



National Justice Project

Using Tort Law to Effect Change in Immigration
Detention

WARNINGS

WARNING

Some of the images contained in this presentation may cause distress

WARNING

This presentation includes the images of Aboriginal and Torres Strait Islanders who are now deceased

Our Mission

- ▶ We use the law to fight institutional discrimination
- ▶ We empower vulnerable communities through legal rights education

to create a fairer society



NJP ENDS DISCRIMINATION IN:



**HEALTHCARE
FOR ABORIGINAL
PEOPLE**



**POLICE, PRISON &
YOUTH SERVICES
FOR ABORIGINAL
PEOPLE**



**DETENTION
OF ASYLUM
SEEKERS AND
REFUGEES**

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Why Use Tort Law
▶ to effect change?

THE DREAM



HUMAN RIGHTS:
CAREER GOALS



THE REALITY





WHY ARE WE DISCUSSING TORT LAW IN THE CONTEXT OF HUMAN RIGHTS



THIS IS WHY WE HAVE SO FEW HUMAN RIGHTS

Race Power -Section 51(xxvi) of the Australian Constitution,^[1] grants the Australian Commonwealth, the power to make special laws for people of any race.

- ▶ As initially drafted, s 51(xxvi) empowered the [Parliament](#) to make laws with respect to: "*The people of any race, other than the [aboriginal race in any State, for whom it is deemed necessary to make special laws](#)*". The Australian people voting at the [1967 referendum](#) deleted the words in italics.
- ▶ [Edmund Barton](#) had argued in 1898 that s 51(xxvi) was necessary to enable the Commonwealth to "*regulate the affairs of the people of coloured or inferior races who are in the Commonwealth*".^{[2][3]} The section was intended to enable the Commonwealth to pass laws restricting such migrant labourers such as the Chinese and [Kanakas](#). Quick and Garran observed in 1901 that "*It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.*"^[4]
- ▶ There were delegates, however, at the 1898 Convention who argued against the use of legislative power to deal specifically with alien races, accepting that people might be excluded from Australia based on race, but arguing that once people were admitted to the country they should be treated in the same way as other citizens.^[5]



▶ Immigration Cases

The Treatment of Asylum Seekers Onshore

Since 2000 there have been a large numbers of cases involving refugees. These cases can be grouped into the following broad categories:

1. Challenges to **adverse findings** regarding refugee status
2. **Administrative law challenges** including to statutory limits on rights to appeal - privative clauses challenges.
3. **Challenges to the conditions in detention** e.g. the keeping of children in detention in circumstances that is not in their best interest; causing harm or failing to deliver mental health services in breach of a duty of care; or cases claiming that conditions of detention are unlawful (therefore an escapee might have a defence to a criminal charge).
4. **Constitutional challenges** and challenges to the **interpretation of the legislation** e.g. indefinite detention of persons not refugees and non-refoulement cases.

<https://www.safecom.org.au/claire-o-connor.htm>

Legal Principles Applicable to the Treatment of Detainees Onshore

HARSH CONDITIONS: Conditions of detention, even if amounting to torturous conditions, do not of themselves render the detention unlawful. [1]

CHILDREN: can be confined in detention conditions until they are removed or given a visa - even if those conditions are causing harm to the child. [2]

INDEFINITE DETENTION: The Minister and his or her officers are permitted to detain a person without a visa for as long as necessary to remove them, even if removal is impossible because the person is stateless. [3]

BREACHES OF INTERNATIONAL TREATIES AND PROTOCOLS: have little or no relevance to refugees or persons detained in immigration detention who are stateless, even if Australia is a signatory to those treaties and protocols because of the expansive interpretation of the Alien's power in the Constitution. [4]

DUTY OF CARE: The Minister for immigration owes a duty of care to non-citizens in immigration detention. [5] The duty of care extends to ensuring the mental wellness of a detainee. [7] If a duty of care is breached and harm results then an action in tort may lie. [8]

LAWFUL DETENTION: It is the Minister's duty to determine if someone is an unlawful non-citizen before detaining them in immigration detention. [6]

PROHIBITION AGAINST REMOVAL OF NON CITIZEN FROM AUSTRALIA

(a) may lie where the act of removal would cause harm to a detainee. [9] but

(b) does not exist where the country being returned to might cause the death or serious harm to the person removed or where the individual's mental health may be compromised. [10]



Foundations of the

- ▶ Offshore Strategy

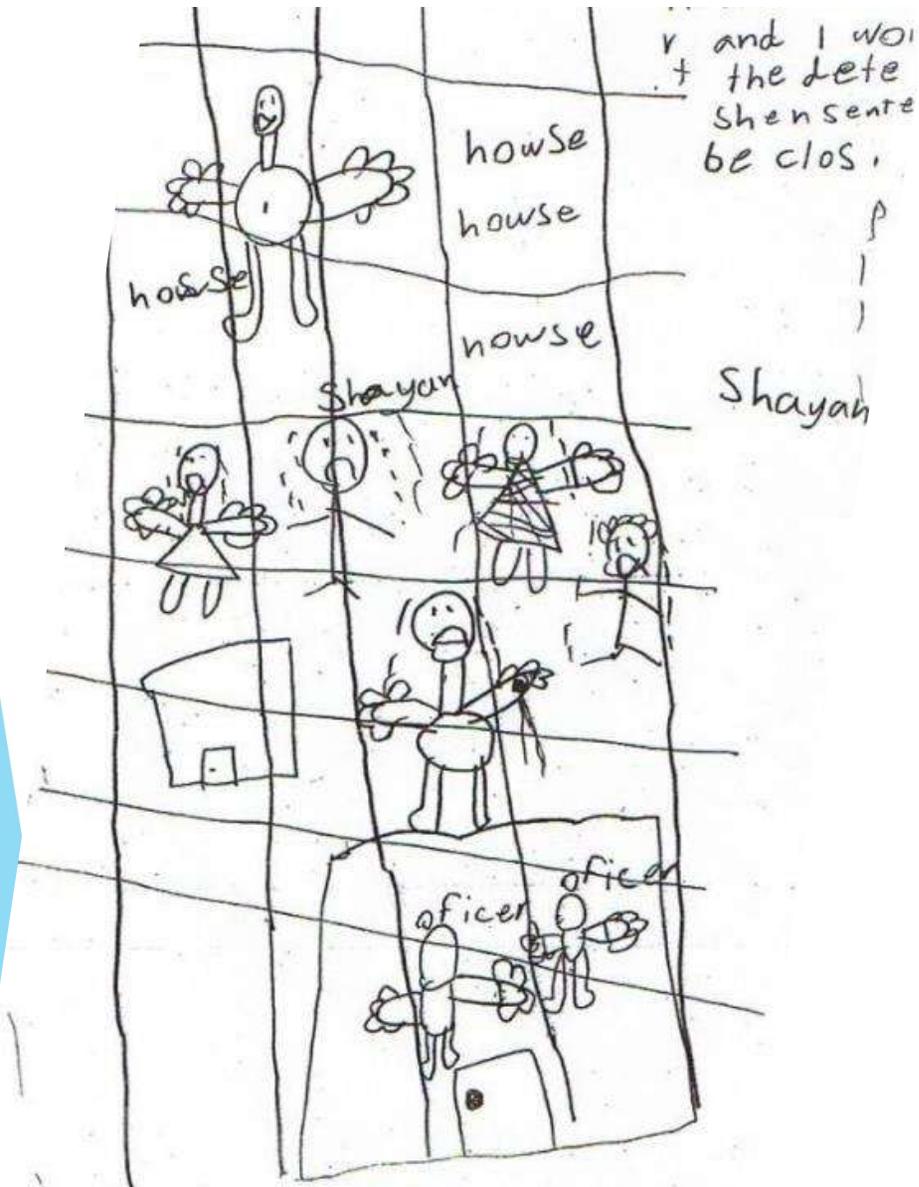
Shayan Badraie

In 2001 Shayan was a 6 year old boy who lay limp in his parents hands inside Immigration Detention Centre in Villawood. His is the first case of what we now know as “resignation syndrome” which gripped kids on Nauru in 2018

2001



Stills from a *Four Corners* program on the Villawood Detention



Shayan Badraie

Artwork Reads:

I hate the
detention centre
and I want the
detention centre
to be closed

Vivian Solon is deported to Manila



Cornelia Rau is detained for 10 months

2004 - 2005

MISSING PERSON

NOT APPROVED FOR PUBLIC DISPLAY



Name:	Cornelia Rau
Age:	36
Age when reported missing:	36
Height:	165 cm
Build:	Thin
Hair Colour:	Brown
Eye Colour:	Brown
Reported at:	Melb
Reference No.:	E 1111111

Circumstances:
Cornelia Rau was reported missing to police on the 17th August 2004. She was last sighted at Melb Hospital on the 17th March 2004. Cornelia usually kept in contact with family and friends. However, she has not made contact since she was reported missing. Extensive inquiries by police have failed to locate Cornelia. Her family have grave concerns for her welfare and safety.

If you are able to offer any information concerning the whereabouts of the above missing person, please contact the Missing Persons Unit on 1300 363 800. Your help is most appreciated.

Missing Persons Unit (1300 363 800) or Expatriate Unit



National Library of Australia nla.pic-an24382



Post 2001 -
▶ Offshore Processing

Offshore Processing Went From Tough under Howard in 2001 to Cruel under Abbott: Australian Government's Campaign to Deter Asylum Seekers



Image From The Australian Government's Customs February 2014 Campaign to Deter Asylum Seekers





Health Crisis Offshore

- ▶ Demands a Response

The Legal Problem

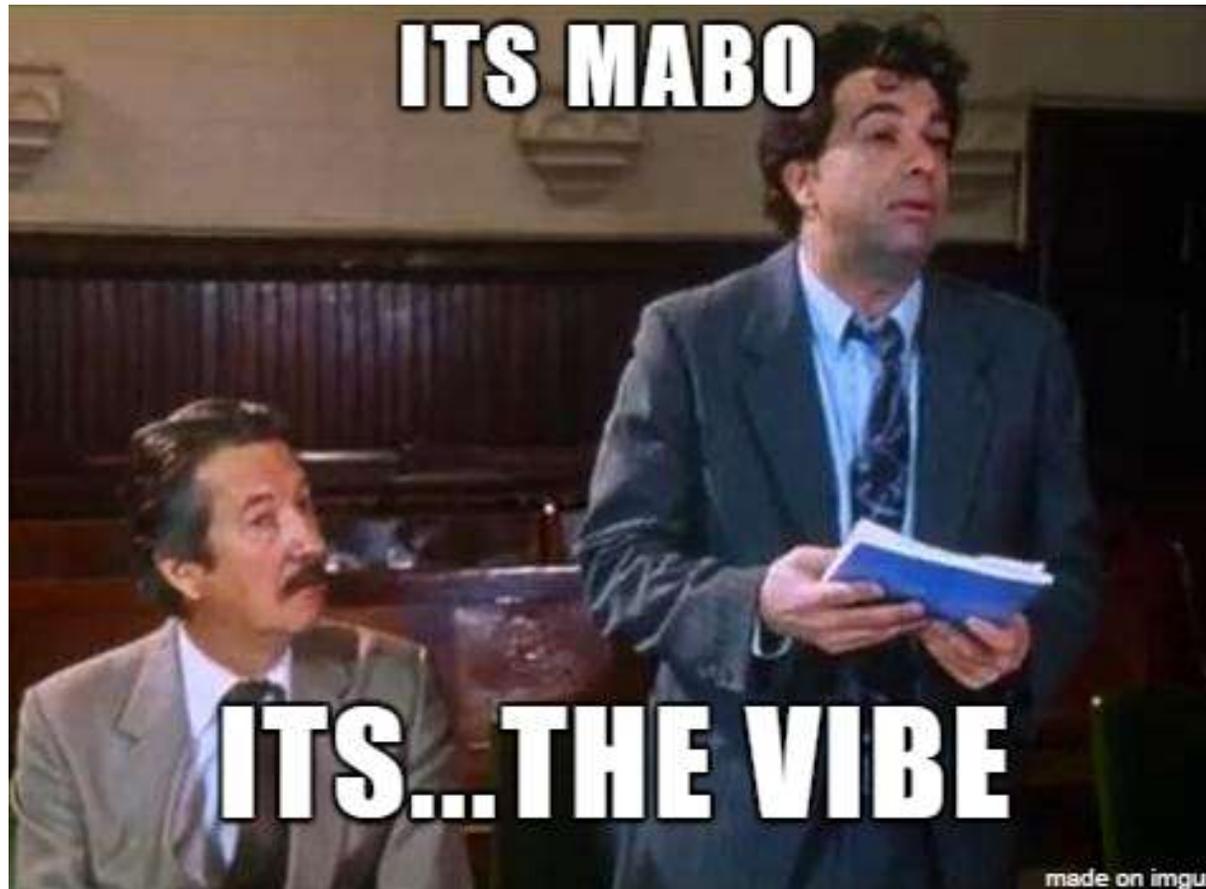
Why wouldn't the well established duties and principles which are applicable onshore, also apply to transferees?

The issue was that offshore processing wasn't a simple case of Gaoler/Prisoner as in the Australian domestic context.

The M68 Case presented lawyers with a legal conundrum as the HC found that the arrangement for offshore detention on Manus and Nauru was valid and they found that the detainees were, prima facie, being detained by PNG and Nauru and not Australia.

It required us to develop a novel duty of care.

We Needed the court to recognize a Novel Tort Duty of Care



Plaintiff M68/2015 v MIPB

The M68 case caused concern but the HC left open the issue of Australian involvement/participation in the offshore detention of asylum seekers. The Memorandum of Understanding dated 3 August 2013 requires the Commonwealth to secure, fund and participate in the the detention of asylum seekers on Nauru and a separate MOU creates a similar obligation for the detention of AS in PNG.

The joint judges (French CJ, Kiefel and Nettle JJ) held that the Commonwealth only participated in the M68's detention, rather than detaining her directly: because the detention was effected by the Government of Nauru, and because the Commonwealth could not compel or authorise Nauru to make or enforce the laws necessary for that detention, the plaintiff was not detained by the Commonwealth itself ([29]-[37]).

We argued that the duty of care extends offshore as the Commonwealth had transferred the individuals & families there, was participating in their 'detention' and care and was sustaining them.

Plaintiff M68/2015 v MIPB (Cont)

- ▶ Keane J also said that the Commonwealth’s arrangements “procured or funded or caused restraints over [M68]’s liberty”.
- ▶ Bell J held that the Commonwealth “exercised effective control” over the detention of transferees, and that the plaintiff’s detention was, “as a matter of substance, caused and effectively controlled by the Commonwealth parties” (at [93]).
- ▶ Gageler J held that the Commonwealth had procured [M68]’s detention (see [173]-[175]).
- ▶ Gordon J went further and held that the Commonwealth “detained the Plaintiff” (at [353]).

Basic Legal (Tort) Principles

- ▶ Is there a duty of care
- ▶ Has there been a breach of the duty
- ▶ Did the breach cause the damage
- ▶ Damage
- ▶ Statutory and other Limits

#Kids off Nauru Chronology

2005
Shayan
Badraie's
family
commences
court
proceedings

2007
Cornelia
Rau
settlement

2017
FRX 17
(FRA17)

2018
Dr Kerryn
Phelps
elected and
promulgates
Medevac
Legislation

2006
Vivian Solon
Mediation &
Negotiations
commence

2016
Abyan & s.99

2018
NJP run 14 cases
for kids. The
AMA, Dr Sara
Townend & World
Vision get
behind #Kids off
Nauru

2019
Medevac
Bill
Passed &
All kids
off
Nauru

Strategic Litigation to Establish the Duty

The National Justice Project slowly built a body of law to extend the Commonwealth Government's duty of care to detainees in PNG and Nauru. You can see the progress of our strategy in the following cases.

- ▶ **S99 v MIPB:** an African woman pregnant after being raped on Nauru who needed a termination [http://classic.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCA/2016/483.html?stem=0&synonyms=0&query=title\(Plaintiff%20s99%20\)](http://classic.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCA/2016/483.html?stem=0&synonyms=0&query=title(Plaintiff%20s99%20))
- ▶ **D7 v MIBP:** an Iranian woman who needed to remain in Port Moresby for care [http://classic.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCA/2016/1331.html?stem=0&synonyms=0&query=title\(D7%20\)](http://classic.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCA/2016/1331.html?stem=0&synonyms=0&query=title(D7%20))

Two suicidal children

- ▶ **FRX17 v MIBP:** [http://classic.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCA/2018/63.html?stem=0&synonyms=0&query=title\(FRX17%20\)](http://classic.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCA/2018/63.html?stem=0&synonyms=0&query=title(FRX17%20))
- ▶ **AYX18 v MIBP:** [http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2018/283.html?stem=0&synonyms=0&query=title\(AYX18%20\)](http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2018/283.html?stem=0&synonyms=0&query=title(AYX18%20))

A pregnant woman with FGM who required a termination

- ▶ **DCQ18 v MIBP:** [http://classic.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCA/2018/918.html?stem=0&synonyms=0&query=title\(DCQ18%20\)](http://classic.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCA/2018/918.html?stem=0&synonyms=0&query=title(DCQ18%20))
- ▶ Also AWP17 v MIBP and others Unreported



▶ Offshore Cases

Abyan

- ▶ Abyan was raped & she became pregnant
- ▶ She required a termination which was not available on Nauru
- ▶ She was taken to Australia for the termination after representations
- ▶ She asked for psychological support
- ▶ She was sent back to Nauru
- ▶ After an outcry she was returned to Australia where she remains today
- ▶ We rushed to court but resolved the case without proceedings.





S99/2016

- ▶ S99 was raped when she was unconscious & she became pregnant
- ▶ She required a termination which was not available on Nauru
- ▶ She was taken to PNG for the termination
- ▶ The NJP acted for S99. We stopped the procedure in PNG & took action to bring her here for care
- ▶ The case was the first to find that the Australian Government had a duty of care to refugees offshore.

Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483

We had been waiting for the right case & S99 was the perfect storm

- ▶ S.99 Case turned on establishing a novel duty of care [201]
- ▶ For policy reasons statutory authorities have the benefit of a higher threshold for the imposition of a duty of care.[190]
- ▶ The duty of care “turns most critically on two factors: the existence and nature of **the statutory power exercised** by the Respondents in respect of the applicant, and the facts relevant to the ‘**salient factors**’ that are critical to ascertaining the existence and scope of any duty in the exercise of those powers (Stavar) [202]

Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483

- ▶ Despite the nomenclature used by the Act to describe her, s99 remains entitled to the protection of Australian law. Principally, that is because the Minister is bound by the law and, as my reasons explain, the Minister and the applicant are parties to a relationship recognised and enforced by the law out of which legal rights and obligations flow.
- ▶ The applicant claims that by reason of a legal relationship recognised by the common law, the Minister must take reasonable care of her.

Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483 Follows Stavar for Novel Torts

If the circumstances fall within an accepted category of duty, little or no difficulty arises. *If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the “salient features” or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.* [202] At [103] his Honour set out a list of seventeen such “salient features” in *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258. They are these:

- (a) the **foreseeability** of harm;
- (b) **the nature of the harm** alleged;
- (c) the **degree and nature of control** able to be exercised by the defendant to avoid harm;
- (d) the **degree of vulnerability** of the plaintiff to harm from the defendant’s conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- (e) the **degree of reliance** by the plaintiff upon the defendant;

Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483 Follows Stavar for Novel Torts

- f) any **assumption of responsibility** by the defendant;
- (g) the **proximity** or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
- (h) the existence or otherwise of a **category of relationship** between the defendant and the plaintiff or a person closely connected with the plaintiff;
- (i) the **nature of the activity** undertaken by the defendant;
- (j) the nature or the **degree of the hazard or danger** liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
- (k) **knowledge** (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
- (l) any potential **indeterminacy** of liability;
- (m) the **nature and consequences** of any action that can be taken to avoid the harm to the plaintiff;
- (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
- (o) the existence of **conflicting duties** arising from other principles of law or statute;
- (p) **consistency** with the terms, scope and purpose of any statute relevant to the existence of a duty; and
- (q) the desirability of, and in some circumstances, need for **conformance and coherence in the structure and fabric of the common law**.

This approach is multi factorial and requires not only the power and an assessment of foreseeability, but also attention to such considerations as control, vulnerability, assumption of responsibility and nearness or proximity



FRX 17

- ▶ FRX's daughter, FRM, is a young pre-teen girl who had attempted suicide by overdose of pills. She was taken to Nauru hospital (*see photos*) but discharged without any psychological care.
- ▶ She continued to express suicidal ideas and a wish to die. She wanted to jump off a cliff and run in front of traffic in the days after the first attempt.
- ▶ She was then admitted to the RAA, in the RPC (*see photos*) which has accommodation supported by IHMS medical staff and security watch.
- ▶ NJP acted urgently to start court proceedings for her and argued that the Government owed her a duty of care and needed to provide her treatment in a specialist child mental health facility.
- ▶ The Court ordered the Government to provide this.
- ▶ She was the first child in Nauru who had a matter taken to Court and set the precedent for other cases to go to Court as well.

DCQ18

- ▶ A Somali woman with type III FGM required a termination
- ▶ Govt argued could be handled in Taiwan we successfully argued against that.



NJP Strategic Casework Achievements/ Statistics

- In 2018 we had 68 Refugee/asylum seeker related active cases (57 opened that year alone)
- We currently have 74 active Refugee/asylum seeker related cases
- We have 63 Offshore cases where the clients have been brought to Australia
- We ran 14 Offshore Court cases in court - every one successful
- We brought a total of 159 people including 48 children to Australia through our actions and more under Medevac Laws



Our Collaborations

#KIDSOFFNAURU

- After FRX17 and AYG18 we were swamped with enquiries
- NJP and ASRC worked on a large number of cases during the first half of 2018, to continue to create precedent.
- In July through August; with US rejections, the suicide of a young man, and some kids leaving, more and more kids became unwell - we saw more suicide attempts and the emergence of resignation syndrome



The team at the first case of FRX17 in Melbourne

Collaborations with caseworkers, doctors, barristers, lawyers and the sector

- ▶ Due to the increase in cases, at the end of August-beginning of September we partnered with the HRLC to provide guidance, templates and assistance in them engaging more lawyers and law firms to take on the offshore matters
- ▶ We created a clearing house of records of court cases; orders and judgements, which was crucial information used in political campaigning, particularly as #kidsoffnauru took off and the Medevac Bill in October 2018
- ▶ The Collaboration between lawyers, caseworkers and doctors across the sector was innovative and unprecedented and led to a large number of people receiving the support and representation they needed from all three groups
- ▶ This work led to over 50 court cases for medical cases offshore being filed by lawyers in the sector. NJP's current total has reached over 74 offshore cases
- ▶ Legal intervention in 2018 ensured that 96 children were transferred (48 by NJP) and a total of 343 PEOPLE in that year alone.

MEDEVAC LAW

- ▶ NJP's work with our sector partners and Dr Kerry Phelp (the independent member for Wentworth) led to the parliament passing the [Home Affairs Legislation Amendment \(Miscellaneous Measures\) Bill 2019](#) allows refugees on Manus Island and Nauru to be brought to Australia temporarily for medical treatment, subject to approval.
- ▶ The bill is now in operation and has been critical to securing the evacuation of about 40 people from Nauru and Manus as at the date that this slide was written.
- ▶ The Medevac law requires two doctors, who must have assessed the person, to recommend their transfer for further assessment or treatment. The individual must require a medical transfer for medical or psychiatric assessment or treatment which is not available offshore;
- ▶ These doctors - usually with the assistance of lawyers - then notify the Secretary of the Department of Home Affairs of their recommendation, who must then inform the Minister for Immigration who has 72 hours to approve.
- ▶ If the Minister refuses to act then the case can be referred to a panel of 9 doctors who review it again. The Minister must accept that decision unless security issues apply.



▶ THANK YOU!!