The Commonwealth’s duty to provide adequate medical care to asylum seekers in PNG and Nauru
Our Work

We use the law to eradicate institutional racism and we empower vulnerable communities to create a fairer society.
Where Can You Follow Us?

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Also see our new clearing house at www.d4j.com.au
Warning

This presentation includes the images of Aboriginal and Torres Strait Islanders who are now deceased
WHO WOULD HAVE THOUGHT

LIONEL HUTZ, ATTORNEY-AT-LAW.

YOU'LL BE GETTING MORE THAN JUST A LAWYER, MR. SIMPSON.
Why are we discussing tort law at a human rights conference
We use tort law because we have very few human rights in our constitution –

We have:
• the right to vote (Section 41),
• protection against acquisition of property on unjust terms (Section 51 (xxxi)),
• the right to a trial by jury (Section 80),
• freedom of religion (Section 116)
• a prohibition of discrimination on the basis of State of residency (Section 117); and
• an implied right to political free speech (Lange Case)

but we have no Bill of Rights to protect the vulnerable and none of the above rights would assist an asylum seeker on Nauru.
This is why we have so few human rights
There is a reason why there are no human rights in our constitution. Our constitution was drafted at a series of Constitutional Conventions in the 1890’s. Our lawmakers considered our rights in the light of the following historical events:

1. The bloody US Civil War which ended in 1865, after which the slaves were emancipated
2. The Gold rush in Victoria occurred at the same time as the US Civil war 1851 – late 1860’s
3. The US, Canada and Australia were all struggling to exclude Chinese Immigration: see the Chinese Exclusion Act in the USA in 1882 and similar Australian State laws

Smack bang in the middle of our constitutional conventions we had:
   a. The Geary Act in the US 1892 that made Chinese Register to prove they were legally permitted to stay in the USA
   b. A Gold Rush in Kalgoorlie in 1893

I could argue that it was the gold rush that sank human rights in Australia as the goldrush states required the right to discriminate against Chinese miners and would not tolerate a bill of rights.
After the Tampa, Australian Immigration Policy moved from benign under Malcolm Fraser to a Pacific Solution under Howard.
And it went From tough under Howard and Rudd 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
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CONTEXT – FRX17
https://www.change.org/p/malcolm-turnbull-this-young-girl-was-raped-and-left-stranded-bring-her-to-australia-for-urgent-treatment/u/22562797
Since about 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.

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]

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

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]

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]

Offshore

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

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 – supported by the power in s198AHA of the Migration Act – and they found that the detainees were, prima facie, being detained by PNG and Nauru and not Australia
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 and to secure, fund and participate in the plaintiff's detention on Nauru and creates a similar obligation for the detention in PNG.

- The joint judges (French CJ, Kiefel and Nettle JJ) held that the Commonwealth only participated in the plaintiff’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]).

- That participation was authorised by s 198AHA because it provides the statutory framework for the exercise of the Commonwealth’s power to enter into an arrangement for regional processing.

We contend that the duty of care extends offshore as it follows the exercise of the Commonwealths power but more on this later.
Keane J also said that the Commonwealth’s arrangements “procured or funded or caused restraints over the plaintiff’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 the plaintiff’s detention (see [173]–[175]).

Gordon J went further and held that the Commonwealth “detained the Plaintiff” (at [353]).
How did we build this body of law: Courts don’t like novel torts - especially where they interfere with government policy
NOVEL TORTS – IMMIGRATION AREA IS REPLETE WITH NOVEL CASES

Vivian SOLON
Wrongful Deportation

S.99 v MIBP
Duty of Care to Transferee in PNG

DQC18 v MHA
Duty to Transferee in Nauru with FGM
Basic Principles

- Is there a duty of care
- Has there been a breach of the duty
- Did the breach cause the damage
- Damage
- Limits
Strategic Litigation to Establish Duty

The National Justice Project is slowly building 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)]

- **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)]

Two suicidal children

  A pregnant woman with FGM who required a termination


- Also AWP17 v MIBP and others Unreported - more later
Strategic Litigation Leads to Transfers

**Children** The NJP has negotiated or secured court orders to bring 10 kids across 8 families, to Australia for medical treatment. This has resulted in 24 people in total being brought to Australia. The extra numbers include the children’s families.

**Adults** The NJP has negotiated or secured court orders to bring 9 adults to Australia for medical treatment. This has resulted in an additional 10 people in total being brought to Australia. The extra one is a child that accompanied her sick mum.

NJP Actions have caused 34 individuals to be transferred to Australia from Nauru. With 28 more in the pipeline: 17 individuals/family groups on Nauru and 11 in PNG.
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 – Bromberg J
Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483

• Despite the nomenclature used by the Act to describe her, the applicant 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.
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. 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;
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.
• Suicidal young girl – her age is suppressed
• At serious risk of death or harm
• An Iranian man with a disability transferred from Xmas Is to Manus Is
• No facilities to address his disability on Nauru or in PNG
DCQ 18

• A Somali woman with type III FGM required a termination
• Govt argued that it could be handled in Taiwan - we successfully argued against that proposition.
Acknowledgements
Footnotes


[4] e.g. The Universal Declaration on Human Rights:
   Article 9: "No one shall be subjected to arbitrary arrest, detention or exile."
   - International Covenant on Civil and Political Rights:
     Article 7: "No on shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment".
     Article 23: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".
   - Convention on the Rights of the Child:
     Article 3: "the best interests of the child shall be the primary consideration .... (and state parties are) to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her..."
     - Ruddock and Vadarlis [2001] FCA 1329


[8] Behrooz v Secretary, Dept of Immigration and Multicultural Affairs and Ors (2004) 208 ALR 271


[10] WAJZ, WAKA, WAGF, WAKB, WAKE and WADX v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) [2004] FCA 1332