canberra

By email: <mailto:mike.clayton@lawcouncil.asn.au>

Dear Mr Smithers, *Jonathan*

### **Migration Amendment (Repairing Medical Transfers) Bill 2019**

Thank you for the opportunity to contribute to a Law Council submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the *Migration Amendment (Repairing Medical Transfers) Bill 2019* ("the Bill").

The views of the Law Society have been informed by our Human Rights Committee.

#### **The intention of the Bill**

The Bill would amend the *Migration Act 1958* (Cth) ("Migration Act") to remove the provisions relating to medical transfers that were added by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth), and generally referred to as the "Medevac Law". Additionally, the Bill would amend ss 198 and 198AH of the Migration Act to clarify the power to remove persons in Australia who were transferred under the Medevac Law.

#### **Human rights implications**

The Explanatory Memorandum accompanying the Bill 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.<sup>1</sup>

The Law Society notes that in *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 ("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* [2009] NSWCA 258 and held that:

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<sup>1</sup> Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019, 9.

[O]n balance, there are sufficient characteristics displayed 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.<sup>2</sup>

The principals 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* [2018] FCA 63 and *AYX18 v Minister for Home Affairs* [2018] FCA 283. 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.

This emerging body of domestic case law is bolstered by findings and statements from international bodies. A report presented to the UN Human Rights Council in April 2017 by the UN Special Rapporteur on the human rights of migrants stated clearly that Australia's responsibilities under the OPCAT 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.<sup>3</sup>

This finding was affirmed by the UN Human Rights Committee ("UN HR Committee") in its concluding observations on the sixth periodic report of Australia published in November 2017,<sup>4</sup> with reference to the "power or effective control" standard for jurisdiction contained in UN HR Committee General Comment 31 of 2004.<sup>5</sup>

The Committee 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.<sup>6</sup>

Under international human rights law, Australia has extraterritorial human rights obligations where it has effective control over territory, persons or the situation. If this threshold is met in the case of regional processing countries – as the UN HR Committee have stated – Australia must comply with human rights obligations with regard to refugees and asylum seekers in these countries. We note that Article 12 of the International Covenant on Economic, Social and Cultural Rights ("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".

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<sup>2</sup> *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, 276.

<sup>3</sup> 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), 35<sup>th</sup> session, Agenda item 3, A/HRC/35/25/Add.3, 73.

<sup>4</sup> UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (9 November 2017), 121<sup>st</sup> session, Agenda item 5, CCPR/C/AUS/CO/6, 35.

<sup>5</sup> 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 2014), 80<sup>th</sup> session, CCPR/C/21/Rev.1/Add.13, 10.

<sup>6</sup> UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (9 November 2017), 121<sup>st</sup> session, Agenda item 5, CCPR/C/AUS/CO/6, 35.

We further note that in General Comment 14 the UN Committee on Economic, Social and Cultural Rights (“UN CESCR”) provided guidance on the interpretation of this Article, stating that:

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.<sup>7</sup>

### **Practical considerations**

Prior to passage of the Medevac Law, medical evacuations from regional processing countries occurred on the basis of a court granting an application for an injunction in cases where the applicant established they were owed a duty of care by the Commonwealth that necessitated their removal to Australia. 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. In this regard, the Medevac Law has arguably promoted efficiencies in the medical evacuation process through providing a legislated pathway for medical evaluations to occur, with appropriate safeguards built in.

As the Law Council have noted, repealing the Medevac Law would potentially reimpose the time, resource and financial costs both for refugees and asylum seekers and the government. This brings into question the statement in the Bill’s Explanatory Memorandum that “[T]hese amendments will have a low financial impact. There are expected to be savings associated with this Bill”.<sup>8</sup>

Thank you for the opportunity to provide comments on this issue. Questions may be directed to Andrew Small, Policy Lawyer, at (02) 9926 0252 or [andrew.small@lawsociety.com.au](mailto:andrew.small@lawsociety.com.au).

Yours sincerely,



Elizabeth Espinosa  
**President**

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<sup>7</sup> UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (11 August 2000), 22<sup>nd</sup> session, E/C.12/2000/4, 30.

<sup>8</sup> Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019, 2.