

Memo

To: Arthur Moses, President of the Law Council of Australia

From: Stuart Webb, President of the Law Institute of Victoria

Subject: Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019

Date: 30 July 2019

The LIV welcomes the opportunity to provide input to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019 ('the Bill').¹

In making these submissions, the LIV directs the LCA to our previous letter of 1 July 2019 requesting the LCA's support in opposing the repeal of the Medevac laws (enclosed).

The LIV notes that the Bill has passed in its current form through the Lower House. It strongly encourages the LCA to lobby Senators on the Crossbench to encourage them to oppose the Bill.

The Medevac Legislation

The LIV strongly opposes the Bill to repeal the medical transfer provisions inserted by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) ('Medevac legislation').²

It is broadly acknowledged that asylum seekers and refugees living on Nauru and Manus Island do not have access to tertiary level hospitals, medical specialists, and appropriate medical interpreters or specialised medical equipment.

The Medevac legislation was passed on 2 March 2019. It provides a clear framework and pathway by which refugees and asylum seekers living on Nauru and Manus Island can be transferred to Australia for specialised medical treatment where that care would not otherwise be available to them.

The LIV and its members believe that the Medevac legislation has been a critical

¹ Migration Amendment (Repairing Medical Transfers) Bill 2019.

² *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth).

legislative development that promotes the fundamental right of refugees and people seeking asylum to access appropriate standards of medical care.

Since its introduction, the legislation has had a profound impact, with approximately 31 refugees and asylum seekers being transferred to receive medical treatment.

The LIV submits that the ongoing need for the legislation can be summarised as follows:

a) Streamlining and use of resources

The Medevac legislation avoids the significant amount of resources that were previously expended by the legal community, the federal government and the Federal Court of Australia in dealing with claims for medical transfer on behalf of refugees and asylum seekers.

Prior to the introduction of the legislation, the only means of compelling the transfer of an asylum seeker requiring medical treatment was to commence injunctive proceedings in the Federal Court of Australia, or to indicate an intention to do so.

The LIV is aware of 52 injunctive proceedings of this sort being commenced in the Federal Court prior to the passage of the Medevac legislation. In addition, the LIV understands that tens of other applications for transfer were resolved prior to the need to issue formal proceedings, but only after a significant amount of time and resources had been expended by the legal representatives for both the applicant and government.

The LIV submits that this was an extremely time consuming and adversarial process which unnecessarily diverted resources from the Federal Court. In this regard, the LIV notes that due to the precarious medical condition of many of the asylum seekers seeking transfer, many of the applications required late night and after-hours hearings.

By way of example, in late December 2018 approximately 20 lawyers and barristers were in court seeking or opposing the transfer of persons who needed urgent medical attention which resulted in all the persons being transferred.

The LIV further submits that 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 is 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 in question, or an agreement between the parties to the same effect, were reached in each matter in which court proceedings were issued.

Lastly, the LIV notes that the Federal government incurred significant legal costs in opposing the claims for transfer, with some reports estimating that the government had spent \$275,000 in this regard by September 2018.³ The LIV submits that this represents an unnecessary expense for Australian taxpayers which is greatly minimised by the current Medevac legislation.

b) Avoidance of further harm

Many of the applicants in the claims for medical transfer were minors with serious medical conditions and adults living with complex physical and/or mental illness.

Prior to the introduction of the Medevac legislation, the arduous legal process to effect transfer for medical treatment subjected these vulnerable people to further unnecessary stress.

In this regard, the LIV notes the matter of *FRM17 v Minister for Immigration and Border Protection*.⁴ The applicant in that claim was a young girl who suffered from a severe mental illness, who had attempted suicide, was suffering from respiratory distress, chest and abdominal pain due to ingestion of unknown amounts of medication.

The psychologists treating the applicant on Nauru noted that she was suicidal. In December 2017, a medical practitioner found that there was no specialist child mental health facility on the island into which the applicant could be admitted for assessment and treatment.

It was only through an urgent hearing on 22 December 2017 that the Court ordered the child be removed from Nauru to a place where she should receive the appropriate mental health care treatment.⁵ She was ultimately brought to Australia to receive the

³ 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>.

⁴ *FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63.

⁵ *FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63.

required medical assistance.

The LIV is concerned that the repeal of the Medevac legislation will mean a return to 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.

c) Independent medical assessment

The LIV submits that the Medevac legislation ensures that decisions about an asylum seeker's need for transfer to receive necessary medical care are appropriately made primarily by independent medical practitioners, free from political influence and delay.

The Medevac legislation provides a distinct and formalised process whereby a decision to transfer is treated as a medical decision, rather than an administrative or government policy based one.

The repeal of the Medevac laws will mean that decisions about the need for critical medical treatment are once again left solely to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, where they become subject to political interference and unnecessary delay.

d) Consistency with duty of care

The LIV submits that the Medevac legislation is consistent with the Commonwealth Government's non-delegable duty of care to provide reasonable healthcare to people held in immigration detention.

The existence of this duty was accepted by the Commonwealth in the matter of *S v Secretary, Department of Immigration and Multicultural Indigenous Affairs*.⁶, during which it was further conceded that the responsible Minister also arguably owes a similar non-delegable duty of care in this regard.

e) Consistency with international obligations

The LIV has consistently held the view that the current migration regime and program of offshore detention is contrary to Australia's obligations under international law. This

⁶ *S v Secretary, Department of Immigration and Multicultural Indigenous Affairs* [2005] 143 FCA 549.

view has been shared by the LCA.

In this regard, the LIV notes that Australia is a signatory to the International Covenant on Civil and Political Rights⁷ and is therefore obliged to ensure those rights for persons in its jurisdiction, regardless of their immigration status. Furthermore, Australia is also a party to the Convention Relating to the Status of Refugees.⁸

The LIV acknowledges the ongoing criticism of Australia's treatment of refugees and asylum seekers by bodies including the United Nations. In particular, the LIV notes the recent comments by the United Nations Special Rapporteur on migrant rights, torture and mental health, who called upon the Australian government to provide immediate healthcare to the 800 refugees held on Nauru.

While acknowledging the ongoing harm perpetuated by the existing framework, the LIV submits that the Medevac legislation does far more to ensure access to necessary medical treatment than the system that existed prior to its introduction.

The LIV is of the view that the repeal of the Medevac legislation would further undermine Australia's human rights obligations.

Government concerns

In arguing for the repeal of the Medevac legislation, the Federal Government has raised concerns about the law's impact upon the Commonwealth's ability to protect Australia's borders. The LIV submits that these concerns are not warranted and are unsubstantiated.

Under the Medevac legislation, asylum seekers and refugees who are transferred to the Australian mainland for medical treatment remain in immigration detention. The Minister retains the discretion as to whether the person is ultimately detained in the community or in a detention centre.

The Medevac framework also provides appropriate protections to address security concerns raised by the transfer. This includes a character test, which allows the Minister to reject a medical transfer where the applicant has previously been sentenced to at least 12 months' jail for a serious offence, or where an applicant is subject to an adverse security assessment.

⁷ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁸ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 151 (entered into force 22 April 1954).

The numbers of transfers since the legislation was enacted undermine the concerns voiced by the Minister for Home Affairs, Mr Peter Dutton, that the Medevac legislation would open the 'floodgates' and result in significantly more asylum seekers and refugees being transferred to Australia to receive treatment. In this regard, the LIV understands that since the law's introduction, 31 applicants have been transferred to Australia. The Minister has rejected nine applications for transfer, seven of which were upheld upon review by the Medevac expert panel.⁹

Additionally, contrary to the Bill's Explanatory Memorandum, there is no reason for decisions relating to whether a person needs urgent medical treatment to be delayed, nor for more time to be given to consider such applications.¹⁰

This will create an unnecessary burden to a Minister who is not medically qualified and would therefore need to rely on medical opinions to make such a decision. This is a duplication of the decision-making process.

The LIV refers the LCA to the Second Reading Speech of the Minister for Home Affairs, and in particular where he states:

"The Department of Home Affairs has advised me that since the Migration Amendment (Urgent Medical Treatment) Bill was first introduced by the former member for Wentworth in December 2018, there has been a marked increase in self-harm behaviours in regional processing countries. Many of these acts are undertaken for the explicit purpose of manipulating the system and gaining access to our country. This bill removes the motivation for transferees to engage in this dangerous behaviour."¹¹

In the LIV's view, this statement provides no evidentiary basis for the assertion made about acts being "undertaken for the explicit purpose of manipulating the system and gaining access to our country". Furthermore, it fails to recognise that the amount of time persons have been residing in Manus and Nauru away from families with an uncertain

⁹ Max Koslowski, 'Medevac panel overturns two cases in four months, despite 'floodgate' fears', *The Age* (online, 23 June 2019) <https://www.smh.com.au/politics/federal/medevac-panel-overturns-two-cases-in-four-months-despite-floodgate-fears-20190622-p5208u.html>

¹⁰ Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth).

¹¹ Commonwealth, Parliamentary Debates, House of Representatives, 4 July 2019, 37 (Peter Dutton, Minister for Home Affairs).

future is a primary factor for self-harm. This is an example of incorrect framing of the issue for political purposes.

The LIV is of the view that the government's concern in this regard erroneously frames the decision as to whether to transfer a person requiring medical care as a political issue, when the need for treatment is a medical question alone.

Conclusion

The LIV strongly opposes the repeal of the Medevac legislation.

The Medevac provisions remain vital to ensuring that asylum seekers and refugees living with complex illnesses and injuries can access the appropriate level of medical treatment that they require.

The success of the government's proposed Bill and the repeal of the Medevac legislation would subject this highly vulnerable group of people to even further physical and psychological harm.

If you would like to discuss any of these matters further, please contact Nethmi Perera, Policy Officer for the Administrative Law and Human Rights Section at the LIV at nperera@liv.asn.au or on 03 9607 9338.

Yours sincerely



Stuart Webb

President

Law Institute of Victoria