Migration Amendment (Repairing Medical Transfers) Bill 2019

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Contents

Purpose of the Bill.............................................................. 2
Background................................................................. 2
Operation of the medical transfer provisions............. 2
Nauruan Overseas Medical Referrals Committee ..... 4
Removal and return power ........................................... 6
Committee consideration........................................... 6
Senate Legal and Constitutional Affairs
Legislation Committee .................................................. 6
Senate Standing Committee for the Scrutiny of
Bills .................................................................................. 6
Policy position of non-government
parties/independents................................................. 6
Position of major interest groups.............................. 7
Financial implications................................................. 9
Statement of Compatibility with Human Rights........... 9
Parliamentary Joint Committee on Human Rights ..... 9
Key issues and provisions ......................................... 10
Current scheme for medical transfers ..................... 10
Repeal of scheme ........................................................... 10
Repeal of transfer provisions .................................. 10
Abolition of Independent Health Advice Panel....... 11
Removal provisions ...................................................... 11
Rights and liabilities .................................................. 13

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House: House of Representatives
Portfolio: Home Affairs
Commencement: The day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at September 2019.
Purpose of the Bill

The purpose of the Migration Amendment (Repairing Medical Transfers) Bill 2019 (the Bill) is to amend the Migration Act 1958 to repeal the provisions inserted by Schedule 6 of the Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019. These provisions (commonly referred to as the medical transfer, or medevac, provisions) established a framework for the transfer of transitory persons from regional processing countries to Australia for the purpose of medical treatment or assessment. The Bill also amends the Migration Act to allow for the removal of people brought to Australia under the medical transfer provisions back to a regional processing country once they no longer need to be in Australia.

Background

The Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019 (Miscellaneous Measures Act) was passed by Parliament in February 2019, and as currently relevant, commenced on 2 March 2019. Schedule 6 of the Miscellaneous Measures Act creates a framework for the medical transfer of transitory persons (that is, persons who arrived irregularly in Australia as asylum seekers and were transferred from Australia to a regional processing country) back to Australia for the purpose of receiving medical treatment or assessment. Detailed information on these provisions can be found in the Bills Digest for the Migration Amendment (Urgent Medical Treatment) Bill 2018.

The medical transfer provisions were first introduced into the House of Representatives in the Migration Amendment (Urgent Medical Treatment) Bill 2018, which was a private member’s Bill, and were then attached, with some amendments, to the Miscellaneous Measures Bill in the Senate by Australian Greens Senator Nick McKim and independent Senator Tim Storer. The provisions passed the Parliament with the support of the Australian Labor Party, the Australian Greens, and members of the cross bench. The Government voted against the amendments to the Miscellaneous Measures Bill, and the Coalition promised during the 2019 election campaign that, if re-elected, it would introduce legislation to repeal the medical transfer provisions. The current Bill fulfils that promise.

Operation of the medical transfer provisions

The medical transfer provisions introduced by the Miscellaneous Measures Act provide that a relevant transitory person must be brought to Australia as soon as practicable for the temporary purpose of receiving medical or psychiatric assessment or treatment where the Secretary is

2. C Petrie and H Spinks, Migration Amendment (Urgent Medical Treatment) Bill 2018, Bills digest, 56, 2018–19, Parliamentary Library, Canberra, 2019. The medical transfer provisions that were inserted into the Migration Act by the Miscellaneous Measures Act were first introduced into Parliament in the Urgent Medical Treatment Bill.
4. For information on the provisions in the Urgent Medical Treatment Bill and the Miscellaneous Measures Bill see C Petrie and H Spinks, Migration Amendment (Urgent Medical Treatment) Bill 2018, Bills digest, 56, 2018–19, Parliamentary Library, Canberra, 2019.
6. Ibid.
notified that the person has been assessed by two or more treating doctors as requiring assessment or treatment which they are not receiving in the regional processing country. In a recent decision, the Federal Court has clarified that it is not necessary for the treating doctors to have a personal consultation with the transitory person for the purposes of assessing them—assessment on the basis of consideration of medical records alone is sufficient. The Miscellaneous Measures Act also provides for the transfer of minors who were in a regional processing country on the day the provisions commenced, and of members of the same family unit as a transitory person brought temporarily to Australia, or other accompanying persons.

The Minister must approve or refuse to approve a transfer within 72 hours. If a decision is not made within 72 hours the Minister is taken to have approved the transfer. The Minister may refuse to approve a transfer on the basis of: reasonable belief that the transfer is not medically necessary; reasonable suspicion that the transfer would be prejudicial to security; or the person having a substantial criminal record. If the Minister refuses a transfer on medical grounds, that decision must be reviewed by the Independent Health Advice Panel (IHAP), which was established by the medical transfer provisions.

When the Miscellaneous Measures Act was being debated by Parliament the Government warned that passage of the Act could result in up to 1,000 people being transferred to Australia within weeks, and an ‘immediate flood’ of around 300 people. However, actual numbers of people who have transferred to Australia under these provisions are much lower than this. As of 31 July 2019, 72 people have been transferred to Australia for medical treatment under the new medical transfer provisions, and a further four people had been transferred as accompanying family members under these provisions. Of the 72 transfers for medical treatment, 69 were of people from PNG, and three were of people from Nauru. All four people transferred under the accompanying family provisions were from Nauru. Also as at 31 July 2019, 23 cases had been referred to the IHAP following the Minister’s refusal to approve a transfer on medical or psychiatric grounds. Of these, the IHAP affirmed the refusal in 13 cases and recommended the transfer proceed in 10 cases.

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8. Migration Act 1958 (Cth), subsection 198C(2), section 198E. The doctors must believe it is necessary to remove the person from a regional processing country for appropriate assessment or treatment: sub-paragraph 198E(2)(b)(iii).
10. Migration Act, subsections 198C(1), (3)–(5); sections 198D and 198G.
11. Migration Act, subsections 198D(2A) and 198E(3A).
12. Migration Act, subsections 198D(5) and 198E(5).
13. This grounds for refusal does not apply to the transfer of ‘legacy minors’ (a person who was in a regional processing country and aged under 18 on the day the provisions commenced).
14. Ibid., sections 198D and 198E. Subsection 501(7) of the Migration Act defines substantial criminal record to mean where a person is: sentenced to death, imprisonment for life or a term of imprisonment of 12 months or more; acquitted of an offence on the grounds of unsoundness of mind or insanity, and detained in a facility or institution as a result; or found by a court to not be fit to plead, in relation to an offence, but nonetheless found by the court on the evidence available to have committed the offence, and detained in a facility or institution as a result.
15. Ibid., section 199A, 198F.
18. Ibid., fact sheet 6, p. 5.
19. Ibid., p. 17.
Nauruan Overseas Medical Referrals Committee

The medical transfer provisions in effect create a statutory obligation for the Government to ensure that transitory persons in regional processing countries, whose health care needs cannot be met in those countries, will be brought to Australia to receive appropriate assessment and treatment. A number of legal and refugee organisations argue that this recognises and gives effect to Australia’s existing obligations under domestic and international law in relation to people it has transferred to regional processing countries. However, even if such obligations exist (which the Government disputes), because the transitory persons are outside Australia, in countries with their own statutory and policy frameworks, the Australian Government may experience difficulties in fulfilling such obligations. For example, recent Regulations made by the Nauruan Government appear to create significant obstacles for the effective implementation of Australia’s Medevac laws, as they introduce a requirement that the Nauruan Government approve all overseas medical transfers and a prohibition on medical practitioners practicing ‘telemedicine’.

The Nauruan Health Practitioners (Overseas Medical Referrals Compliance) Regulations 2019 (OMRC Regulations) commenced on 15 February 2019, and set out procedures for, and restrictions on, the overseas transfer of residents of Nauru for medical assessment or treatment. They provide that all proposed overseas transfers of patients for medical treatment must be approved by the Overseas Medical Referrals Compliance Committee (OMRC), and the OMRC’s recommendation to approve a transfer must be submitted to the relevant Nauruan Minister for final approval. The Regulations further provide that the OMRC Committee must not make an overseas medical referral where: a patient refuses to undergo a health assessment or treatment; a patient presents a report or referral by an overseas medical practitioner or health practitioner not registered under the Act; or a referral is prepared by a health practitioner or health service provider on the recommendation of an overseas health practitioner by telemedicine examination or diagnosis. However, the OMRC Committee may consider a report prepared by a registered medical practitioner from outside Nauru, on request by a private practitioner or health service provider.

The Nauruan Health Practitioners (Telemedicine Prohibition) Regulations 2019, which commenced on 22 February 2019, prohibit the provision of health and medical services by telemedicine to a resident of Nauru, except in limited circumstances. The Regulations further provide that the

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20. For example, see: Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], 23 August 2019, pp. 13–16; Australian Human Rights Commission, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], 21 August 2019, pp. 6–7; Kaldor Centre for International Refugee Law and Australian National University, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], 16 August 2019, pp. 1–2; Andrew and Renata Kaldor Centre for International Refugee Law, ‘Who is legally responsible for offshore processing on Manus and Nauru?’, Kaldor Centre website, 1 October 2018.

22. Health Practitioners (Overseas Medical Referrals Compliance) Regulations 2019 (Nauru) (OMRC Regulations).
23. OMRC Regulations, subsection 4(4), section 10.
24. Ibid., subsection 6(4).
25. Ibid., subsection 6(5).
26. Telemedicine is defined as ‘the practice of health and medicine using any form of telecommunications, electronic audio and video communications or any other means of communication between a health practitioner outside the jurisdiction of the Republic and a patient, who is a resident of Nauru’: Health Practitioners (Telemedicine Prohibition) Regulations 2019 (Nauru) (Telemedicine Prohibition Regulations) section 3.
Board is not to register any person to practice as a health practitioner in Nauru remotely from outside the country’s jurisdiction.\(^{27}\)

While these Regulations were introduced only recently, in practice, Nauru’s Overseas Medical Referrals Committee has played a key role in approving transfers since 2017.\(^{28}\) In Senate Estimates in 2017, Home Affairs Secretary Mike Pezzullo stated, in relation to the increased role played by Nauru in regards to transfer approvals:

... I think you’ll find that the material change here related to the fact that as Nauru's capability increased they wanted to have a greater say in who got treated within their facilities versus who was the subject of a request to come to Australia.\(^{29}\)

An example of this arose in September 2018, when the Nauruan Government refused to approve a medical transfer which had been ordered by the Federal Court of Australia.\(^{30}\)

The Nauruan Regulations appear to create significant obstacles for the full implementation of Australia’s new process for requesting, approving and reviewing medical transfers from Nauru. While the Australian laws compel an officer to bring a transitory person to Australia if the Minister has approved the transfer, this cannot practically occur without the transfer also being approved by the Nauruan Minister, in accordance with Nauru’s OMRC Regulations. This will require the transfer to be recommended by Nauruan medical practitioners, the Republic of Nauru hospital and/or the OMRC Committee. If Australia’s Minister approves a transfer but the Nauruan Minister does not, Australia would appear to have very limited legal options to compel a transfer.

These issues were brought to light recently in Federal Court proceedings relating to an application for medical transfer from Nauru, initially under the existing medical transfer power contained in section 198B of the Migration Act, and then later under the new medical transfer provisions.\(^{31}\) On 14 June 2019, the Court ordered the Australian Government to ‘take all steps within their power’ to cause the applicant’s transfer to Australia for medical treatment as soon as reasonably practicable.\(^{32}\) Australia’s Minister approved the transfer under the medical transfer provisions in late June 2019; however, at its meeting of 27 June Nauru’s OMRC Committee held over consideration of the case until 11 July, pending further medical assessment. After a further interlocutory hearing in early July 2019, the Court made orders requiring that if the applicant was not transferred to Australia by 4pm on 12 July, the Minister was to file and serve affidavit evidence of what steps had been taken to secure transfer and why it had not occurred, and identifying individuals they considered responsible.\(^{33}\) The Court acknowledged that ‘at one level, responsibility for the applicant’s transfer having not been effected lies principally with the Government of Nauru’, yet it also found:

At another level, the responsibility for the applicant’s transfer having not been effected lies with the respondents, who have, on the evidence:

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27. Telemedicine Prohibition Regulations, subsection 5(1).
32. Ibid., [1].
33. Ibid.
(a) formed a view that they need to defer to the Government of Nauru by not engaging in any conduct which they apprehend might lead to criticism or complaint from the Government of Nauru, or which might cause the transfer of the applicant to be further impeded; and

(b) chosen to give preference to an approach which places the Commonwealth’s relationship with Nauru ahead of the steps both the first respondent (under s 198E of the Migration Act 1958 (Cth)) and this Court (on 14 June 2019) have determined to be necessary to undertake for the applicant’s health and welfare.  

The Court was subsequently advised that the applicant was brought to Australia on 12 July, but no further information was provided on the process by which this occurred, and the role the OMRC Committee played in this process.

**Removal and return power**

Following passage of the *Miscellaneous Measures Act* the Attorney-General, Christian Porter, announced that the Government had legal advice indicating that the new medical transfer provisions did not provide any power for the Government to return a person to a regional processing country once they no longer needed to be in Australia. The current Bill attempts to rectify this to ensure that people who have been brought to Australia under the medical transfer power are able to be returned to Nauru or PNG once they have received the necessary medical treatment, or are considered to no longer need to be in Australia. This issue is addressed in more detail under ‘Key issues and provisions’ below.

**Committee consideration**

**Senate Legal and Constitutional Affairs Legislation Committee**

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 18 October 2019. Details of the inquiry are available at the inquiry homepage.

**Senate Standing Committee for the Scrutiny of Bills**

The Scrutiny of Bills Committee considered the Bill in its report dated 24 July 2019. It expressed concern about one of the Bill’s application provisions, and its impact on rights and liabilities arising under the medical transfer provisions. This is discussed in more detail under ‘Key issues and provisions’ below.

**Policy position of non-government parties/independents**

The Opposition and the Australian Greens are opposed to the Bill, and voted against it in the House of Representatives on 25 July 2019.

The independent members for Warringah, Zali Steggall, Denison, Andrew Wilkie, and Indi, Dr Helen Haines, also voted against the Bill in the House of Representatives.

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34. Ibid., at [5].
35. CEU19 v Minister for Immigration, Citizenship and Multicultural Affairs (No 2) [2019] FCA 1130, at [4].
39. Ibid.
Centre Alliance also opposes the Bill, and voted against it in the House of Representatives.\(^\text{40}\) Centre Alliance Senator Stirling Griff has been vocal in his opposition to the Bill, and has indicated that the Government’s plan to repeal the medical transfer provisions would ‘sully the relationship’ between himself and the Government.\(^\text{41}\)

One Nation supports the repeal of the medical transfer provisions, having voted against their introduction in the *Miscellaneous Measures Act*.\(^\text{42}\) One Nation Senator Malcolm Roberts has called the medical transfer provisions an ‘abomination’ that provide ‘a back doorway for queue jumpers to come to onshore Australia’.\(^\text{43}\)

Independent Senator Cory Bernardi has not formally stated a position on the Bill, but was opposed to the introduction of the medical transfer provisions, stating at the time that ‘Bill Shorten and Labor have opened the door to another flood of illegal arrivals of boatpeople from Indonesia in pushing through the controversial medevac legislation’.\(^\text{44}\)

At the time of writing Senator Jacqui Lambie had not stated her position on the Bill.

**Position of major interest groups**

The repeal of the medical transfer provisions is opposed by refugee advocates, human rights groups, medical representatives, legal advocacy groups, and the United Nations. Of the 84 submissions from individuals and organisations to the Senate inquiry into the repeal Bill which had been published at the time of writing, 82 (all excluding the Department of Home Affairs, and one individual who asks questions but makes no recommendation) argue against its passage.\(^\text{45}\) The broad consensus expressed by these submissions is that the medical transfer provisions are necessary for ensuring that people are able to brought to Australia for essential medical treatment without having to go through time-consuming and costly court proceedings, and that it is appropriate that decisions as to whether it is necessary to transfer persons to Australia for medical treatment should be made by medical professionals, as provided for in these provisions.

The Office of the United Nations High Commissioner for Refugees (UNHCR) argues that the measures the Bill seeks to repeal ‘enhance transparency and predictability in the provision of healthcare in critical situations’ and ‘are all the more necessary in light [of] UNHCR’s observations of the shortfalls in protection standards in respect of both Papua New Guinea and Nauru’.\(^\text{46}\) UNHCR also argues against the provisions of the Bill that provide an explicit removal power for people who have been transferred to Australia under the medical transfer provisions, consistent with its long standing position that asylum seekers and refugees in Australia should not be returned to PNG or Nauru.\(^\text{47}\)

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40. Ibid.
41. K Murphy, ‘Centre Alliance senator warns Coalition not to repeal medevac law’, *The Guardian (Australia)*, 2 July 2019.
42. Australia, Senate, *Journals*, 137, 6 December 2018, p. 4544.
47. Ibid., p. 6.
The Refugee Council of Australia finds it ‘deeply troubling’ that the Bill ‘seeks to repeal a law that has allowed sick men and women access to medical treatment that is otherwise unavailable to them on Nauru or in Papua New Guinea (PNG).’

The Royal Australian College of General Practitioners, the Royal Australasian College of Physicians, the Australian and New Zealand College of Anaesthetists, the Australasian College for Emergency Medicine, the Royal Australian and New Zealand College of Psychiatrists and the Australian Medical Association all oppose the repeal of the medical transfer provisions, arguing that the provisions enhance refugees’ and asylum seekers’ access to essential healthcare, and that decisions on necessary medical treatment should be made by medical professionals.

Australian Lawyers for Human Rights argue that the medical transfer provisions are essential not just for a medical perspective, but also a legal one:

The Medevac legislation is a vital part of ensuring Australia complies with its binding international obligations under the United Nations Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees (Refugee Convention) and international human rights law.

The Australian Human Rights Commission (AHRC) considers that repeal of the medical transfer provisions would ‘significantly limit the right to health for refugees and asylum seekers subject to regional processing arrangements in Papua New Guinea (PNG) and Nauru without appropriate justification.’ It argues that the process for conducting medical transfers prior to commencement of these provisions did not adequately fulfil Australia’s obligations to provide timely and appropriate access to health care, as the process was time consuming and not informed by independent medical opinion.

The Human Rights Law Centre considers that:

The Medevac Laws are working. Removing a fair, transparent and doctor-led process for accessing essential, and in many cases, life-saving medical care is cruel and unnecessary. Repealing the Medevac laws will increase the risk of more innocent people dying on Nauru and Manus.

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51. AHRC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], August 2019, p. 3.

52. Ibid., p. 15.

53. Human Rights Law Centre, Government’s attempt to strip medical treatment from refugees cruel and unnecessary, media release, 19 August 2019.
Financial implications

The Explanatory Memorandum states that the financial impact of the Bill is expected to be low. The Bill is expected to result in savings, due to fewer people being transferred to Australia from regional processing countries for medical treatment.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights reported on the Bill on 10 September 2019. The Committee raised concerns about the Bill’s compatibility with Australia’s non-refoulement obligations, noting it had previously raised human rights concerns about the conditions for individuals transferred to regional processing countries. It stated:

... there do not appear to be sufficient legislative and procedural mechanisms to guard against the consequence of a person being sent to a regional [processing] country even in circumstances where there may be a risk of harm to the person in that country including in the context of immigration detention.

It sought the Minister’s advice on this issue, as well as whether the Bill’s measures are compatible with the right to an effective remedy, querying whether there is ‘independent, impartial and effective review’ of a decision to remove a person from Australia.

The Committee also expressed concern about the Bill’s compatibility with the right to health, noting that ‘restricting access to a type of medical transfer to Australia may in turn restrict access to appropriate health care for those held under regional processing arrangements’. It sought advice from the Minister on this, including:

- to what extent the repeal of the medical transfer provisions will restrict access to health care for those on Nauru and Manus Island and
- the adequacy and effectiveness of the remaining discretionary transfer provisions under section 198B of the Migration Act in protecting the right to health.

The Minister’s response to the Committee has not been received at the time of writing.

54. Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019, p. 2.
55. The Statement of Compatibility with Human Rights can be found at pages 9–13 of the Explanatory Memorandum to the Bill.
57. Ibid., p. 5.
58. Ibid., p. 6.
59. Ibid., p. 6.
60. Ibid., pp. 6–9.
Key issues and provisions

Current scheme for medical transfers

As discussed above, Schedule 6 of the *Miscellaneous Measures Act 2019* established a framework for the temporary transfer of certain transitory persons to Australia to receive medical assessment and treatment. It also established the Independent Health Advice Panel, responsible for reviewing refusals of the Minister on medical grounds, as well as for monitoring, assessing and reporting on the physical and mental health of transitory persons in regional processing countries, and the standard of health services provided to them.\(^{62}\)

The framework established by the *Miscellaneous Measures Act* provides only for the medical transfer of those who were in a regional processing country on 2 March 2019, or those born in a regional processing country.\(^ {63}\) It does not apply to any person removed from Australia to a regional processing country after this date.

Repeal of scheme

Items 1, 2, and 9 to 13 of Schedule 1 repeal all of the medical transfer provisions.

Repeal of transfer provisions

The main effect of the repeal is that the statutory power to bring transitory persons to Australia will be confined to section 198B of the *Migration Act*. Section 198B provides that an officer ‘may’ bring a transitory person to Australia for a temporary purpose. This is a broad discretionary power—the Act does not limit the circumstances which may fall within the meaning of ‘temporary purpose’.\(^ {64}\) However, it does not create an obligation for the Minister or an officer to bring, or consider bringing, a person to Australia in any circumstances.

Practically, this means that if the Minister refuses a requested medical transfer, there is nothing under the *Migration Act* that provides a statutory right of review or appeal for the person who has made the request. Refugee Legal has criticised section 198B as failing to provide:

- a clear and transparent process for the transfer power to be triggered
- a clear timeframe for consideration of transfer requests
- a clear explanation of the types of medical conditions that will trigger a transfer or
- a ‘medically driven regime that puts medical opinions front and centre’.\(^ {65}\)

Legal organisations have suggested that the repeal is likely to lead to an increase in court proceedings in relation to medical transfers.\(^ {66}\) Maurice Blackburn Lawyers has stated that as of February 2019 (just prior to the commencement of the *Miscellaneous Measures Act*), at least 52 proceedings had been commenced in the Federal Court of Australia seeking to compel the

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63. Ibid., paragraphs 198D(1)(a), 198E(2)(a).
64. The *Miscellaneous Measures Act* inserted subsection 198B(4) into the *Migration Act*, which provides that a final goal purpose may include, but is not limited to, medical or psychiatric assessment or treatment, or accompanying a person who is brought to Australia under the Act. Item 9 of the Bill repeals this subsection.
Australian Government to transfer people in regional processing countries to Australia for medical treatment. Such cases have been argued on the basis that the Australian Government owes a common law duty of care to the transitory persons it has transferred to regional processing countries, which, in the circumstances of the case, requires the Government to transfer the person to Australia for medical care. These cases have largely involved the issuing of interlocutory injunctions, which require the Court to be satisfied there is a serious question to be tried but not to make a final decision on the matter.

The Human Rights Law Centre (HRLC) states that of 48 cases that it and a ‘coalition of not-for-profit organisations and law firms acting pro bono’ had brought before the Federal Court between December 2017 and February 2019, ‘every single court case was successful in securing a transfer to Australia for medical care’. It argues that this success ‘highlights the serious unmet medical needs of many people held offshore’. The HRLC has further submitted:

Leaving sick people to rely on pro bono legal assistance and the court system as the only means to access vital medical treatment is an inappropriate response to the medical crisis in offshore detention.

In a joint submission to the Senate inquiry, the Kaldor Centre for International Refugee Law and the Australian National University similarly argue:

While these cases ultimately achieved an outcome for each applicant, the reliance on discretionary Ministerial powers and judicial intervention was inadequate, ineffective and ill-suited to responding to urgent medical needs and preserving the life and well-being of people transferred offshore.

Abolition of Independent Health Advice Panel

Item 11 repeals the provisions of the Migration Act relating to the Independent Health Advice Panel. This removes the legislative basis for the Panel.

A number of stakeholders have noted that the broader monitoring and oversight functions which the Panel performed beyond its review of medical transfer decisions, will also be lost if it is abolished. UNHCR has suggested that by abolishing these functions, ‘the Bill would permit weaker governance and accountability in respect of the provision of health services’. The Kaldor Centre and ANU have argued that the Panel’s monitoring and oversight functions ‘are crucial to ensuring Australia meets its obligations with respect to the health and well-being of people transferred offshore’ and should be retained even if the Bill is passed.

Removal provisions

Items 3 to 8 amend the Migration Act to expressly provide for the removal of those who have been brought to Australia under the medical transfer provisions. This is aimed at addressing what

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67. Maurice Blackburn Lawyers, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions], 16 August 2019, p. 3 and Attachment 1 (for a list of cases). For a list of cases which includes those lodged after the commencement of the medical transfer provisions, see: Kaldor Centre for International Refugee Law, ‘Medical transfer proceedings’, Kaldor Centre website.


69. Human Rights Law Centre, Submission to Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 5.

70. Ibid., p. 6.

71. Kaldor Centre and ANU, Submission to Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 3.

72. UNHCR, Submission to Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 4.

73. Kaldor Centre and ANU, Submission to Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 8.
the Government believes to be a gap in the medical transfer framework—the Explanatory Memorandum states:

... 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. 74

Section 198 sets out the circumstances in which an unlawful non-citizen must be removed from Australia. Relevantly, these include:

• where a person has been brought to Australia for a temporary purpose under section 198B, they must be removed as soon as reasonably practicable after they no longer need to be in Australia for that purpose (whether or not it has been achieved) 75 and

• where a person brought to Australia for a temporary purpose under section 198B gives birth to a child while in Australia, both the person and their child must be removed as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not it has been achieved). 76

There are currently no equivalent provisions for the return of a person brought to Australia under section 198C (the existing medical transfer provision). Items 3 and 6 amend subsections 198(1A) and 198(1B), respectively, to extend their application to non-citizens brought to Australia under ‘repealed section 198C’.

Similarly, section 198AH sets out the circumstances in which a transitory person may be taken to a regional processing country. These include where the person is an unauthorised maritime arrival brought to Australia from a regional processing country for a temporary purpose under section 198B, who is detained under section 189, and who no longer needs to be in Australia for the temporary purpose (whether or not it has been achieved). 77 Item 7 extends this provision to apply to persons brought to Australia under ‘repealed section 198C’.

Collectively, these amendments provide an express basis for the removal of persons brought to Australia under the medical transfer provisions. Item 14 provides that the changes will apply to those who have been brought to Australia under ‘repealed section 198C’ before, on or after commencement of the amendments.

Some legal organisations have questioned the Government’s assertion that transitory persons brought to Australia under the medical transfer provisions cannot be returned, suggesting that even if the current removal powers do not expressly apply to people brought to Australia under section 198C, ‘they could plausibly be interpreted to do so by necessary implication’. 78 They have further argued that the Government could amend the existing provisions to include an express return power without having to repeal the medical transfer scheme. 79

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74. Explanatory Memorandum, Migration Amendment (Repairing Medical Transfers) Bill 2019, p. 4.
75. Migration Act, subsection 198(1A).
76. Ibid., subsections 198(1B) and (1C).
77. Ibid., subsection 198AH(1A).
78. Kaldor Centre and ANU, Submission to Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 6; also see Castan Centre for Human Rights Law, Submission to Senate Legal and Constitutional Affairs Legislation Committee, op. cit., pp. 3–4.
79. Ibid.
Rights and liabilities

Sub-item 15(1) provides that subsection 7(2) of the Acts Interpretation Act 1901 does not apply in relation to the Bill’s repeal of a medical transfer provision. This provision of the Acts Interpretation Act states that the repeal of an Act (or part of an Act), does not, amongst other things, ‘affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part’. By excluding this rule, the Bill therefore seeks to ensure that repealing the medical transfer provisions will also remove any rights which were accrued, or liabilities incurred, during the time in which the provisions were in force.

Sub-item 15(2) provides that this does not affect rights or liabilities arising between parties to court proceedings in which judgement is reserved or has been delivered at the time the Repairing Medical Transfers Act commences, where the judgment sets aside, or declares invalid, a decision made under a medical transfer provision.

This means that if a transfer is refused under the medical transfer laws, and the person affected has challenged the refusal in court:

- if, when the Repairing Medical Transfers Act commences, the Court has made or reserved its decision, then a decision to set aside the original refusal, or declare it invalid, will stand but
- if, when the Repairing Medical Transfers Act commences, the matter is before the Court but it has not yet reserved its decision (because it has not heard all the evidence, for example), the Court will be unable to find that the Commonwealth has legal obligations towards the person arising out of the medical transfer provisions.

The Scrutiny of Bills Committee expressed concern about this item, noting that the Explanatory Memorandum does not explain why it is necessary, or ‘what rights or privileges acquired or accrued by persons under the previous provisions will be affected by the repeal’. The Committee requested more detailed information from the Minister on whether sub-item 15(1) will trespass on the rights and liberties of any person, and why it is necessary and appropriate to include in the Bill. In response, the Acting Minister stated that she did ‘not consider that sub-item 15(1) does trespass on the rights of any person’, explaining:

This position was taken because the existing power in section 198B of the Migration Act can still be exercised to effect the temporary transfer of a transitory person to Australia, including for the delivery of medical care to that person. This power continues to operate in parallel to the medical transfer provisions introduced in March 2019. These existing transfer mechanisms mean that those persons in need of medical attention in Australia or a third country will receive that attention. As such, it is an unnecessary duplication to preserve any rights accrued under the medical transfer provisions, other than those preserved in sub-item 15(2).

While acknowledging that repeal of the medical transfer provisions would not remove the Minister’s ability to approve the temporary transfer of a person to Australia for medical treatment, and that medical services remain available to persons in regional processing centres, the Committee stated:

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80. Acts Interpretation Act 1901 (Cth), paragraph 7(2)(c).
81. Senate Standing Committee for the Scrutiny of Bills, Scrutiny digest, op. cit., p. 23.
82. Ibid., p. 24.
... it is unclear from the acting minister's response why this justifies extinguishing any right, privilege, obligation or liability accrued under the medical transfer provisions.

It reiterated its concerns that the Bill might retrospectively ‘extinguish certain rights and expectations accrued under or as a result of the medical transfer provisions’. 84

84. Ibid., pp. 64–5.