Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

16th August 2019

Dear Committee Secretary,

Re: Migration Amendment (Repairing Medical Transfers) Bill 2019

We write to express our concerns with the proposed amendments to the Migration Act set out in the Migration Amendment (Repairing Medical Transfers) Bill 2019. In our view the Bill should not be passed in its current form.

Background/Rationale of the Bill

The Bill seeks to repeal the provisions inserted into the Migration Act 1958 by the Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019, which created a mechanism for the transfer of asylum seekers and refugees from regional processing countries to Australia for the purpose of medical or psychiatric assessment or treatment, on the recommendation of medical advice. The current regime establishes an Independent Health Advice Panel, whose objective is to ‘monitor, assess and report on the physical and mental health of transitory persons who are in regional processing countries and the standard of health services provided to them’.1 In addition the Panel can review the Minister’s decision not to transfer a person on medical grounds and effectively overturn this decision, other than where there are security or character reasons for refusal.2

We observe at the outset that the number of cases in which the Panel has ordered the transfer of an individual against the views of the Minister is extremely small in comparison with the overall number of transferred persons.3 In addition, therefore, to our very serious concerns about the

1 Migration Act, 199A(2)  
2 Migration Act, 198F(5)  
3 As stated by Andrew Giles MP: ‘We know that the government has approved approximately 90 transfers and that 20 cases have been referred to this panel. Of the 20 referred to the panel, the panel has upheld the minister’s decision not to transfer the individual on 13 occasions and overturned the minister’s decision not to transfer in seven cases’: Andrew Giles, Migration Amendment (Repairing Medical Transfers) Bill 2019: Second Reading Speech (23 July 2019) https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/6de0d50b-0944-45f2-a320-4c1eb07a7e9c/0167/hansard_frag.pdf;fileType=application%2Fpdf

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human rights implications of this Bill, we note that there is a genuine question as to whether it is necessary or justified.

The Explanatory Memorandum to the current Bill states that some ‘significant issues’ with the current regime include (inter alia):

- The medical transfer provisions undermine the Australian Government’s regional transfer arrangements;
- The medical transfer provisions have a very broad application with very limited scope for refusing transfers on security and character grounds;
- The medical transfer provisions impinge on the sovereignty of Papua New Guinea and Nauru, the Governments of which are responsible for the management of regional processing arrangements in their respective countries and people residing under those arrangements4.

Other ‘significant concerns’ are stated to relate to an inadequate timeframe to make decisions (‘to gather and consider all the relevant information’) and the fact that the current provisions ‘provide that a person is not entitled to remuneration in relation to their position as a member of the Independent Health Advice Panel (IHAP)’. The ‘most notable’ concern is 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’.5

It is important to note that the concerns around gaps in the current framework, including the timeframe for decision-making by the Panel and the remuneration of the Panel, could be rectified by minor amendments to the current regime. However this Bill proposes to repeal the scheme, indicating that the concerns around security and sovereignty are the animating concerns of this Bill. Our submission focuses on Australia’s compliance with international law, most notably various international human rights treaties to which Australia is party.

1. Application of International Human Rights Obligations Extra-Territorially

The Statement of Compatibility with Human Rights, prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011, states that:

‘The Australian Government’s long-standing view is that Australia’s human rights obligations are essentially territorial. Persons in regional processing countries are outside Australia’s territory. Australia has accepted that there may be exceptional circumstances in

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4 Explanatory Memorandum, Schedule 1, p 4
5 Explanatory Memorandum, Schedule 1, p 4
which the rights and freedoms set out under the International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) may apply to persons beyond the territory of a State party, and the extent of the obligations that a State may owe under international human rights law where it is operating extra-territorially will be informed by the degree of control exercised by the State. 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.⁶

This suggests that Australia does not have responsibility for the conditions in offshore processing centres that lead to the need for medical treatment, or for the inadequate medical treatment available in such regional processing centres. We strongly disagree with this view; indeed it is not sustainable as a matter of international law.

The Australian government would be aware that the relevant Committees vested with jurisdiction to oversee compliance with the above-mentioned treaties have explicitly stated otherwise. In addition, the United Nations High Commissioner for Refugees (UNHCR) has unequivocally held that:

the physical transfer of asylum-seekers from Australia to Nauru or Papua New Guinea, as bilateral arrangements agreed between Contracting States to the 1951 Convention, does not extinguish the legal responsibility of Australia, as the transferring State, for the protection of the asylum-seekers and refugees affected by the arrangements. In UNHCR’s view, Australia and each of Nauru and Papua New Guinea have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers and refugees is fully compatible with their respective obligations under the 1951 Convention and other applicable international human rights instruments.⁷

(a) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

As noted above, the Australian government accepts that Australia’s obligations under the CAT may be enlivened extra-territorially where Australia exercises a sufficient level of control, but disputes whether the level of control is present in this context. On this issue, the Committee Against Torture has stated:

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⁶ Statement of Compatibility with Human Rights, at 9, emphasis added

'The Committee is concerned at the State party’s [Australia’s] policy of transferring asylum seekers to the regional processing centres located in Papua New Guinea (Manus Island) and Nauru for the processing of their claims, despite reports on the harsh conditions prevailing in those centres, such as mandatory detention, including for children, overcrowding, inadequate health care, and even allegations of sexual abuse and ill-treatment. The combination of the harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering. All persons who are under the effective control of the State party, because inter alia they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the Convention (arts. 2, 3 and 16).'

The government has been on notice for many years that multiple international bodies have deemed the treatment to which asylum seekers and refugees forcibly transferred by Australia to regional processing countries are subjected to be cruel, inhuman or degrading treatment or punishment. The U.N. Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment found that Australia, ‘has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment, as provided by articles 1 and 16 of the CAT.\(^8\)

Due to Australia’s ongoing responsibility, the Committee Against Torture noted in 2014:

The transfers to the regional processing centres in Papua New Guinea (Manus Island) and Nauru, which in 2013 were deemed by the Office of the United Nations High Commissioner for Refugees not to provide “humane conditions of treatment in detention”, do not release the State party from its obligations under the Convention, including prompt, thorough and individual examination of the applicability of article 3 in each case and redress and rehabilitation when appropriate.\(^9\)

The Migration Act currently goes some way to providing the requisite ‘prompt, thorough and individual examination of the applicability of article 3 in each case and redress and rehabilitation

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\(^8\) Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, Addendum, 5 March 2015, A/HRC/28/68/Add.1:

‘In the absence of information to the contrary, the Rapporteur concludes that there is substance in the allegations presented in the initial communication, reiterated above, and thus, that the Government of Australia, by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment, as provided by articles 1 and 16 of the CAT’. (a) JAL 27/03/2014 Case No. AUS 1/2014 State Reply: 26/05/2014

\(^9\) Concluding Observations on the combined fourth and fifth periodic reports of Australia, 23 December 2014, CAT/C/AUS/CO/4-5 at [17].
when appropriate’ through the mechanism of the Independent Health Advice Panel. This must be maintained in order to uphold our obligations under the CAT.

(b) International Covenant on Civil and Political Rights (ICCPR)

The Australian government accepts that Australia’s obligations under the ICCPR may apply extra-territorially where Australia exercises sufficient control to amount to an exercise of jurisdiction (pursuant to Article 2(1) ICCPR). Yet it disputes that the requisite degree of control exists in relation to regional processing countries. However the Human Rights Committee has unequivocally refuted this position as follows:

While noting the State party’s [Australia’s] position that it does not exercise effective control over unauthorized maritime arrivals taken to regional processing centres in Papua New Guinea and Nauru, the Committee recalls the “power or effective control” standard for jurisdiction laid out in its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant. 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.¹⁰

In terms of specific issues, the Committee has outlined the following concerns:

(a) The conditions in the offshore immigration processing facilities in Papua New Guinea (Manus Island) and Nauru, which also hold children, including inadequate mental health services, the serious safety issues and instances of assault, sexual abuse, self-harm and suspicious deaths, and the fact that the harsh conditions have reportedly compelled some asylum seekers to return to their country of origin, despite the risks that they face there;
(b) Severe restrictions on access to and information regarding the offshore immigration processing facilities, including a lack of monitoring by the Australian Human Rights Commission;
(c) The closure of the Manus Island regional processing centre on 31 October 2017 without adequate arrangements for long-term viable relocation solutions for all the refugees and asylum seekers who were transferred there by the State party...

These concerns are such that the Human Rights Committee recommends that Australia should ‘end its offshore transfer arrangements and cease any further transfers of refugees or asylum seekers to Nauru, Papua New Guinea or any other “regional processing country”’, and ‘take all the measures necessary to protect the rights of refugees and asylum seekers affected by the closure of processing centres, including against non-refoulement, ensure their transfer to Australia...

¹⁰ Concluding Observation on the sixth periodic report of Australia, 1 December 2017, CCPR/C/AUS/CO/6 at [35]
or their relocation to other appropriate safe countries, and closely monitor their situation after the closure of the centres'.

In our view at a very minimum the government must leave the current arrangements in place which provide for an objective, medical-based intervention through the mechanism of the Independent Health Advice Panel.

(c) *International Covenant on the Elimination of Discrimination against Women (CEDAW)*

In addition to the human rights concerns that apply generally to the asylum seekers and refugees transferred to regional processing centres, there are specific issues with Australia’s current arrangements that concern the treatment of women and girls. This has been addressed by the Committee on the Elimination of Discrimination against Women, the international body vested with supervisory responsibility in relation to CEDAW.

In 2018 the Committee stated that it is ‘concerned that the State party [Australia] has violated its obligations under international human rights and humanitarian laws, including by outsourcing the processing of refugee claims offshore, transgressing non-refoulement obligations and separating families’.  

Addressing specifically the extra-territoriality issue the Committee stated:

> The Committee reminds the State party that, in line with the Committee’s general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women and general recommendation No. 28, it is responsible for all its actions affecting human rights, regardless of whether the persons affected are on its territory or not, and that all persons who attempt to enter its territory and are subject to Australian refugee status determination procedures, whether onshore or offshore, fall under the responsibility of the State party.  

The Committee stated that it is particularly concerned that women and girls seeking asylum in Australia (inter alia):

> ‘[m]ay endure transfers to third countries for abortions and medical treatment’;

> ‘Are separated from their families as a result of immigration detention or offshore transfers for medical treatment’ and

> ‘Are exposed to rape, sexual abuse and physical harm, perpetrated with impunity, by security guards, service providers, refugees and asylum seekers and members of the local

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11 Id
13 At [54]
community in Nauru, with the women who are victims of such violence left without access
to justice’...\textsuperscript{14}

Amongst a range of recommendations, those most relevant to the current Bill are that Australia:

‘Guarantee that all refugee and asylum-seeking women and girls who are under the
responsibility of the State party have access to comprehensive, adequate and accessible
sexual and reproductive health services and information, including to emergency
contraception and abortion services, on its territory’;

‘Guarantee that refugee and asylum-seeking women and girls have unconditional access
to gender-, age-, culture- and language-appropriate social, education, mental and physical
health services on the territory of the State party’; and

‘Ensure that all immigration facilities under the responsibility of the State party adhere to
standards for the prevention of sexual and gender-based violence, investigate all
complaints of sexual and physical violence against women and girls, including rape, bring
perpetrators to justice and guarantee that they are punished, and provide redress and
adequate compensation to victims; and ‘take the measures necessary to grant immediate
access to its territory to all women who have been granted international protection’.

The proposed Bill would further undermine the capacity of the Australian government to adhere
to these obligations and recommendations.

In sum, the government’s claim that its obligations are not enlivened due to the extra-territorial
nature of the regional processing centres is patently at odds with the clear views of the
international bodies that have the authority to supervise the most important international human
rights treaties to which Australia is party. The government’s view is not sustainable as a matter
of international law.

Given the concrete risk of human rights violations inherent in the scheme of offshore processing,
the current provisions must be maintained as they provide a safeguard to ensure the most
vulnerable asylum seekers and refugees can be transferred to Australia for essential medical
treatment. It is vital that an independent body, such as the Independent Health Advice Panel,
has the capacity to assess individual cases in order to ensure that Australia’s obligations are
respected.

Finally, it is important to note that Australia’s obligations in relation to torture, cruel, inhuman
and degrading treatment are absolute, and are thus not subject to any justifications based on
national security, or similar domestic policy concerns. Hence the three justifications outlined in
the Explanatory Memorandum concerning these issues are irrelevant in this context.

\textsuperscript{14} Ibid
2. *Non refoulement under international human rights law*

In the Statement of Compatibility with Human Rights the government acknowledges that the Bill engages Australia’s *non-refoulement* obligations, that is, not to return a person to a country in which there is a risk of subjection to torture, cruel, inhuman or degrading treatment under the CAT or the ICCPR.

The effect of the Bill is that ‘transitory persons’ currently in Australia to receive medical treatment, will be subject to removal powers\(^\text{15}\), which may engage Australia’s obligations in this regard. The Statement claims that these provisions ‘do not impact on the protections against *refoulement*, which already exist in Australia’s legislation, policies and procedures’.\(^\text{16}\)

However we submit that the existing ‘legislation, policies and procedures’ referred to do not adequately implement Australia’s *non refoulement* obligations in this specific context, namely, where serious health issues are at stake.

There is ample authority from international and regional human rights bodies and courts that return to inhuman or degrading treatment may be implicated where a state returns a person in situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.\(^\text{17}\)

Given the very serious cases that have warranted intervention and the widely available information about the serious mental health condition of many asylum seekers and refugees in regional processing countries, these are very real concerns. The current *non refoulement* provisions do not adequately protect against the return of seriously ill individuals to a country in which there is a risk that a lack of adequate medical treatment will lead to a further serious decline in physical or mental health. This is another important reason why this Bill should not be passed in its current form.

### 3. *Convention on the Rights of the Child and Right to Health*

The government acknowledges that Australia’s obligations in relation to family unity and children are engaged by the Bill, yet states that ‘no children have been transferred to Australia’ under the

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\(^{15}\) See Explanatory Memorandum at pp 5-6

\(^{16}\) Id at 11

\(^{17}\) *See Paposhvili v Belgium,* App no 41738/10 (ECHR[GC], 14 December 2016) [183]. See also Inter-American Court of Human Rights, Rights and Guarantees of Children in the Context of Migration [229]. For a more detailed discussion see Michelle Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Law’ (2009) *New Zealand Law Review* 257.
existing provisions, and that ‘family unity will be respected because anyone transferred is only transferred for a temporary purpose’.\(^8\)

In relation to the requirement under the Convention on the Rights of the Child’s Article 3 that ‘in all actions concerning children... the best interests of the child shall be a primary consideration’,\(^9\) the government states that the ‘Ministerial discretions contained within the Act for persons in Australia will not be affected and will consider the individual circumstances of the case including any international obligations, such as a the best interests of affected children, where applicable’.\(^10\)

However the Act does not require the Minister to consider the best interests of the child,\(^21\) and if this Bill is passed there will no longer be an independent review of the minister’s decision in relation to medical transfers. Australia cannot rely on a non-reviewable, discretionary decision to comply with its core human rights obligations.

Likewise, while the government acknowledges that Article 12 of the *International Covenant on Economic, Social and Cultural Rights* is implicated in this context, namely, the obligation to ‘recognise the right of everyone to the enjoyment of the highest attainable standard of physical and medical health’, it is claimed that ‘transitory persons in Australia for a temporary purpose will continue to receive medical care in Australian medical facilities’.\(^22\) However the removal of the current regime which relies on independent medical expertise to assess the needs of asylum seekers and refugees in offshore processing facilities and onshore is clearly a regressive step in complying with Article 12.

### 4. Retrospective operation of the Bill

The Bill provides that subsection 7(2) of the *Acts Interpretation Acts 1901* ‘does not apply in relation to the repeal by this Schedule of a medical transfer provision’.\(^23\) The Explanatory Memorandum explains that subsection 7(2) ‘would, if applicable, preserve, amongst other things, any right, privilege, obligation or liability acquired, accrued or incurred under the medical transfer provisions’.\(^24\)

We echo the concerns expressed by the Senate Standing Committee for the Scrutiny of Bills which observed that there is no explanation provided by the Minister as to why this provision is necessary. In our view any existing rights and privileges ought to be preserved not removed.

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\(^{18}\) P 12  
\(^{19}\) Article 3(1) CRC cited in Statement of Compatibility at p 11  
\(^{20}\) P 13  
\(^{21}\) S 1988  
\(^{22}\) P 13  
\(^{23}\) Schedule 1, Part 2, Item 15(1)  
\(^{24}\) P 7
In sum the wide range of serious human rights concerns in relation to this Bill suggest that it should not be passed in its current form.

Please do not hesitate to be in touch should you have any questions about this submission or require further information.

Yours sincerely,

/ Professor Michelle Foster
Director, Peter McMullin Centre on Statelessness