

2019

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MIGRATION AMENDMENT (REPAIRING MEDICAL TRANSFERS) BILL 2019**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Home Affairs, the Hon. Peter Dutton MP)

## **MIGRATION AMENDMENT (REPAIRING MEDICAL TRANSFERS) BILL 2019**

### **OUTLINE**

The Migration Amendment (Repairing Medical Transfers) Bill 2019 (the Bill) amends the *Migration Act 1958* (the Migration Act) to repeal the provisions inserted by Schedule 6 to the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (the medical transfer provisions).

As the medical transfer provisions do not provide for any return or removal mechanism, the Bill also amends the Migration Act to extend existing powers in relation to persons transferred to Australia under the medical transfer provisions to allow for their removal from Australia or return to a regional processing country once they no longer need to be in Australia for the temporary purpose for which they were brought.

### **FINANCIAL IMPACT STATEMENT**

These amendments will have a low financial impact. There are expected to be savings associated with this Bill due to fewer medical transfers to Australia from regional processing countries and removal of oversight arrangements.

### **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at [Attachment A](#).

**MIGRATION AMENDMENT (REPAIRING MEDICAL TRANSFERS) BILL 2019****NOTES ON INDIVIDUAL CLAUSES****Clause 1      Short Title**

1. Clause 1 provides that the short title of the Bill, once enacted, will be the *Migration Amendment (Repairing Medical Transfers) Act 2019*.

**Clause 2      Commencement**

2. Clause 2 of the Bill sets out the times at which the various provisions of the Act commence.

3. Subclause 2(1) of the Bill provides that each provision of the Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

4. Table item 1 provides that sections 1 to 3 and anything in the Act not elsewhere covered by the table will commence on the day the Act receives the Royal Assent.

5. Table item 2 provides that Schedule 1 will commence on the day after the Act receives the Royal Assent.

6. The note in subclause 2(1) makes it clear that the table relates only to the provisions of the Act as originally enacted. The table will not be amended to deal with any later amendments to the Act.

7. Subclause 2(2) of the Bill provides that any information in column 3 of the table is not part of the Act. Information may be inserted in this column, or information in it may be edited, in any published version of the Act. There is currently no information in column 3 of the table.

**Clause 3      Schedules**

8. This clause provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.

## **SCHEDULE 1 – Repairing medical transfers**

### **Part 1 – Amendments**

#### **BACKGROUND**

The provisions inserted into the *Migration Act 1958* (the Migration Act) by Schedule 6 to the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (the Miscellaneous Measures Act) (the medical transfer provisions) create a framework for the transfer of transitory persons (and their family members, and other persons recommended to accompany the transitory person) from regional processing countries to Australia for the purposes of medical or psychiatric assessment or treatment. The provisions also provide for the transfer of transitory persons who are minors to Australia, irrespective of any medical or psychiatric condition.

There are a number of issues regarding the effect of these provisions, most notably 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 for the temporary purpose for which they were transferred. Other significant issues are:

- the medical transfer provisions undermine the Australian Government’s regional processing arrangements;
- the medical transfer provisions have a very broad application with very limited scope for refusing transfers on security or character grounds;
- the timeframes to make decisions do not allow a sufficient amount of time to gather and consider all the relevant information;
- 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 arrangements; and
- the medical transfer 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).

Furthermore, standard medical processes already exist which provide for the transfer of transitory persons for temporary medical purposes from regional processing countries, including transfer to Australia under the Migration Act.

To address the shortcomings of the medical transfer provisions and noting the existing medical transfer processes, including processes under the Migration Act, the Bill repeals the medical transfer provisions. The Bill will also provide for the removal from Australia, or return to a regional processing country, of transitory persons who are brought to Australia under the medical transfer provisions, once the temporary purpose for which they were brought to Australia is complete.

#### **Item 1            Subsection 5(1)**

9. This item repeals the following definitions in subsection 5(1) of the Migration Act:

- definition of *legacy minor*;
- definition of *relevant transitory person*;
- definition of *treating doctor*.

10. These definitions are being repealed because the sections in which these defined terms appear, sections 198C and 198D, are repealed by Item 10 of this Schedule.

**Item 2 Paragraph 42(2A)(ca)**

11. This item omits “or 198C” from paragraph 42(2A)(ca). The reference is no longer required because section 198C is repealed by Item 10 of this Schedule.

**Item 3 Subsection 198(1A)**

12. This item inserts “or repealed section 198C” in subsection 198(1A) after “section 198B”. This amendment makes it clear that, in the case of an unlawful non-citizen who has been brought to Australia under the repealed section 198C for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

13. Currently, subsection 198(1A) does not provide for the removal of transitory persons brought to Australia for a temporary purpose under section 198C. This amendment extends the existing removal power to allow for the removal of those transferred to Australia under section 198C, closing the loop hole left open as a result of the amendments to the Migration Act made by Schedule 6 of the Miscellaneous Measures Act.

**Item 4 Subsection 198(1A) (note)**

14. This item omits “Note:” and substitutes “Note 1:” in the note at the end of current subsection 198(1A). This is consequential to Item 5, which inserts new Note 2.

**Item 5 At the end of subsection 198(1A)**

15. This item inserts Note 2 to highlight that section 198C is being repealed by this Act (see Item 10). The Note also highlights the purpose of section 198C, that it provided for certain transitory persons to be brought to Australia for a temporary purpose (including the temporary purpose of medical or psychiatric assessment or treatment).

16. The effect of amended subsection 198(1A) is that a transitory person brought to Australia under repealed section 198C for a temporary purpose must be removed from Australia as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved) (see Item 3).

**Item 6 Paragraph 198(1B)(a)**

17. This item inserts “or repealed section 198C” in paragraph 198(1B)(a) after “section 198B”. This amendment makes it clear that subsection 198(1C) applies if an unlawful non-citizen who is not an unauthorised maritime arrival has been brought to Australia under the

repealed section 198C for a temporary purpose, and the conditions in paragraphs 198(1B)(b) and (c) are met.

**Item 7 Paragraph 198AH(1A)(a)**

18. This item inserts “or repealed section 198C” in paragraph 198AH(1A)(a) after “section 198B”. This amendment makes it clear that a transitory person is covered by subsection 198AH(1A) if the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under repealed section 198C for a temporary purpose and the conditions in paragraphs 198AH(1A)(b) and (c) are met.

19. The effect of a person being covered by subsection 198AH(1A) is that section 198AD will apply to that person. Section 198AD provides that an officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

20. Currently, there is no reference to section 198C in sections 198AD and 198AH. This means that there is no power for the Minister to return a person who was transferred to Australia under section 198C to a regional processing country. This loop hole was created as a result of the amendments to the Migration Act made by Schedule 6 of the Miscellaneous Measures Act.

21. This amendment extends the existing return power to allow for the return to a regional processing country of those transferred to Australia under section 198C, closing the loop hole.

**Item 8 At the end of subsection 198AH(1A)**

22. This item inserts a new note to highlight that section 198C is being repealed by this Act (see Item 10). The Note also highlights the purpose of section 198C, that it provided for certain transitory persons to be brought to Australia for a temporary purpose (including the temporary purpose of medical or psychiatric assessment or treatment).

23. The effect of amended subsection 198AH(1A) is that a transitory person brought to Australia under repealed section 198C for a temporary purpose must be taken to a regional processing country as soon as reasonably practicable if they no longer need to be in Australia for that temporary purpose (whether or not that purpose has been achieved).

**Item 9 Subsection 198B(4)**

24. This item repeals subsection 198B(4). This subsection related to the nature of the temporary purpose for which a transitory person could be brought to Australia under section 198C.

**Item 10 Sections 198C to 198J**

25. This item repeals sections 198C to 198J. These sections related to the process under which certain transitory persons could be transferred from a regional processing country to Australia for a temporary purpose, and to concomitant tabling of information in Parliament.

**Item 11 Subdivision D of Division 8 of Part 2**

26. This item repeals Subdivision D of Division 8 of Part 2. This Subdivision sets out provisions relating to the IHAP, including its establishment, functions and powers.

**Item 12                      Subsection 474(4) (table items 1A to 1D)**

27. This item repeals subsection 474(4) (table items 1A to 1D). These table items provided that the relevant decisions were not privative clause decisions.

28. The effect of this amendment is that any decisions made under the provisions listed in the repealed table items prior to the repeal of those provisions will become privative clause decisions in accordance with subsection 474(2) of the Migration Act. Privative clause decisions, where affected by error, are subject to judicial review in accordance with Part 8 of the Migration Act.

**Item 13                      Subsection 499(1)**

29. This item omits “(other than the panel established under section 199A)” from subsection 499(1). This reference is no longer required because section 199A is repealed by Item 11 of this Schedule.

**Part 2 – Application provisions etc.**

**Item 14                      Application of amendments relating to removal etc.**

30. Subitem 14(1) provides that the amendments of subsection 198(1A) [Items 3 to 5] and paragraph 198(1B)(a) [Item 6] made by this Schedule apply in relation to an unlawful non-citizen brought to Australia under repealed section 198C before, on or after the commencement of Item 14.

31. Subitem 14(2) provides that the amendment of paragraph 198AH(1A)(a) [Item 7] made by this Schedule applies in relation to a transitory person brought to Australia under repealed section 198C before, on or after the commencement of Item 14.

32. The effect of this item is that any person transferred to Australia before, on or after commencement of this item will be subject to return and removal.

**Item 15                      Effect of repeal of medical transfer provisions**

33. Subitem 15(1) provides that subsection 7(2) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act) does not apply in relation to the repeal by this Schedule of a medical transfer provision. Subsection 7(2) of the Acts Interpretation Act would, if applicable, preserve, amongst other things, any right, privilege, obligation or liability acquired, accrued or incurred under the medical transfer provisions.

34. For the avoidance of doubt, the exclusion of subsection 7(2) of the Acts Interpretation Act is intended to exclude the operation of both subsection 7(2), as well as the common law principles to which it seeks to give effect.

35. Subitem 15(2) provides that, despite subitem 15(1), the repeal by this Schedule of a medical transfer provision does not affect rights or liabilities arising between parties to proceedings in which judgment is reserved by a court or has been delivered by a court as at the commencement of this item, and the judgment sets aside, or declares invalid, a decision made under a medical transfer provision.

36. The purpose of this subitem is to confirm that the repeal of a medical transfer provision will not affect cases where judgment has been reserved or delivered by a court before the commencement of this item.

37. The effect of this is to preserve any such decision (or pending decision) of a court prior to the commencement of this item where that decision sets aside, or declares invalid, a decision made under the medical transfer provisions.

38. For the avoidance of doubt, nothing in this item is intended to affect the original jurisdiction of the High Court under section 75 of the Constitution.

39. Subitem 15(3) provides for the definition of medical transfer provision. The provisions of the Migration Act that are included are:

- subsection 198B(4);
- sections 198C to 198J;
- Subdivision D of Division 8 of Part 2;
- subsection 474(4) (table items 1A to 1D).



**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

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

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

The Migration Amendment (Repairing Medical Transfers) Bill 2019 (the Bill) amends the *Migration Act 1958* (the Migration Act) to repeal the provisions inserted by Schedule 6 to the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (the Miscellaneous Measures Act) (the medical transfer provisions).

As the medical transfer provisions do not provide for any return or removal mechanism, the Bill also amends the Migration Act to extend existing powers in relation to persons transferred to Australia under the medical transfer provisions to allow for their removal from Australia or return to a regional processing country once they no longer need to be in Australia for the temporary purpose for which they were brought.

These amendments reflect the Government's intention that the integrity and efficacy of the regional processing framework not be undermined and that the decision making power is returned to Government.

**Human rights implications**

The amendments made by this Bill remove the legislative provisions inserted by Schedule 6 of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019*. The Parliamentary Joint Committee on Human Rights examined the human rights implications of the re-establishment of regional processing in its ninth report of 2013 in the 43<sup>rd</sup> parliament and again in the 25<sup>th</sup> report of the 44<sup>th</sup> Parliament.

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 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.

Since the Regional Processing Framework was re-established in 2012, it has been the policy intention that the Minister and the Commonwealth have the power to return persons to a

regional processing country that have been brought to Australia for a temporary purpose. This Bill repeals the legislated obligation (section 198C) introduced by the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* which came into force on 2 March 2019 to bring relevant transitory persons and family members, relevant transferees and legacy minors to Australia for the temporary purpose of medical or psychiatric assessment or treatment. The Schedule 6 amendments did not provide a return or remove mechanism for individuals transferred under section 198C of the Act, and the Bill will empower the Government to return persons to a regional processing country or remove persons from Australia who have been brought to Australia for a temporary purpose.

Noting the above, this Bill engages the following rights:

- *Non-refoulement*
- Respect for family and children
- Right to Health.

#### *Non-refoulement*

Australia has obligations under the ICCPR and the CAT not to return a person to a country in certain circumstances.

Article 3 of the CAT states:

*No State party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

*Non-refoulement* obligations also arise, by implication, in relation to Articles 6 and 7 of the ICCPR.

Article 6(1) of the ICCPR states:

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 7 of the ICCPR states:

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

These are in addition to the obligations under the *1951 Convention relating to the Status of Refugees* (Refugees Convention) which is not one of the treaties that this Statement is required to address.

Section 198AD creates a duty for an officer to take an unauthorised maritime arrival to a regional processing country as soon as reasonably practicable, unless one of the specified exemptions applies. Section 198AH provides that section 198AD applies, subject to certain exceptions, to a transitory person who is covered by subsection 198AH(1A) or 198AH(1B).

The Bill introduces provisions to ensure the Commonwealth can return a person transferred under 198C to a regional processing country or remove such person from Australia as soon as

practicable after the Minister is satisfied that the person no longer needs to be in Australia for that temporary purpose. This power exists for individuals brought to Australia for a temporary purpose under section 198B, however was not included in the non-government amendments that introduced section 198C.

These amendments do not alter the longstanding policy intention that the Minister and the Commonwealth have the power to return persons to a regional processing country that have been brought to Australia for a temporary purpose, regardless of their refugee status in the regional processing country. These amendments do however ensure consistency with other provisions relating to transitory persons. The Government takes Australia's *non-refoulement* obligations seriously, and will ensure administrative arrangements are in place to support Australia to meet its *non-refoulement* obligations to those individuals transferred under section 198C as it has done and continues to do for persons transferred under 198B. The amendments do not impact on the protections against *refoulement*, which already exist in Australia's legislation, policies and procedures. In making the amendments, the Government is not creating any new obligations or seeking to avoid obligations.

Australia will continue to meet its *non-refoulement* obligations through other mechanisms under the Migration Act, policies and procedures.

#### Respect for the family and children

Rights relating to respect for the family and children are contained in Articles 17(1), 23(1), and 24 of the ICCPR.

##### *Article 17 ICCPR*

*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

##### *Article 23 ICCPR*

*1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

##### *Article 24 ICCPR*

*1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*

In addition, Article 3 of the Convention on the Rights of the Child (CRC) provides:

*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Further, Article 9 and 10 of the CRC provides:

## Article 9

1. *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*
2. *In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.*
3. *States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*
4. *Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.*

## Article 10

*In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*

No children have been transferred to Australia under section 198C.

The Bill supports family unity as all persons transferred under section 198B and 198C were only intended to come for a temporary purpose. The introduction of return and removal measures to support the return or removal from Australia of persons brought to Australia under section 198C is respecting families by not splitting families when returning some (those transferred under section 198B), but not all to a regional processing country or otherwise removing them from Australia. It will ensure that those transferred consistent with 'spilt family' provisions (section 198G) can be managed in the same way as the rest of the family unit subject to any reason consistent with the above obligations to depart from the practice.

The scope of the right to respect for the family and the right to freedom from interference with the family requires countries to adopt legislative, administrative and other measures to protect families, and to refrain from arbitrary interference in families. The obligations under

the CRC include the obligation to treat the best interests of the child as a primary consideration and to treat applications for family reunification of children with their parents to be treated in a positive, humane and expeditious manner.

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 the best interest of affected children, where applicable.

On transfer to Australia under section 198C, individuals are informed their stay in Australia is for temporary purposes only. The return amendments correct deficiencies in the drafting of Schedule 6 of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019*.

### **Right to Health**

To the extent that the provisions in the Bill relate to a transitory person in Australia, these provisions may engage the Right to Health under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states:

*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

Transitory persons in Australia for a temporary purpose will continue to receive medical care in Australian medical facilities. The government is of the view that such an arrangement is consistent with Article 12 of the ICESCR.

The Bill will not affect the existing provisions for the temporary transfer of transitory persons for medical treatment in a third country. Section 198B provides a standing authority for individuals in need of medical care not available in the regional processing country to be brought to a third country, including Australia, for medical treatment.

### **Conclusion**

The measures proposed in this Bill are compatible with human rights.

**The Hon. Peter Dutton MP, Minister for Home Affairs**