Australian Human Rights Commission

Human Rights Commissioner
Edward Santow

23 September 2019

Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

Migration Amendment (Repairing Medical Transfers) Bill 2019

I write to provide the Committee with some further information that is particularly relevant to the above inquiry, but which had not been made publicly available prior to the Committee's hearing on 26 August 2019.

I ask that the Committee accept this letter as a supplementary submission.

On 12 September 2019, the Attorney-General tabled in Parliament a report prepared by the Australian Human Rights Commission (the Commission) dealing with the transfer of families with young children to the regional processing centre on Nauru. A copy of the report is available on the Commission's website (https://www.humanrights.gov.au/about/news/human-rights-report-transferring-asylum-seeker-families-nauru).

The report describes the Commission's inquiry into complaints by three families transferred to Nauru and it is one of the most detailed accounts of the conditions faced by people detained at the Nauru centre.

There are three aspects of the report that I wish to bring to the Committee's attention. The issues relate to:

- the inadequacies in medical treatment available at the Republic of Nauru Hospital (**RON Hospital**) for people requiring specialist care, and particularly specialist neonatal care

- particular health risks faced by people detained at the regional processing centre on Nauru
- the inadequacy of the process for medical transfers prior to the medical transfer provisions of the Migration Act (often referred to as the 'medevac' legislation) coming into force, as demonstrated in the case of one of the complainants who required transfer to Australia as a result of a complicated pregnancy that could not be dealt with on Nauru.

Republic of Nauru Hospital

In its submission to this inquiry, the Department noted that there are primary healthcare services in Nauru, but that patients in Nauru requiring secondary and tertiary healthcare services are likely to require transfer to other countries.[1]

The view of the Independent Health Advice Panel in its first quarterly report was that there was 'reasonable quality primary and secondary care' on Nauru but that 'specialist medical care was not readily available'.[2] Medical experts who gave evidence at the hearing also noted the deficiencies in specialist care.[3]

The Commission's report recently tabled in Parliament revealed the serious deficiencies at the RON Hospital, particularly when it came to neonatal care. The deficiencies are documented in reports provided to the Australian Government by its health contractor, International Health and Medical Services (**IHMS**), by a committee of medical experts established jointly between the governments of Australia and Nauru, by Comcare, and by an independent expert engaged by Australia's Department of Immigration and Border Protection (now known as the Department of Home Affairs) to examine the capability of the RON Hospital to provide neonatal and maternity services.

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1 Department of Home Affairs, *Submission to the Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019*, [5].

2 Independent Health Advice Panel, *First Quarterly Report*, p 3.

3 Committee Hansard, Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Repairing Medical Transfers) Bill 2019*, 26 August 2019, p 4 (Dr Tony Bartone, President, Australian Medical Association); p 10 (Professor Kerryn Phelps AM); p 24 (Dr Lara Roeske, Chair, RACGP Specific interests, and RACGP Board Director, Royal Australian College of General Practitioners).

The information set out below is taken from these reports, as discussed in the Commission's own report that was tabled on 12 September 2019.[4] Some of this material has not previously been made public.

The first family groups were transferred to Nauru in August 2013.[5]

On 20 November 2013, IHMS provided advice to the Department about the risks of giving birth in Nauru.[6] IHMS strongly recommended that births only take place on Nauru once there is a blood supply available at the RON Hospital, because of the risks of infant and maternal mortality. IHMS advised that the rate of maternal mortality in Nauru was 30 times higher than in Australia.

More generally, IHMS recommended in November 2013 that 'women who have risk factors are managed in Australia past the 1st trimester'. IHMS was clear about the risks involved in delivering babies in Nauru where there are complicated pregnancies. It said:

> Almost all pre-term babies in Nauru die. In Australia babies born at 24 weeks have a 40% chance of survival and those born at 25 weeks >60% chance of survival. Unfortunately the length of time it takes for a medical evacuation from Nauru to a specialist mainland unit to give these preterm babies a chance of survival is far too long.

In February 2014, the JAC Health Subcommittee[7] considered the availability of child health services on Nauru, including at the RON Hospital. It found that, at that time:

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4 *Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128 (**AHRC Report**) at [299]–[310]. At https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/ms-bk-ms-co-and-mr-de-behalf-themselves-and-their.

5 Department of Home Affairs, *Submission to the Inquiry into the Migration Amendment (Repairing Medical Transfers) Bill 2019*, 'Fact Sheet 2: History of Regional Processing'.

6 A copy of this advice was attached to a departmental submission to the Minister for Immigration and Border Protection MS15-001045 dated 26 March 2015, produced in a redacted form pursuant to a freedom of information request FA 16/08/00942 for documents about 'Conditions and treatment of asylum seekers on Nauru'. At https://www.border.gov.au/AccessandAccountability/Documents/FOI/FA160800942-documents-released.pdf (accessed 13 November 2017).

7 The Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements (**JAC Health Subcommittee**). This subcommittee

> There is no MOU [Memorandum of Understanding] in place with the RoN hospital [for the provision of services to people held in detention or to stakeholder staff]. There is a single paediatrician from Cuba with minimal English providing local paediatric services. The RoN hospital has a single working neonatal incubator and three infant warmers. There is an oxygen supply, and there is capacity to provide nasal prong oxygen, nasogastric feeds, gain intravenous access, and provide intravenous antibiotics, however there are not facilities for neonatal intubation or ventilation. We did not see a bag and mask ventilation facility, although it is possible this is available. It is unclear how resources are allocated if there is more than one sick baby. …
>
> From a medical care perspective, there are significant risks in this environment for children. The standard is not in keeping with an Australian community standard of care, including the standard for remote or regional Australia. The standard is not adequate for children of asylum seeker/refugee background who carry significant vulnerabilities and who essentially have no screening prior to transfer.[8]

A blood bank was established at the RON Hospital by 1 April 2014. However, in March 2014, the RON Hospital ceased to have a resident obstetrician and later, a paediatrician, due to staff departures. IHMS advised the Department that with the absence of such staff onsite, the risk to newborns was increased further. The Department agreed to IHMS' recommendation that all pregnant women at the RPC be transferred to Australia to give birth and that newborns not be returned to Nauru until at least three months of age, pending Nauru's recruitment of a resident obstetrician and paediatrician. This was still the position in March 2015.[9]

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comprised five experienced Australian medical practitioners appointed by the Governments of Australia and Nauru with expertise in mental health, psychiatry, children and infectious diseases. They visited the regional processing centre on Nauru from 16 to 19 February 2014 and prepared a report of their observations.

8 Physical and Mental Health Subcommittee, Joint Advisory Committee for Nauru Regional Processing Arrangements, *Nauru Site Visit Report, 16-19 February 2014*, p 34. At https://www.theguardian.com/world/interactive/2014/may/29/nauru-family-health-risks-report-in-full (accessed 6 November 2017).

9 Department of Immigration and Border Protection, Submission MS15-001045 to Minister for Immigration and Border Protection, *Nauru Regional Processing Centre – Transfers to Australia for Medical Treatment*, 26 March 2015, [17].

Even with a blood bank and experienced staff members, the risks involved in complicated pregnancies remained significantly higher in Nauru than in Australia. IHMS said:

> Increased availability of experienced staff able to operate appropriate equipment and availability of blood products is likely to make a substantial improvement to the rate of maternal deaths. However given the large differential between Australia and Nauru it would be unrealistic to suggest that this could be reduced to a level that was similar to Australia.

In April 2015, the Department advised the Minister for Immigration and Border Protection that, '[u]nlike Australian rural hospitals, the RON Hospital lacks the option of accessing a large well-equipped domestic metropolitan hospital for more complex diagnoses and surgeries'.

By May 2015, there was still no full-time permanent obstetrician at the RON Hospital. Around this time, the Secretary of the Department agreed to place a full-time obstetrician at the RON Hospital in order to reduce the need for medical transfers. The Department noted in a submission to the Minister on 29 May 2015, that this would 'enable the delivery of low risk births on Nauru … but high risk births would still need to be transferred to Australia'.

In July 2015, there was a change in policy by the Department, described in the Commission's evidence to the hearing on this Bill[10] and shown in the graph provided to the Committee,[11] which resulted in a sharp reduction in the number of people approved for medical transfers. The policy was that asylum seekers were to be treated in a third country outside of Australia for medical support, other than in exceptional circumstances.[12]

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[10] Committee Hansard, Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Repairing Medical Transfers) Bill 2019*, 26 August 2019, p 28 (Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission).

[11] Document tabled by the Australian Human Rights Commission at the public hearing in Canberra, 26 August 2019. At https://www.aph.gov.au/DocumentStore.ashx?id=da29f794-6fe6-476c-b6cb-109b583e5585.

[12] *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 at [395]; Department of Immigration and Border Protection, *Submission to the Inquiry into serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional*

Comcare visited the RON Hospital in November 2015 as part of an inspection of the Nauru regional processing centre and found that 'the facilities that are there are very basic and generally in a state of poor repair'.[13]

The Department engaged a Senior Staff Specialist in obstetrics and gynaecology at a leading Queensland hospital to provide a report on the capability of the RON Hospital to provide neonatal and maternity services. The assessment was made using the Queensland Government's Clinical Services Capability Framework (**CSCF**) for Maternity and Neonatal services.[14] A report was provided to the Department on 27 February 2016.

There are six levels of service in the Queensland CSCF, with level 1 being a level of service sufficient to manage the least complex patients (low risk ambulatory care clinical services only, delivered predominantly by registered nurses or health workers), and level 6 being the highest level of service (generally provided at large metropolitan hospitals).[15] Using the CSCF criteria, the report rated the RON Hospital as a level 0 service for neonatal services and level 2 for maternity services. The maternity facilities were described as 'very substandard, even for third world countries'.

In relation to neonatal services, the report noted that:

> RoN Hospital has one neonatology trained paediatrician … appointed on a three month locum, but is not supported by necessary clinical services capability in all other aspects, including trained neonatal nurses, nursery, equipment, and ability to perform basic life support and resuscitation for babies, infants and children.

Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre, [252]–[253].

13 Comcare Inspector Report of Nauru Regional Processing Centre between 15 and 18 November 2015, produced to the Senate Legal and Constitutional Affairs References Committee inquiry into Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre in answers to questions on notice on 15 March 2017. At https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Additional_Documents (accessed 2 November 2017).

14 Queensland Government, Queensland Health, *About the CSCF*, at https://www.health.qld.gov.au/clinical-practice/guidelines-procedures/service-delivery/cscf/about (accessed 12 October 2017).

15 Queensland Government, Queensland Health, *Clinical services capability framework, Fact sheet 2, Explanation of service levels*, at https://www.health.qld.gov.au/__data/assets/pdf_file/0021/444423/cscf-fs1-service-levels.pdf (accessed 12 October 2017).

> There is limited capability to commence mechanical ventilation by bag and mask ventilation but this would constitute merely basic life support, and not any level of advanced life support, or sustainability of life support until suitable air ambulance transfer could happen, for both adults and neonates. …
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> RoN Hospital can care for infants above 37 weeks gestational age provided these infants do not require acute resuscitation beyond basic bag and mask resuscitation. Consequently in the event of a term infant requiring advanced life support, including airway and respiratory support, their capability is severely limited. A functional laryngoscope is not available, making endotracheal intubation, laryngeal suctioning and ventilation impossible. There is no capacity for CPAP. Surfectant is not available. …
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> There is a need for an additional neonatal resuscitaire, as the only one at the hospital is needing to be wheeled around between the operating theatre and the delivery rooms, compromising care if needed concurrently.
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> There is currently no incubator for sick babies. This could be part of immediate purchase of much needed basic equipment. …
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> RoN Hospital in conjunction with IHMS current does not meet requirements to be able to safely and reliably provide neonatal services at the present time. As a direct consequence of this it is my recommendation that all pregnant women be transferred out of Nauru in advanced gestation, ideally by 36 weeks for low risk women, and earlier for high risk women, to avoid risking the onset of labour and its attendant risks to the neonate who needs advanced life support.

The level of neo-natal services available at the RON Hospital are important when considering the case of Ms BK discussed below.

While there have been improvements made to the RON Hospital since 2016, evidence from the IHAP is that the hospital still does not provide tertiary level care and that specialist medical care is not reliably available on Nauru.[16] For this kind of care, medical transfer remains a necessity.

In particular, there is still no access to high quality inpatient psychiatric care in Nauru. For patients with severe mental illness and at a high risk of suicide, medical transfer also remains a necessity.[17]

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[16] Independent Health Advice Panel, *First Quarterly Report*, p 3.
[17] Independent Health Advice Panel, *First Quarterly Report*, p 3.

Health risks faced by families detained at the regional processing centre on Nauru

The Commission's report makes findings about the conditions of detention at the regional processing centre on Nauru. These findings were made based on first-hand accounts by officers of the Department, Commonwealth agencies and other independent bodies that have inspected those conditions. The Commission had regard to accounts of conditions by the Department's Chief Medical Officer; by the Commonwealth Ombudsman, Comcare and the Australian National Audit Office (which reviewed other first-hand accounts); by doctors engaged by IHMS to provide a visiting specialist paediatric service; and by the JAC Health Subcommittee appointed by the Governments of Australia and Nauru. The Commission also considered records created by service providers that had been contracted to the Department in the relevant period: Transfield, IHMS, Wilson Security and Save the Children.

Some of the key findings made by the Commission were that:

- The accommodation of families in vinyl marquees on the phosphate plateau of central Nauru failed to provide them with sufficient protection from heat, rain and risk of serious disease, including dengue fever.
- The accommodation was not adequate for families with babies and young children.
- Deficiencies in accommodation and overcrowding contributed to poor health outcomes and facilitated the spread of illness.
- Two families who made complaints to the Commission had been sent to Nauru in the middle of what the Department's Chief Medical Officer described as a dengue fever 'epidemic'.[18]
- A failure to address identified problems with infrastructure at the centre carried a risk of traumatic physical injury to children.

The general conditions faced by people detained at the Nauru centre are described in more detail in section 5 of the report, from [119]–[218].

[18] AHRC Report, [169].

Failure of medical transfer regime

A key problem with the medical transfer regime prior to the introduction of the medical transfer provisions was that, in all cases (whether or not security issues were raised), the final decision on transfer rested with Departmental officers who could, and on occasions did, act contrary to medical advice for policy reasons that were not related either to the security or safety of the Australian public or to the best health interests of the patient.

An example of this is shown in the case of Ms BK, one of the complainants to the Commission. A full account of the issues involved in her case is set out at [249]–[298] and [314]–[324] of the Commission's report. Some key aspects of her case are set out below.

Ms BK and her family were detained at the Nauru regional processing centre for 16 months between May 2014 and September 2015. In February 2015, Ms BK returned a positive pregnancy test.

Ms BK had a complicated pregnancy that required her to be transferred off Nauru to give birth. There were two factors that complicated her pregnancy. The first factor was gestational diabetes, which was identified early in her pregnancy. The second factor was cephalopelvic disproportion. This had also been an issue with her first pregnancy, when she needed a caesarean section. For the reasons explained earlier in this letter, it was clear that the RON Hospital was not equipped to deal with complicated pregnancies like that of Ms BK.

IHMS made frequent, repeated recommendations to the Department for Ms BK to be transferred to Australia. The view of the medical officers treating her, including her visiting obstetrician and her psychologist, was that her physical and mental health would be at grave risk unless she was transferred.

Departmental policy at that time was that pregnant women 'are currently moved to Australia before 28 weeks gestation'.[19] In May 2015, the Department told a

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[19] Commonwealth, Department of Immigration and Border Protection, *Submission to the Select Committee on the Recent Allegations relating to the Conditions and Circumstances at the Regional Processing Centre in Nauru*, May 2015, p 51. At https://www.aph.gov.au/DocumentStore.ashx?id=5fffbfa9-f782-4307-af2c-9d0125c602a4&subId=351269 (accessed 3 November 2017).

Senate inquiry that IHMS has recommended that pregnant transferees not give birth on Nauru because there were no ongoing obstetric and paediatric staff at the RON Hospital. The Department said that, pending confirmation of suitable obstetric and paediatric arrangements by the RON Hospital, pregnant asylum seekers would continue to be transferred to Australia to give birth.[20]

However, two months after giving this evidence, the July 2015 change in policy by the Department, which saw the significant reduction in people approved for medical transfer, came into effect.

In August 2015, Ms BK was at 29 weeks gestation and had not been transferred. IHMS told the Department that the need for a transfer was urgent. Her treating psychologist warned of the prospect of acute psychiatric admission.

Despite this medical advice, the Department delayed the decision to transfer Ms BK until she was almost 35 weeks pregnant. Ms BK was given conflicting information from a number of sources about where she would give birth, up until the day before she was transferred off the island. The uncertainty directly contributed to a deterioration in her mental health leading to a diagnosis of a major depressive disorder.

The Commission found that the failure to take immediate steps to give effect to the urgent recommendations of treating doctors that Ms BK be transferred to Australia to give birth, as a result of complications in her pregnancy, was contrary to article 10(1) of the *International Covenant on Civil and Political Rights* (**ICCPR**) and article 24(2)(d) of the *Convention on the Rights of the Child*.

Further, the Commission found that the delay in making a decision to transfer Ms BK to Australia to give birth, in light of advice that this delay was contributing to the development of a psychiatric illness, was contrary to article 7 of the ICCPR.

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[20] Commonwealth, Department of Immigration and Border Protection, *Submission to the Select Committee on the Recent Allegations relating to the Conditions and Circumstances at the Regional Processing Centre in Nauru*, May 2015, p 41. At https://www.aph.gov.au/DocumentStore.ashx?id=5fffbfa9-f782-4307-af2c-9d0125c602a4&subId=351269 (accessed 3 November 2017).

Conclusion

Dangerous patient outcomes for people like Ms BK occurred because of a combination of:

- an approval regime for medical transfers, where the final decision on whether a person was transferred rested in all cases with a departmental officer rather than treating medical officers regardless of whether or not there were security risks to the Australian public; and
- a policy that people should not be transferred other than in 'exceptional circumstances', which appears to have resulted in a position where decision makers were, on occasions, reluctant to accept medical advice that transfer to Australia was necessary.

If the current medevac regime was available during Ms BK's pregnancy, and if there had been a refusal to transfer her at 28 weeks, her case would have been referred to the Independent Health Advice Panel which almost certainly would have approved her transfer to Australia.

Ms BK's case is not an isolated one, as can be seen from the examples in the Commission's primary submission.[21]

Her case provides another example of why it is important that this Bill not be passed.

Yours sincerely,

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[21] Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Repairing Medical Transfers) Bill 2019*, 21 August 2019, [53]-[63].