

Strategic litigation, offshore detention and the Medevac Bill

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2018 saw a flood of litigation in the Federal Court of Australia, on behalf of children and adults living in offshore detention who required urgent medical care. Starting with a single case brought by the National Justice Project (NJP) in February 2017,¹ by the end of 2018 over 50 injunctions had been filed in the Federal Court by lawyers across Australia, all founded in tort law and the Minister for Home Affairs' duty of care.²

Lawyers sought and uniformly obtained urgent interlocutory mandatory injunctions to force the Minister to bring the applicants to places where they could get the urgent medical care that they needed. This litigation has led to the evacuation of hundreds of individuals from Nauru and Papua New Guinea (PNG) to Australia over the last 12 months for their own or their family members' urgent medical treatment.³ Ultimately, this strategic approach to developing the duty of care was the foundation of the successful Kids Off Nauru campaign and historical legislative change: the Medevac Bill. This article traces the experience of two lawyers from the NJP as the crisis unfolded and reflects on its ongoing legacy.

I Legal background: onshore duty of care and Plaintiff M68/2015

The duty of care in onshore immigration detention is well established in Australian law. While the High Court has repeatedly found that indefinite immigration detention is permitted,⁴ the Commonwealth continues to be bound by its duty of care to detainees.⁵

In February 2016, however, in the case of *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, a majority of the High Court found that Nauru was detaining people offshore, not Australia.⁶ This finding raised questions as to whether Australia owed the same duty of care to those it had sent offshore. In light of this decision, a strategic approach was essential in taking the next step to ensuring accountability for offshore processing.

II Plaintiff S99/2016

This wave of tort-based litigation was based on the ground-breaking work done by the NJP in the case of *Plaintiff S99/2016 v Minister for Immigration and Border Protection* ('*Plaintiff S99/2016*').⁷ In that case, a young refugee on

Nauru (S99) had been raped while she was having what appeared to be an epileptic fit. It was not possible to diagnose the fits on Nauru, as they did not have the necessary equipment, but S99 had been suffering from them since her teenage years. As a result of that rape, she became pregnant and required a termination. Due to her complex health needs, doctors recommended that she be brought to Australia urgently to undergo the procedure.

Instead, the Minister took her to PNG. Having taken steps to facilitate the necessary medical treatment (the termination) for S99, Bromberg J found that the Minister had a duty to ensure that medical treatment was provided safely and legally. His Honour went on to find that she could not receive a safe or legal termination in PNG, where abortions remained illegal and a couple had recently been prosecuted for procuring one.⁸ He granted the requested injunction preventing the Minister from procuring the termination there. This was the first case that found a duty of care was owed to refugees or asylum seekers who had been taken to Nauru or PNG by the Australian government.

iii The first suite of 2018 cases

Because the legal strategy was novel, the NJP moved slowly to build on the precedent set in *Plaintiff S99/2016*. It commenced a number of cases, largely focusing on children suffering from severe psychiatric or other health problems. *FRX17* was the first, brought in December 2017.⁹

FRX17 was a case of a young girl, 'not yet a teenager',¹⁰ who attempted suicide on 9 December 2017 by taking an overdose of medication, and continued to experience suicidal ideation.¹¹ Eleven days later, the NJP filed in the Federal Court, seeking an interlocutory injunction which would force the Minister to provide her with urgent psychiatric care. Murphy J considered that the balance of convenience, in view of evidence showing a child of extreme suicide risk, strongly supported the granting of the injunction.¹² His Honour was not persuaded by the Minister's argument that the injunction would 'potentially impinge upon the conduct of foreign affairs', given it did not lead evidence to this end.¹³ Requests for an expedited trial were not granted,¹⁴ given the imminent suicide risk. *FRX17* was followed by *AYX18*

in March 2018,¹⁵ and then *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* ('*DJA18*') in June 2018.¹⁶

AYX18 was a 10-year-old boy at the time the application was filed. He had been separated from his father, who had been flown to Australia for medical treatment. The boy required an operation, which his mother would not consent to him undergoing in Nauru, due to the history of deaths following operations in the only hospital there. Doctors on Nauru recommended that the boy be brought to Australia for the operation.

Soon after that recommendation was rejected, the boy attempted suicide twice, by taking tablets and attempting to strangle himself with a curtain. He also had to have a knife forcibly taken from him. Perram J granted the injunction sought so the boy could get the care he so urgently needed.¹⁷

DJA18, brought by Maurice Blackburn Lawyers, was the case of a two-year-old child with suspected herpes encephalitis, 'a serious and life-threatening neurological condition'.¹⁸ Instead of following the medical recommendation that the child be flown from Nauru to Australia for treatment, the Minister chose to take her and her mother to PNG, where the Minister argued she could get adequate treatment. Her father was not permitted to travel with them, even though he was the only family member with English language skills. Instead, he was left in Nauru. Medical evidence was clear that any delay in treatment could lead to severe, life-long complications. Murphy J granted orders that required the transfer of the child, her mother and her father to Australia within 48 hours.¹⁹

iv Emerging mental health crisis

In June and July, children and adolescents on Nauru started exhibiting increasingly dangerous symptoms of mental illness. In July 2018, NJP alone filed four separate cases in the Federal Court seeking urgent medical care for severely ill children and teenagers. Two additional applications were made by other firms that month. A crisis was quickly unfolding.

We have no insight into why the cases escalated so rapidly. The judgments and research, however, give some indication.

In *BAF18 as litigation representative for BAG18 v Minister for Home Affairs*,²⁰ brought

by Russell Kennedy, Bromberg J found that the very environment on Nauru stifled children's development, as children are not 'able to undertake the anticipated tasks of adolescence associated with preparing for independence and adulthood', thereby stifling the applicant's development, despite him being 'identified as bright'.²¹ Further, he found that 'the applicant's continued residence on Nauru is a causative and contributing factor in his mental illness and substantial risk of self-harm'.²²

Médecins Sans Frontières ('MSF') provided independent mental health treatment on Nauru between November 2017 and October 2018. Its report — titled 'Indefinite Despair'²³ — details some key factors in the decline in mental health MSF doctors witnessed while they were on Nauru: the long and indefinite nature of the detention;²⁴ widespread experiences of violence and/or harassment in Nauru (including sexual violence), often exacerbating feelings of helplessness and historical trauma;²⁵ rejection letters for resettlement in the USA started being received in May;²⁶ and the tragic death of a well-respected young man in June 2018.²⁷

Resignation Syndrome (also known as Pervasive Refusal Syndrome or Traumatic Refusal Syndrome) started emerging at about this time, the condition underlying two of the four cases NJP filed in July 2018.²⁸ This Syndrome, previously only seen in foreign countries, saw children stop eating, drinking, talking and getting out of bed. As the Syndrome progresses, sufferers experience wasting and give up on showering and toileting themselves. All of these symptoms were seen in children on Nauru. It can quickly become life-threatening or cause permanent disability.²⁹

In *DWE18*, an adolescent was diagnosed with Resignation Syndrome.³⁰ Her food and fluid intake was so low she required hospitalisation for rehydration in Nauru.³¹ Expert medical evidence indicated that she needed urgent inpatient treatment for Major Depressive Disorder and Resignation Syndrome, and was at risk of developing kidney failure, permanent cardiac and/or neurological damage if she did not receive treatment.³² Nauru Hospital did not have the necessary facilities, such as EEG or child and adolescent psychiatric experts and facilities, to monitor and treat her.³³ Robertson J made orders that the girl be transferred to Australia for treatment.³⁴

Around this time, children and teenagers started attempting suicide and self-harm at alarming rates. Children started dousing themselves in petrol and trying to set themselves alight.³⁵ Others took whatever pills they could find, or cut themselves repeatedly.³⁶ Psychosis started to emerge in children and teenagers.³⁷ There were no facilities on Nauru that could manage these conditions, yet the Minister continued to resist transfers.³⁸ It appeared to be only a matter of time before this crisis level of mental illness in children would be lethal.

NJP quickly developed effective ways to work with people offshore and close relationships within the sector. Suddenly lawyers' phones were full of photos of critically ill and injured children and their medical records, sent to us by their parents as evidence, gathered to prove that our clients needed urgent care. The Asylum Seeker Resource Centre triaged the cases and helped NJP gather evidence. The Human Rights Law Centre came on board to help train other lawyers in how to run these cases.

The situation continued to deteriorate. Five cases were filed in August when there were still over 100 children on Nauru.³⁹ Nine were filed in September,⁴⁰ then 17 in October.⁴¹ The strategy was working.

The court cases were just the tip of the iceberg: for every case filed, the NJP acted for triple that number to secure urgent medical transfer (although in many of these cases, we were only days, hours and sometimes minutes away from filing). All of these people, or a member of their family, had been at imminent risk of permanent harm or death if they did not get the treatment the doctors said they urgently needed. Many were hospitalised for weeks or months when they finally arrived in Australia.

At the same time that these injunctions were being fought and won, the sector was looking for a better way. The cases were attracting significant media attention, the Australian Medical Association and doctors were raising their voices and it was becoming clear that the Minister's resistance was not sustainable. The 'Kids Off Nauru' campaign gathered momentum under the leadership of the Asylum Seeker Resource Centre, Refugee Council of Australia and World Vision Australia. The final children left Nauru in February this year.⁴²



Medical area treatment at the detention centre on Manus Island. Manus Island, 21 March 2014 (Eoin Blackwell/AAP Image)

As the pressure built to take action, independent Dr Kerry Phelps was elected to Parliament. The fallout from the change in leadership also saw Julia Banks leave the Liberal Party to sit as an independent. Suddenly the Government was in minority and there was a critical mass of support for legislation that would streamline the medical transfer process.

The Kids Off Nauru campaign and the Medevac Bill negotiation saw doctors, lawyers, caseworkers and others in the sector collaborating in previously unseen ways. While the lawyers continued to fight the Minister in court, doctors and other organisations worked with MPs and the media to explain the nature of the health crisis, the urgency of the situation and to correct circulating misinformation. The Medevac Bill was passed into law in February 2019, against the wishes of the Government of the day.⁴³

This legislation brings access to essential medical care into a medical, rather than legal, framework. Under the amendment, if two treating doctors believe that the applicant should be transferred from an offshore processing country to Australia for medical or psychiatric assessment or treatment, the Minister must facilitate transfer except in specific circumstances.⁴⁴ The Minister can only refuse transfer if he believes that transfer is not necessary,⁴⁵ the individual could be prejudicial to security under the *Australian Secret Intelligence Organisation Act 1979* (Cth) ('ASIO Act'),⁴⁶ or the Minister knows that the person has a substantial criminal record as defined in the Act.⁴⁷ If the Minister rejects the application for the former reason, the application is assessed by an independent panel of doctors.⁴⁸ If the panel recommends a transfer, the Minister can refuse it if they believe that transfer could be prejudicial to security under the *ASIO Act*.⁴⁹

References

1 *AKM17 v Minister for Immigration and Border Protection* (filed 1 February 2017) FCA NSD124/2017. This case was discontinued. The first judgment for one of these matters can be found in *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1 ('FRX17').

2 See, eg, *AYX18 v Minister for Home Affairs* [2018] FCA 283

('AYX18'); *DCQ18 v Minister for Home Affairs* [2018] FCA 918; *DRB18 v Minister for Home Affairs* [2018] FCA 1163.

3 The NJP alone was responsible for approximately 150 transfers from Nauru and Papua New Guinea to Australia. We ran approximately a quarter of the cases filed.

4 See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992)

Within days of the Medevac Bill passing both Houses of Parliament, the Nauruan Government introduced regulations banning telemedicine.⁵⁰ This had the effect of making the Medevac process more difficult to use in Nauru; meaning that it is generally only possible for doctors to review medical records to prepare their reports, rather than interview patients via telephone or video conference. The issue was considered by the Court recently, in the case of *CCA19 v Secretary, Department of Home Affairs*,⁵¹ with the Secretary arguing that only assessments by telephone or video conference would be adequate to meet the requirements of the amended Act.⁵² Bromberg J disagreed, finding that a review on the papers was sufficient.⁵³

The health crisis continues. Despite all of the evidence of its need and the massive waste of resources forced by the Minister's intransigence prior to its passage,⁵⁴ the Minister continues to promise to repeal the Medevac Bill.⁵⁵ At the time of writing, the Minister had presented a Bill for this purpose to Parliament.⁵⁶ This would reintroduce politics into life-or-death decisions currently being made by doctors under Medevac. Regardless of the fate of this Bill, however, there is now an army of lawyers around Australia with the expertise to challenge the Minister when he withholds life-saving care. The Minister's intransigence has trained us all well. ☹️

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176 CLR 1, 27–8 (Brennan, Deane and Dawson JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 [31] (McHugh J).

5 See, eg, *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* (2004) 207 ALR 83; *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217; *SBEG v Secretary,*

- Department of Immigration and Citizenship [No. 2] (2012) 292 ALR 29.
- 6 (2016) 257 CLR 42, 67 (French CJ, Kiefel and Nettle JJ).
- 7 (2016) 243 FCR 17 ('*Plaintiff S99/2016*').
- 8 Ibid [287], [290]-[294].
- 9 *FRX17* (n 1).
- 10 Ibid 2 [2] (Murphy J).
- 11 Ibid 3 [4] (Murphy J).
- 12 Ibid 23 [70] (Murphy J).
- 13 Ibid 23-4 [73] (Murphy J).
- 14 Ibid 24 [74] (Murphy J).
- 15 *AYX18* (n 2).
- 16 [2018] FCA 1050 ('*DJA18*').
- 17 *AYX18* (n 2) [30] (Perram J).
- 18 *DJA18* (n 16) 6 [1] (Murphy J).
- 19 Ibid 10 [18], 21 [66] (Murphy J).
- 20 (2018) 162 ALD 115.
- 21 Ibid 122 [34] (Bromberg J).
- 22 Ibid 127 [51] (Bromberg J).
- 23 Médecins Sans Frontières, *Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru* (Report, December 2018) ('*Indefinite Despair*').
- 24 Ibid 5.
- 25 Ibid 21.
- 26 Ibid 10, 34.
- 27 Ibid 10.
- 28 *DWE18* as litigation representative for *DWD18* v *Minister for Home Affairs* [2018] FCA 1121 ('*DWE18*'); *DLZ18* by her litigation representative *DMA18* v *Minister for Home Affairs* (filed 4 July 2018) FCA NSD1183/2018, cited in *FRM17* v *Minister for Home Affairs* [2019] FCAFC 148.
- 29 Karl Sallin et al, 'Resignation Syndrome: Catatonia? Culture-Bound?' (2016) 10 *Frontiers in Behavioural Neuroscience*. See also extracts from medical assessments describing symptoms and risks in *DWE18*.
- 30 *DWE18* (n 28) 4, 6.
- 31 Ibid 5.
- 32 Ibid 8.
- 33 Ibid 6.
- 34 Ibid 10.
- 35 See, Ben Doherty, 'Refugee Girl at Risk of Suicide to be Moved from Nauru to Australia after Court Action', *The Guardian* (online, 7 July 2018) <<https://www.theguardian.com/world/2018/jul/07/refugee-girl-at-risk-of-suicide-to-be-moved-from-nauru-to-australia-after-court-action>>; Ben Doherty, 'Nauru Self-Harm 'Contagion' as a 12-Year-Old Refugee Tries to Set Herself Alight', *The Guardian* (online, 23 August 2018) <<https://www.theguardian.com/australia-news/2018/aug/23/nauru-self-harm-contagion-as-12-year-old-refugee-tries-to-set-herself-alight>>; Siobhán O'Grady, 'Children in Australia's Offshore Migrant Center are so Distraught, Some Have Attempted Suicide', *The Washington Post* (online, 20 September 2018) <<https://www.washingtonpost.com/world/2018/09/20/children-australias-off-shore-migrant-center-are-so-distraught-some-have-attempted-suicide/>>.
- 36 *Indefinite Despair* (n 23) 27.
- 37 Kate Aubusson, 'Terrifying' Symptoms: Nauru Medical Records Expose Delays in Transfers for Treatment', *The Sydney Morning Herald* (online, 20 October 2018) <<https://www.smh.com.au/national/terrifying-nauru-medical-records-delays-transfers-20181019-p50asg.html>>.
- 38 Each case that the NJP brought to court followed weeks or months of engaging with the Department of Home Affairs to request transfers for our clients.
- 39 See, eg, *EHW18* v *Minister for Home Affairs* (filed 30 August 2018) FCA VID1070/2018; *EFL18* by her litigation guardian *EFN18* v *Minister for Home Affairs* (filed 17 August 2018) FCA VID1007/2018.
- 40 See, eg, *EQQ18* v *Minister for Immigration, Citizenship and Multicultural Affairs* (filed 10 September 2018) FCA VID1115/2018; *ETH18* by her litigation representative *ETI18* v *Minister for Home Affairs* (filed 13 September 2018) FCA NSD1695/2018; *EWK18* v *Minister for Home Affairs* (filed 21 September 2018) FCA VID1212/2018.
- 41 *FCC18* v *Minister for Immigration Citizenship and Multicultural Affairs* (filed 3 October 2018) FCA VID1263/2018; *FDI18* v *Minister for Home Affairs* (filed 4 October 2018) FCA VID1274/2018; *FBO18* as litigation representative for *FBN18* v *Minister for Home Affairs* (7 October 2018) FCA VID 1284/2018.
- 42 Helen Davidson, 'Last Four Refugee Children Leave Nauru for Resettlement in US' *The Guardian* (online, 28 February 2019) <<https://www.theguardian.com/world/2019/feb/28/last-four-refugee-children-leave-nauru-for-resettlement-in-us>>.
- 43 Brett Worthington, 'Senate Passes Controversial Refugee Evacuation Bill, Scott Morrison Says New Laws 'Weaken Our Borders'' *ABC News* (online, 13 February 2019) <<https://www.abc.net.au/news/2019-02-13/senate-passes-controversial-refugee-evacuation-bill/10806196>>.
- 44 *Migration Act 1958* (Cth) s 198E.
- 45 Ibid sub-s (4)(a).
- 46 Ibid sub-s (b).
- 47 Ibid sub-s (c).
- 48 Ibid s 198F.
- 49 Ibid sub-s (5).
- 50 *Health Practitioners (Telemedicine Prohibition) Regulations 2019* (Republic of Nauru) 22 February, 2019, SL No 6 of 2019.
- 51 [2019] FCA 946.
- 52 Ibid 7 [16].
- 53 Ibid 15-16 [45] (Bromberg J).
- 54 Each injunction matter required the use of valuable court time, plus two legal teams, often involving senior counsel. In the 2017-18 financial year, the Commonwealth had spent \$275,000 fighting requests for transfer. It is estimated that costs in the 2018-19 financial year will be significantly higher: Helen Davidson, 'Australia Spent \$275,000 Fighting Requests for Urgent Medical Transfers of Asylum Seekers', *The Guardian* (online, 29 September 2018) <<https://www.theguardian.com/australia-news/2018/sep/29/australia-spent-320000-fighting-requests-for-urgent-medical-transfers-of-asylum-seekers>>. Given the practice of the Minister of often consenting to transfers immediately prior to the court hearing, or consenting to or not opposing the Federal Court's orders, this expenditure appears wasteful. See *EWV18* v *Minister for Home Affairs* [2018] FCA 1460, [58] (Thawley J) on this point.
- 55 Helen Davidson, 'Medevac Law Repeal a Priority, Coalition Says, as Self-Harm Rises Among Refugees', *The Guardian* (online, 22 May 2019) <<https://www.theguardian.com/australia-news/2019/may/22/medevac-law-repeal-a-priority-coalition-says-as-self-harm-rises-among-refugees>>.
- 56 Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth).