

# A decade too long

## Submission on the Migration Amendment (Evacuation to Safety) Bill 2023

# Human Rights Law Centre

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## Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded lands on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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## A. Summary

1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to contribute to the Committee's inquiry into the Migration Amendment (Evacuation to Safety) Bill 2023 (**Bill**).
2. The Bill addresses the urgent needs of the nearly 200 people who will soon mark 10 years of survival under Australia's offshore processing regime. Successive governments have sought to normalise the ongoing atrocity of offshore detention by prolonging the mistreatment of people who remain there year upon year. Regardless, the Australian Government remains responsible for those people's futures.
3. The Bill will compel the Federal Government to offer those still offshore the choice to finally enter Australia. The Bill is necessary because the Federal Government has failed to bring people to safety, despite public commitments to establish a transparent transfer process and to govern humanely.
4. People in Nauru and Papua New Guinea are still waiting too long to access critical medical care. There is no clear process to seek or be considered for transfer to Australia. While in opposition, this Government supported the former 'Medevac' legislation and campaigned on a commitment to re-introduce a proper process through which people offshore could access timely and appropriate medical care in Australia. This is precisely what this Bill would deliver, and the Government should support it.
5. The Bill is an opportunity to end the years of uncertainty, isolation, violence, neglect and indefinite separation from family that people have endured, and to avoid further harm or preventable deaths occurring offshore. The HRLC supports the Bill, and the Committee ought to recommend that the Bill be passed.
6. Once all people who are currently in Nauru and Papua New Guinea have the option to leave, further legislation is needed to repeal the laws propping up Australia's failed offshore processing regime, and to guarantee permanent safety for those previously subjected to it.

### Recommendations

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| <b>1</b> | The Committee ought to recommend that the Bill be passed   |
| <b>2</b> | Further legislation should be introduced to repeal offshore processing and provide permanent safety to people previously subjected to it |
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## B. A functional transfer process must be protected in law

7. It is necessary to impose a statutory obligation on the Federal Government to transfer people in Nauru and Papua New Guinea to Australia because successive governments have failed to voluntarily transfer those who need it. These failures have caused irreparable harm and in some cases, cost lives.
8. The people who still remain offshore were forcibly taken there in 2013 and 2014. They have experienced poor living conditions and inadequate physical and mental health care for close to 10 years. The lives that have been lost, and the significant damage incurred to people's health, can be attributed to the conditions of offshore processing and the utter dysfunction of the Australian Government's processes for identifying and adequately treating serious health issues, and acting upon medical, family and other circumstances that necessitate transfer to Australia.
9. At no stage in the history of the offshore detention policy has there existed a government instituted process for transfers that has not been laden with risk and inefficiency. Prior to the Medevac laws, the Australian

Government repeatedly and consistently ignored medical recommendations for transfer to Australia, placing the lives of men, women and children in the Australian Government's care at risk.

10. Twelve people died in offshore detention before the Medevac laws were introduced.<sup>1</sup> Most of those deaths involved untreated physical or mental health conditions and included cases in which the Australian Government ignored explicit medical advice recommending urgent transfer to Australia.<sup>2</sup>
11. Because the Australian Government consistently refused to follow the advice of doctors about critically unwell people in its care, many people were forced to take court action to secure urgent medical transfers to Australia. More than 340 people were transferred to Australia as a result of legal action before the Medevac laws were introduced.
12. Leaving sick people to rely on pro bono legal action as the only means to access vital medical treatment has been a wholly an inappropriate response to the medical crisis in offshore detention. It should not be repeated.
13. During the short period of their operation, the Medevac laws provided a robust, transparent and timely process for people to access appropriate health care. Since the repeal of those laws, the previous trend of the Australian Government ignoring medical needs has resumed.
14. The Asylum Seeker Resource Centre's (ASRC) submission to this inquiry outlines the significant unmet medical needs of people still in Nauru and Papua New Guinea today, and the dysfunction of the current system (or lack thereof) for seeking medical transfers for people with serious conditions. We commend that submission to the Committee.
15. Medical need is not the only reason that people may require transfer to Australia. People should be transferred if, for example, their personal safety is at risk, they are separated from family in Australia, or the Australian Government cannot guarantee that other fundamental rights are upheld offshore.
16. Successive governments have failed to deliver a functional system to facilitate transfers of people from Nauru and Papua New Guinea to Australia based on need and free from political influence. Such broad discretionary power over people's health and lives must be removed from the Minister's hands.

## C. Government support for evacuations to safety

17. The current Government supported the Medevac legislation when in opposition, on the basis that it allowed sick men and women access to medical treatment that was otherwise unavailable to them. As Labor Senators observed at the time:

“The need for a medical transfer system that gives due weight to medical assessments, which the medevac law has created, has been abundantly confirmed. No matter how much money is spent to ameliorate life in an unhealthy environment, the result is likely to be unhealthy people.”<sup>3</sup>

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<sup>1</sup> Ben Doherty, Nick Evershed and Andy Ball, “Deaths in offshore detention: the faces of the people who have died in Australia's care”, *Guardian Australia*, 20 June 2018, available at: <https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care>.

<sup>2</sup> Coroner's Court of Queensland, *Findings of Inquest into the Death of Hamid KHAZAEI*, 30 July 2018, available at [https://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/577607/cif-khazaei-h-20180730.pdf](https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf).

<sup>3</sup> Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019, *Labor Senators' dissenting report*, October 2019.

18. The Australian Labor Party was later elected to federal government on a platform which recognised that people in offshore detention have been left languishing indefinitely, and committed to improving the processes for medical transfers and establishing an Independent Health Advice Panel.<sup>4</sup>
19. After eight months in power, the Government has not acted on these promises. It has reaffirmed its commitment to offshore processing in Nauru, but has done nothing to improve the health or safety of people held there or in Papua New Guinea.
20. We refer the Committee to the submission made by the ASRC, which provides recent case studies illustrating the opacity and dysfunction of the current transfer arrangements. As detailed in that submission, lawyers and advocates have been forced to rely on frantic communication with Ministers and officials within the Department to raise critical medical concerns relating to former detainees in Papua New Guinea and Nauru. Despite repeated requests made to Minister O’Neil’s office to clarify and formalise the process for transfers, to date there has been no acknowledgment (let alone response) to any transfer request by the Minister’s office. The lives and welfare of people in the former RPCs cannot be left to an opaque process, governed ultimately by Ministerial fiat.
21. The Government’s previous recognition of the need for a legislated transfer process and, more broadly, the need for a resolution for people held offshore indefinitely, ought to guarantee its support for this Bill. Anything less would amount to a failure of leadership and a breach of the Government’s relationship of trust with the people who elected it.

## D. Protecting family unity

22. The Bill will enable any person currently in Nauru or Papua New Guinea to come to Australia while a durable settlement solution is determined. It would represent a key step towards ending the widespread government practice of intentionally separating refugee families as a deterrence method.
23. Australian governments have used the offshore detention regime to intentionally separate people from their family members, as a means of punishing people for seeking asylum and pressuring them to return to danger. The laws, policies and practices connected with offshore detention have caused hundreds of people to endure prolonged separation from their families, including children from their parents.
24. Many families were separated simply because they arrived in Australia on different dates. The policy of forced transfers to offshore detention, applicable since the arbitrary date of 19 July 2013, makes no exceptions for people with close family already in Australia.<sup>5</sup> As a result, family members who arrived just days or weeks apart were separated for years.
25. For example, the Human Rights Law Centre has worked with a woman who fled the same persecution as her husband. He arrived shortly before the introduction of compulsory offshore processing and was able to apply for protection while living in the Australian community. His wife arrived just three months later and was sent to Nauru. She spent five years alone in detention in Nauru, where she was subjected to frequent harassment, before being transferred to Australia for urgent medical treatment. Despite now living here with her husband, the Australian Government maintains that she will never be permitted to settle in Australia. The Government expects her to either uproot the life her husband has built over the past 10 years in Australia, or facing indefinite separation once again.

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<sup>4</sup> Australian Labor Party, *2021 ALP National Platform* (March 2021), available at <https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>

<sup>5</sup> Section 198AD of the Migration Act requires that ‘unauthorised maritime arrivals’ be taken to a ‘regional processing country’.

26. The Australian Government also deliberately separated families in situations where one person needed to be evacuated from offshore detention for urgent medical treatment in Australia, but other family members were forced to stay behind.
27. Whistle-blowers from inside the Government have confirmed that refusing to allow family members to travel during medical evacuations was part of an ‘unofficial policy’ to use family separation as a coercive measure to encourage people to agree to return to Nauru or Papua New Guinea despite their health and safety concerns, or even to abandon their protection claims.<sup>6</sup>
28. This ‘unofficial policy’ was frequently implemented against women who were experiencing pregnancy complications and were taken to Australia for treatment or to give birth. Their husbands or partners were not permitted to travel with them. These fathers were forced to miss the birth of their children, and mothers were left to care for their newborns alone.
29. Family separation through offshore detention has not ended with the change of government. Just last year, a man remained on Nauru despite 17 members of his family – including his wife and children – receiving humanitarian assistance to flee Afghanistan for Australia after the Taliban took control of Kabul in 2021.<sup>7</sup> They were all living in Australia, yet he was not permitted to see them.
30. The families who have survived these experiences remain deeply impacted by them, both due to trauma and the ongoing ramifications of having different visa statuses, rights and settlement pathways. The HRLC is assisting a number of families to pursue a complaint to the United Nations Human Rights Committee regarding the Australian Government’s unlawful interference with family, seeking assurances of non-repetition and protection against future separation.
31. As Behrouz Boochani wrote, “These stories – stories about love, family and endless separation...have become part of the identity of Australia’s detention and refugee deterrence system, a system that has been engineered to utilise any possible means for forcing refugees back to their countries...Not only have these men and women been taken hostage by the Australian detention system, but their families have also experienced the violence of this systematic torture.”<sup>8</sup>
32. The practice of forcibly separating families is further evidence of the need to compel the Australian Government to bring people offshore to safety. However, further legislation is also needed to ensure that families who have experienced this treatment are not separated again in future, and are able to settle together permanently in a location that meets their needs.

## E. Ending a decade of cruelty

33. In 2019, Labor Senators wrote in relation to the offshore processing regime reintroduced by their party in 2012:

“The system was never intended to consign people into indefinite detention with little or no hope of permanent resettlement. But that is what it has become. In this situation, it is not surprising that health outcomes for the asylum seekers in offshore centres continue to deteriorate.”<sup>9</sup>

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<sup>6</sup> Ben Doherty, ‘Border Force tells Nauru refugees to separate from family if they want to settle in US’, *The Guardian* (online, 6 December 2017) available at <https://www.theguardian.com/world/2017/dec/06/border-force-tells-nauru-refugees-to-separate-from-family-if-they-want-to-settle-in-us>.

<sup>7</sup> Ben Doherty, ‘Hardly anyone is getting off: despite Labor’s promises, refugees needing urgent medical care remain on Nauru’, *The Guardian* (online, 18 December 2022) available at <https://www.theguardian.com/australia-news/2022/dec/18/hardly-anyone-is-getting-off-despite-labors-promises-refugees-needing-urgent-medical-care-remain-on-nauru>.

<sup>8</sup> Human Rights Law Centre, *Together in Safety: A report on the Australian Government’s separation of families seeking safety*, foreword by Behrouz Boochani, p 2-3.

<sup>9</sup> Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019, Labor Senators’ dissenting report, October 2019.

34. Offshore processing is a failed policy which has cost far more in human suffering than can be measured by the billions of dollars wasted on it. Despite the previous government committing to reducing the number of people held offshore to zero, this has not happened. It is beyond time to end the decade of cruelty towards people who came to Australia seeking protection.
35. The Bill is necessary to ensure that people can access the medical care they need. But bringing the final survivors of offshore processing to Australia is also the bare minimum this Government must do to enable them to begin rebuilding their lives in safety.