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Andrew & Renata Kaldor Centre for International Refugee Law

Factsheet

MEDICAL TRANSFERS FROM OFFSHORE PROCESSING TO AUSTRALIA

Last update: August 2021

Refugees and asylum seekers subject to offshore processing in Nauru and Papua New Guinea (PNG) are classified as 'transitory persons' under Australian law, and may be transferred back to Australia for a variety of purposes, including medical treatment.

When can asylum seekers be transferred from offshore processing to Australia?

Australia's *Migration Act 1958* deems all asylum seekers transferred to regional processing countries to be 'transitory persons'. The Department of Home Affairs has the power to transfer a transitory person from another country to Australia for a 'temporary purpose'. The *Migration Act* specifies that 'such force as is necessary and reasonable' may be used when making a transfer.

The *Migration Act* does not define the 'temporary purposes' for which asylum seekers may be transferred from offshore processing in the regional processing countries of Nauru and PNG to Australia. However, the revised Explanatory Memorandum to the Act states that 'temporary purposes' may include:

- medical treatment for a condition which cannot be adequately treated in the place where the person has been taken;
- trials at which the person is to provide evidence in the prosecution of people smugglers; or
- transit through Australia, either to return to their country of origin or to a third country.

Asylum seekers who are transferred to Australia for medical treatment or another temporary purpose generally are not granted a visa authorising their entry. Accordingly, they are typically held in detention, pursuant to ss 189 and 196 of the *Migration Act*. This may be in onshore detention centres, community detention or 'alternative places of detention', such as hotels. The purpose of detention is typically removal from Australia. Removal must be carried out when the government determines the person no longer needs to be in Australia for the temporary purpose, or when the person requests removal, whichever comes first.

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Transitory persons brought to Australia from offshore processing may in some circumstances be granted visas authorising them to stay in Australia, but this is subject to government discretion. Generally, they are barred from making an application for a substantive visa, though this bar can be lifted by the Minister on public interest grounds. The Minister may also elect to grant a person in detention a Bridging Visa E – a short term visa allowing them to live in the community, with limited rights and social supports. The Minister also has an even broader power under s 195A of the *Migration Act*, that enables him or her to grant any kind of visa to a person in detention on public interest grounds, whether the visa has been applied for or not.

How many asylum seekers have been transferred from offshore processing to Australia?

As of 31 March 2021, there were 1,219 transitory persons in Australia (including 267 children, 146 of whom were born in Australia or Nauru). As of 30 April 2021, 240 people remained in Nauru and PNG.

Duty of care and medical transfer litigation

The *Migration Act* creates broad powers allowing Australian officials to transfer people from offshore processing to Australia, but no direct obligation to do so, even when urgent medical treatment is required. Nevertheless, Australia has a range of legal obligations under international human rights and refugee law that extend to people transferred to Nauru and PNG, including with respect to their health and well-being, and in 2016 the Federal Court of Australia found that the Commonwealth owed a duty of care under Australian law to a refugee in offshore processing who required urgent medical treatment.

Following a number of occasions where doctors recommended that individuals be transferred from offshore processing to Australia for specialist medical treatment, and the government refused or resisted transfer, over 50 cases were lodged in the Federal Court on behalf of refugees and asylum seekers who required urgent medical treatment. These cases sought, and successfully obtained, urgent interlocutory injunctions to force the Australian government to transfer those in need of treatment (and in some cases their family members) to places where they could receive urgent care. As a result of this litigation, hundreds of individuals were evacuated from offshore processing to Australia.

What was the so-called Medevac law?

The 'Medevac law' was a piece of legislation introduced in the wake of a series of court-ordered medical transfers, a documented mental health crisis in Nauru and the successful 'Kids off Nauru' campaign. The law was operative for eight months in 2019, and aimed to improve the process for asylum seekers held under Australia's offshore processing arrangements to be transferred to Australia to receive medical treatment. It became law on 1 March 2019, and was repealed on 8 December 2019.

When the Medevac law was in force, asylum seekers and refugees in offshore processing countries could be transferred to Australia for medical treatment or assessment if two doctors said transfer was necessary. This was a change from the previous system, where

transfer decisions rested in the hands of public servants.

Under the Medevac process, if two doctors recommended that a person be transferred to Australia for medical treatment the Minister was required to approve or refuse the transfer within 72 hours of receiving that recommendation. A transfer could be refused due to character and/or national security grounds, or (in the case of adults only) on medical grounds. Any transfers refused by the Minister on medical grounds were referred to an eight-person medical panel, which had 72 hours to review the case and make a recommendation for or against transfer. If the medical panel recommended transfer, the Minister retained a power to refuse the transfer on security or character grounds, but would otherwise have to approve the transfer.

The Morrison government opposed the Medevac law. It was passed when the government did not have a majority in parliament, with the support of Labor and most of the crossbench. After the Morrison government was re-elected in May 2019, it sought to repeal the Medevac law as a matter of priority. In December 2019, just eight months after the law was introduced, the government secured its repeal, after striking a deal with Tasmanian Senator Jacqui Lambie. The details of the agreement with Senator Lambie have not been made public.

During the time that the Medevac law was operational, 192 people were transferred from offshore processing under its provisions.

How are medical transfers made now that the Medevac law has been repealed?

The repeal of the Medevac law has meant that if a person in offshore processing needs to be transferred to Australia for medical treatment, the provisions in the *Migration Act* authorising transitory persons to be transferred to Australia for a temporary purpose will apply. Where the need for treatment is urgent and the government does not authorise a transfer, litigation seeking a court ordered transfer may be commenced.

This factsheet is part of the Kaldor Centre's series of publications on offshore processing.