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**RACP Submission to the Senate Legal and
Constitutional Affairs Legislation
Committee inquiry into the Migration
Amendment (Repairing Medical Transfers)
Bill 2019**

About The Royal Australasian College of Physicians (RACP)

The RACP trains, educates and advocates on behalf of over 17,000 physicians and 8,000 trainee physicians, across Australia and New Zealand. The College represents a broad range of medical specialties including general medicine, paediatrics and child health, cardiology, respiratory medicine, neurology, oncology, public health medicine, occupational and environmental medicine, palliative medicine, sexual health medicine, rehabilitation medicine, geriatric medicine, and addiction medicine. Beyond the drive for medical excellence, the RACP is committed to developing health and social policies which bring vital improvements to the wellbeing of patients.

Recommendations

The RACP recommends that the *Migration Amendment (Repairing Medical Transfers) Bill 2019* Bill is NOT passed.

The RACP strongly recommends:

- The *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* is NOT repealed.
- The Independent Health Advice Panel (the IHAP) established by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* continues to provide independent medical review and assessment of requests for medical transfer, refused by the Minister responsible for the administration of this legislation – “the Minister”) on medical grounds, of seriously unwell refugees and asylum seekers who are currently in regional processing countries.
- The IHAP continues to monitor and report on the adequacy of health service provision and conditions for refugee and asylum seekers in regional processing counties.
- A report of the IHAP’s activities is tabled by the Minister for Home Affairs in each house of Parliament within 3 sitting days of that House after the report is given to the Minister.

Introduction

The Royal Australasian College of Physicians (RACP) is pleased to provide a submission in response to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the *Migration Amendment (Repairing Medical Transfers) Bill 2019*¹.

The effect of this Bill is to repeal the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (known as ‘Medevac Legislation’²). This submission focuses on the positive impact of the Medevac Legislation and argues that the Medevac Legislation should not be repealed.

Our members have firsthand experience of providing healthcare in regional processing countries, assessing refugees and asylum seekers requiring medical transfer to Australia, and treating these patients after their transfer to Australia. They have seen the consequences of prolonged offshore processing and inadequate medical care in the regional processing centres, and delays and failures to transfer seriously unwell refugees and asylum seekers, including children and young people. They have reported inconsistent health information required for medical transfers and repeatedly raised concern about access to appropriate care for refugees and asylum seekers subject to the regional processing arrangements.

The Medevac Legislation

The Medevac Legislation came into effect in March 2019 and has multiple elements. The legislation creates a framework for the transfer of refugees and asylum seekers from regional processing countries to Australia for necessary medical or psychiatric assessment and care, with independent medical oversight where transfers are declined by the Minister, and a process for monitoring and reporting on health services and conditions for refugees and asylum seekers in regional processing countries³.

The legislation defines ‘relevant transitory persons’ under s198E(2) - broadly, as people [refugees and asylum seekers] in a regional processing country requiring medical or psychiatric assessment or treatment that is unavailable in the regional processing countries, and also defines clear processes and timelines to initiate and report on transfers of patients for medical or psychiatric care.

The Medevac Legislation also establishes an Independent Health Advice Panel (IHAP) under s199D, including the Chief Medical Officer (CMO)/Surgeon General of the Department of Home Affairs (DHA)/Australian Border Force (ABF), the Commonwealth CMO and at least six other independent medical experts nominated by the medical colleges/peak bodies, including a nominee of the RACP. The IHAP has two main roles: the ability to review decisions made by the Minister (s198F) that transfer from the regional processing countries for medical or psychiatric care is not necessary (on grounds as per s198E(4)(a)); and 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 (199A(2)). The IHAP also has the power to obtain information and documents (199D). It is critical that the IHAP is able to perform this oversight function so that the Parliament and the Australian public are appropriately informed, increasing transparency and accountability.

As at 13 August 2019, only the first IHAP report for the period 2 March to 31 March 2019 had been tabled. At the time period covered by the report the only members of the IHAP were the CMOs from the Departments of Home Affairs and Health, and no cases where the Minister had refused a medical transfer had been referred to IHAP.

Based on the best information available and in the absence of the release of the second IHAP report covering the period from 1 April to 30 June 2019, we understand that as at 24 July 2019, the Minister had approved the transfer of 88 patients to Australia from regional processing countries based on medical need⁴. Of the cases referred to the IHAP where transfer had been refused on grounds as per s198E(4)(a) - *where 'the Minister reasonably believes that it is not necessary to remove the person from a regional processing country for appropriate medical or psychiatric assessment or treatment'*, the Panel agreed with the Minister's decision not to transfer individuals on 13 occasions, and disagreed with the Minister's decision (recommending that medical transfer was necessary based on urgent health need) on 8 occasions. There is no evidence that the IHAP is making decisions on anything other than medical grounds, in an independent and impartial manner.

The RACP also notes that medical transfers from the regional processing countries do not result in a substantial burden to the Australian hospital and medical system. There have been 88 medical transfers⁵ from offshore regional processing centres approved by the Minister since the Medevac Legislation came into effect in March 2019¹. In any one year period, there are over 11 million separations (episodes of admitted patient care) in Australia's public and private hospitals.⁶

Key issues

1. The Medevac legislation enables independent, transparent oversight of an Australian contracted health system in the regional processing environment

The Medevac Legislation provides a level of legislated independent oversight, public accountability and clinical governance that has not previously been in place for health services contracted by the Australian Government in the regional processing countries.

The Medevac Legislation provides for independent medical oversight by requiring the IHAP 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'* (199A(2)). In addition, the IHAP can make recommendations to the Minister on the treatment of individuals and also health systems issues, and the panel is able to travel to regional processing countries to conduct monitoring and assessment, and request information to inform their reporting.

Health services for refugees and asylum seekers in regional processing countries are contracted by the Australian government and provided by International Health and Medical Services (IHMS) in Nauru (since January 2013), and by Pacific International Hospital in Manus Island (since May 2018). The Minister's response to the first IHAP report⁷ outlines expenditure on offshore contracts - with a total cost of AUD \$455.5 million since 2012-13. As these are services that have been contracted by the Australian government to undertake offshore processing, and at significant cost, it is important for the Australian Parliament and public to be assured that appropriate standards of clinical care, including appropriate clinical governance, are in place.

¹ Note: As per Ms Kearney's speech in the House of Representatives on 24 July 2019, 88 evacuations have been approved by the Minister for Home Affairs, and a further eight additional evacuations have been approved by the IHAP panel (total of 96 evacuations).

Reporting by IHAP is available to Parliament and the Australian public in a timely manner - the Minister must provide a summary of the reports prepared by the IHAP to Parliament on a specified quarterly timeline and is required to respond to each report and lay the response before each of the Houses of Parliament within three sitting days after the summary report was tabled in that House. The legislation also requires the Minister to table the reasons for refusal of transfer (198J).

The Queensland Coronial Inquest into the preventable death of Mr Hamid Khazaei ⁸ asserts that “It is incumbent on the Australian Government to implement sustainable systems for the delivery of health care that meet the requisite standard. Those systems should also be subject to ongoing and independent scrutiny on behalf of the Australian community, which is required to meet the ongoing and considerable costs of the current arrangements.”

Other than the IHAP, the RACP is not aware of any other functioning current independent advisory structures to the Department of Home Affairs relating to offshore processing. Previous advisory groups, such as the former Detention Health Advisory Group (DeHAG, 2006-2012) and the Immigration Health Advisory Group (IHAG, 2013) and the previous iteration of the Independent Health Advice Panel (2016-2018), have not been sustained, and have not reported publicly. Other Australian oversight mechanisms, such as the Australian Health Practitioner Regulation Agency and Australian health service standards do not have immediate jurisdiction/applicability in the offshore setting, however, as noted by the Queensland Coroner, the “Australian Government retains responsibility for the care of persons who are relocated, for often lengthy periods, to offshore processing countries where standards of health care do not align with those in Australia”.⁹

Given the duration of offshore processing (now longer than 6 years for most of these cohorts), the impact of detention and migration uncertainty on physical and mental health, challenges with oversight mechanisms, and the complexity of offshore health service delivery and cost to the Australian taxpayer; independent monitoring and reporting is essential. The legislated nature of the Medevac provisions ensures greater transparency around medical decision making and improves oversight and reporting on offshore health systems to the Australian Parliament and public.

2. Medical decisions are often time critical, and should be made by medical professionals

The Medevac Legislation is essential to address delays in and refusals of medically necessary transfers, and to ensure medical decisions are reviewed by medical professionals.

Medical decision making is often time critical. There is a risk of patient deterioration while awaiting access to tests, investigations and treatment, and delays in care can adversely affect health outcomes. Medical practitioners have a professional duty of care to patients and undertake years of medical training, including, in many cases, further specialist training. It is therefore highly concerning when medical recommendations are overruled by persons without medical expertise.

In the 5 years prior to 2019, 12 people have died whilst being held in regional processing countries, with at least 6 as a result of suicide. A Queensland Coronial Inquest report detailed the preventable death of Hamid Khazaei in Manus in September 2014¹⁰ due to severe sepsis. The Coroner found Mr Khazaei would likely have survived if clinical errors had been avoided and a doctor's request for an urgent transfer had not been delayed by immigration officials. An ongoing Queensland Coronial investigation into the death of Omid Masoumali in Nauru in April 2016 has identified that delays in medical transfer contributed to his preventable death because of poor access to health care, with an estimated 90-95% chance of survival had he received a medical evacuation to a major Australian hospital in a timely manner¹¹.

There are limited public data on the time taken for the Department of Home Affairs to approve medical transfers from the regional processing countries prior to the Medevac Legislation, although available information suggests lengthy delays. Paediatricians accepting care for children transferred from Nauru in late 2018 noted that transfer had frequently been recommended many months prior, with clinical deterioration in the interim, which was life-threatening in multiple cases. In February 2019 the Asylum Seeker Resource Centre released details of 49 de-identified medical cases from Manus and Nauru reporting that 25 people recommended for medical transfer by IHMS were still awaiting transfer, with the majority having waited two to three years¹².

The Medevac Legislation defines timelines and processes for responding to urgent medical matters, where medical transfer is recommended after review by two doctors. The legislation specifies timeframes for:

- i) The Secretary to notify patients who are recommended for medical transfer to the Minister (as soon as practicable)
- ii) The Minister to make a decision on the recommendation (within 72 hours)
- iii) Security briefings to the Minister (within 72 hours of the Minister being notified)
- iv) Review of patients by the IHAP where the Minister does not believe transfer is medically necessary (notified as soon as practicable, review within 72 hours)
- v) The Minister to reconsider their decision (within 24 hours being notified of the IHAP decision).

The timeframes specified within the legislation for review and response compel the Department and the Minister to act so that the patient's health is prioritised, and ensure medical decisions are reviewed by medical professionals.

3. The impact of offshore processing on physical and mental health and monitoring health service provision in this context

The RACP remains concerned at the health status of people subject to offshore processing. The Minister's response to the first IHAP report states that there were 493 men on Manus Island and 319 people on Nauru¹³. The first IHAP report (prior to external members joining the IHAP) provides information on services but does not include detail on the health status at individual or population level.

The RACP notes both hospitalisations and care episodes appear to be high for these cohorts, suggesting substantial ongoing health concerns. While it is unclear from the first IHAP report if the service utilisation statistics refer to the period of 1 January to 30 March or 2 March to 30 March, the high rates of service use are concerning. Based on available information across the IHAP report and Minister's reply:

- 43/319 people on Nauru required hospital admission in the period of the first IHAP report (73 hospitalisations) with a 'high number of mental health admissions' - if this number is extrapolated over the year this would be a rate several times higher than the Australian hospital separations/1000 population
- There were 5908 appointments for 237 people on Nauru in the quarter, which would average to six appointments per person per week², and 1981 consultations for the cohort in Manus, which would average to one appointment per person each 3 weeks.

The IHAP First Quarterly Report provides detail on services, reporting that there, there are reasonable quality primary and secondary care services available in Nauru. The services provided on Manus Island are more limited, with the IHAP First Quarterly Report stating that there is a reasonable range of primary care at the ELRTC, with some limited secondary services at the Lorengau Hospital. Specialist medical care is not readily available on the Island. Further services (including acute inpatient mental health treatment) are available at PHI in Port Moresby, however, there is no access to electroconvulsive therapy (ECT) or psychiatric intensive care¹⁴. The RACP would like further information on:

- the health status of the cohorts, including prevalence information, critical incidents, and near miss events
- preventive medical and environmental services, e.g. vaccination, vector and rodent control, provision of safe water and rubbish disposal,
- access to general surgeons, and surgical services
- laboratory diagnostic services,
- medical imaging services,
- health materiel and resupply arrangements,
- blood resupply,
- health leadership and management, clinical governance arrangements,
- communications procedures,
- resuscitation capacity, aeromedical evacuation procedures and staffing.

² Assuming the period of the IHAP report is 2 March to 30 March

The RACP looks forward to the second IHAP report and expects that this will provide more comprehensive information. The RACP notes that repeal of the Medevac Legislation will make it much more difficult for the Australian Parliament and public to be able to scrutinise the adequacy of the services that are provided.

4. The medical transfer provisions allow the Minister sufficient scope for refusing transfers on security or criminal grounds

The Medevac Legislation includes strong and appropriate safeguards where there are national security concerns or serious criminal issues, and only applies to refugees and asylum seekers who are considered 'relevant transitory persons' under the legislation, which requires that they be in a regional processing country on the day the relevant section commenced; or born in a regional processing country.¹⁵

Specifically, the legislation includes clear provisions for the Minister to refuse to grant a transfer if:

- the Minister reasonably suspects that the transfer of the person to Australia would be prejudicial to security within the meaning of the Australian Security Intelligence Organisation Act 1979, including because an adverse security assessment in respect of the person is in force under that Act¹⁶
- the Minister knows that the person has a substantial criminal record (as defined by subsection 501(7) as in force at the commencement of this section) and the Minister reasonably believes the person would expose the Australian community to a serious risk of criminal conduct¹⁷.

The IHAP does not review Ministerial decisions in cases where a medical transfer has been refused on either of these grounds. For cases where IHAP has recommended that medical transfer be approved contrary to the Minister's initial decision to refuse a transfer on medical grounds, the Minister is empowered by Section 198F (5) to refuse to approve the transfer based on the national security or criminal record grounds outlined above.

These sections provide reassurance to the Australian Parliament and public that the Minister retains the power to refuse entry to Australia by persons who may pose a threat to the Australian community on either national security or criminal grounds.

Conclusion

The Medevac Legislation and (legislated) independent oversight through IHAP are essential given the duration, circumstances, impact and cost of offshore processing arrangements. In essence, the Medevac Legislation allows medical experts to make decisions about healthcare for seriously ill individuals and enables Australian independent medical oversight of a health system contracted by the Australian government, arising as a result of Australian immigration policy. It is critical that the IHAP is able to perform this oversight function so that the Parliament and the Australian public are appropriately informed, and the Medevac Legislation provides a level of oversight, transparency and accountability around offshore arrangements that has not been present previously.

References

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- ¹³ Minister Dutton, Minister for Home Affairs. Response to the Independent Health Advice Panel First Quarterly Report (2 – 31 March 2019).
- ¹⁴ Australian Government, Department of Home Affairs, Independent Health Advice Panel First Quarterly Report
- ¹⁵ Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019 (Cth) [Sections 198D (1)(a) and 198E (2)(a)]
- ¹⁶ Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019 (Cth) [Sections 198D (3A) and 198E (4B)]
- ¹⁷ Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019 (Cth) [Sections 198D (3B) and 198E (4C)]