Walking Away from Omelas: What Price a Just Society?

Moira Rayner*

> A boundless and generous contentment, a magnanimous triumph felt not against some outer enemy but in communion with the finest and fairest in the souls of all men everywhere and the splendour of the world's summer ...[1]

I The Rights Stuff

'Human rights' have been largely crushed since September 11th. During the Cold War human rights were the creed of dissidents in Beijing and activists against tyrannical regimes everywhere. They underpinned a Western, democratic ideology, even if honoured in the breach rather than the observance. But since September 11 this has been ditched. The imperatives of war and 'national security' supposedly trump those of 'human rights', such as freedom from arbitrary arrest and indefinite detention, due process, and a fair trial.

The greatest overt threats to human rights come not from evil empires but collapsing rogue regimes. But even in Western democracies human rights are under attack: 'It's not just that it's difficult for human rights to get a hearing. It's difficult to frame an argument for their being a central issue', Harvard Professor Michael Ignatieff notes.[2] This profound unpopularity has even infected what was once an 'anti-authoritarian'

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1 Ursula LeGuin, "The Culture of a Utopian City", in Ursula LeGuinn, *The Ones Who Walk Away From Omelas* (1974).

2 Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (2004).

Australia. A nasty consensus has developed. Human rights advocates are illiberally dismissed as 'radicals' or absurd idealists and pressured to be silent – not to be taken seriously or heard at all. That is why we accepted lies about 'children overboard', the suffering of women and children and old people in indefinite 'immigration' detention, the denial of responsibility for stolen generations, the lamentable and repeated proof that children in institutional care get hurt, and that civil liberties such as the right to a fair trial and the presumption of innocence should be sacrificed to national security and good relationships with powerful friends.

The fragility of human rights is one of the themes of this paper. A second is the small matter of trust. I'm sensitive that this has become the 'theme' of the federal election campaign, but I got to it first. Trust that we will be treated fairly and cared for when we are needy or in trouble is what holds a community together and makes people want to obey the rules about behaving in a civilised way, and legitimises governments and makes them stable, and allows us to accept limitations on our personal freedoms. Respect for human rights is an essential element of this trust. A third is the relevance of human rights in a globalised economy whose currency is fear, and in a legal system which gives them no role at all, in Australia, not even to challenge the legitimacy of draconian laws, and to acknowledge the courage it takes for human rights advocates to brave the 'tyranny of petty coercion'[3] which urges caution. My final is a suggestion about what we should do to build a human rights culture in Australia.

These are my personal views as an advocate of the rights of children and a student of human rights as a fundamental civilising principle; of someone who is a serial 'commissioner' in anti-discrimination, law reform and anti-corruption bodies, and a lawyer: above all, a lawyer and a believer in the rule of law.

II The Fragility of Human Rights

The human rights movement's strength is that it is incorruptible. Human rights advocates can never belong to a silent majority. It is also its weakness. What makes the movement so irritating to governments is its unwillingness to conform to a pragmatic, consensus view on the relative priorities of human and other rights and interests: Ignatieff calls it a kind of moral perfectionism; a 'refusal to allow trade-offs between principle and power, rights and expediency.'[4] In essence a human rights advocate accepts that each human being is as valuable as the next. The international human rights regime grew out of the World War II experience, that without a developed understanding of the worth of a

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3 Marilynne Robinson, 'The Tyranny of Petty Coercion', *Harpers Magazine*, August 2004.
4 Ignatieff, above n 2.

human being, we couldn't sustain civilisation. People have needs, but we also have values. Amartya Sen, the Nobel Laureate, recently wrote: 'They cherish their ability to reason, appraise, act and participate. Seeing people in terms only of their needs may give us a rather meagre view of humanity.'

If human rights are under threat then so is civil society: from without from the waves of international investment and competition, and the mass movements of people and ideas that come with it, and from within, our fear and retreat to the familiar, to authoritarianism, the parochial and the personal: to flying by instrument instead of looking out the window where people are drowning (that's what happened to the human cargo of the SIEV-X). Only by not looking can we 'send a message' to people-smugglers or tolerate the suffering of children. We have become deeply cynical about both politics and the law. Civilised values cannot survive huddling behind domestic doors.

Two hundred years ago Adam Smith[5] had a great idea, that there was an 'invisible hand' that enables individual self-interest to work best in meeting the common economic good. That idea is the basis for our modern ideology of a market-driven, globalised economy, but it has a weakness. Some needs must defer to others because of the value we place on intangibles. It has another weakness. When Adam Smith developed his ideas there were fewer than a billion of us and nothing we did could significantly harm the earth: now there are six billion, and we already have. Yet today we still focus on the personal – personal profit-making and health, the pollution of our particular backyards, and the survival of our own children, our own particular businesses and sectional interests. Yet we know, now, that what happens in South American rain forests affects the ice floes of the Arctic and the climate in Perth, Western Australia. We also know that the denial of human rights in Israel or Iraq affects the stability of governments anywhere.

III Trust

My next point is about the necessity of human, not contractual, rights in a market economy. Iraq's post-invasion governance is a pretty powerful indication that without the rule of law, no 'market' can operate.

A black American academic called Patricia Williams once wrote that we understand 'the rules' differently, anyway, when our experience of how they work is different.[6] For the dominant group – 'most whites,' she said – achievements are seen as the function of 'committed self-control, of

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5 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

6 Patricia Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harvard Civil Rights, Civil Liberties Law Review* 401.

self-possession. For blacks, on the other hand, relationships are frequently dominated by historical patterns of physical and psychic dispossession.'[7] Then she gave an example: how very differently she, as a black academic woman descended from African slaves, and her friend Peter, a white male professor, used trust and distrust as bargaining factors when apartment shopping. He had handed over the cash deposit in exchange for a handshake agreeing to a sub-lease with pleasant strangers. She had insisted on negotiating a detailed, formal lease agreement with personal friends. She wrote:

> We both wanted to establish enduring relationships with the people in whose houses we would be living; we both wanted to enhance trust of ourselves and to allow whatever closeness, whatever friendship, was possible. This similarity of desire, however, could not reconciliate our very different relations to the word of law. [8]

Her white male colleague was aware of his own power and went to some lengths to reduce the 'wall' that image might create through informality. She on the other hand, was '... [a]cutely conscious of the likelihood that, no matter what degree of professional or professor I became, people would greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute.'[9] It was essential for her to create boundaries between friendship and contract. By showing she could speak the language of lease she enhanced her trustworthiness. He required informality – she needed rules, not just to encourage trust in others, but her own personal sense of order and entitlement. She had just discovered a most personal contract: the bill of sale of her great-great-grandmother, the twelve year old sexual slave of a white plantation owner: a res over which white men exercised contractual rights, because she had no rights at all.

It would take a very long time of listening intently to each other to bridge those experiential gaps – to be able to see things simultaneously, yet differently. These experiences determine what kind of a voice we have. A white male might express 'needs' and expect to have them met: poor black people's 'needs' have never resulted in political priority. That is why children's rights have never been a priority either: children have been the object of rights claims between parents and the state. We need political mechanisms that can deal with the denial of needs and the difference of our experiences – the full and uncensored voices of every life.

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7 Ibid.
8 Ibid.
9 Ibid.

IV Relevance

Michael Ignatieff has described human rights as a kind of anti-politics, a moral code that simply refuses any political justification for denying basic rights.[10] But to change this – power is always unequally distributed and injustice is common – human rights advocates must find a way to reconcile moral perfectionism with getting a hearing.

It's hard to argue for the rights of accused terrorists in a country whose citizens have been attacked, or to criticise governments when it looks so unpatriotic. But human rights have been closely associated with the advance of western civilisation, especially after World War II when we established the most effective rights enforcement regime in the world, the *European Convention on Human Rights*[11] (of which, more later). Signing on to a commitment to human rights has meant limits on sovereignty – a Europe of Strasbourg, where the European Courts of Justice and Human Rights sit – rather than a Europe of Dachau and Auschwitz. It has also meant enriching the lives of ordinary people. Amartya Sen wrote:

> First, political freedom is a part of human freedom in general, and exercising civil and political rights is a crucial part of good lives of individuals as social beings. Political and social participation has intrinsic value for human life and well being. To be prevented from participation in the political life of the community is a major deprivation. Second ... democracy has an important instrumental value in enhancing the hearing that people get in expressing and supporting their claims to political attention (including claims of economic needs). Third ... the practice of democracy gives citizens an opportunity to learn from one another, and helps society to form its values and priorities. Even the idea of 'needs', including the understanding of 'economic needs', requires public discussion and exchange of information, views, and analyses. In this sense, democracy has constructive importance, in addition to its intrinsic value for the lives of the citizens and its instrumental importance in political decisions.[12]

Now I want to take a further step, and say that a legal system that silences a vulnerable minority – children – is inherently unstable. I judge our legal system by looking at how we protect the rights of children under Australian law.

Our Common Law assumes that children are persons 'under a disability,' and provides for their interests to be protected by natural guardians or, as a last resort, by the state. What our system does not do

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[10] Ignatieff, above n 2.

[11] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature on 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights / ECHR*').

[12] Amartya Sen, 'Democracy as a Universal Value' (1999) 10 *Journal of Democracy* 3, 10.

is ensure that there is someone with an enforceable duty to ensure that children's rights are protected. This week, as we discuss the 'children overboard' disclosures and the report of the inquiry into children in institutional care, we should be very aware of the consequences.

We have plenty of laws about child cruelty and child protection and research about good parenting. We also have decades of Royal Commissions and reports about the failure of the lot of them to protect children properly. The law does not protect children until their needs cannot be denied because having them met is an entitlement, and the law finds someone and places the responsibility upon them to protect the children. Some say that if there is no effective remedy for the breach of a 'right' it does not really exist. Sometimes a 'right' is so clearly '... of such importance that it would be wrong to deny it or withhold it from any member' of our human society.[13] As John Stuart Mill said 250 years ago, it is unjust to punish children for their parents' irresponsibility, poor judgment or poverty.

This brings me to a classic instance of the law's evident failure to protect the most vulnerable human of all: the child who, without parents, family, or even a community, seeks asylum. We have a particular obligation to children, not only in international law – Australia ratified UNCRC[14] in 1990 (and the *Refugee Convention*[15] in 1954) – but because of their 'natural' dependency.

There was no need, nor moral right, to lock away hundreds of children in immigration detention. Many of these children have been detained in difficult, deleterious and (for some) dangerous conditions for months or years already. They cannot develop to their full potential under such conditions, that not only breach international guidelines for the detention of prisoners, let alone children, but quite possibly our international obligations under the 1987 *Convention Against Torture and other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment.*[16] That Convention defines 'torture' as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on someone by way of punishment, the intimidation or coercion of themselves or a third person, or for a discriminatory reason, inflicted by or at the instigation of or with the consent or acquiescence of a person acting in an official capacity.[17]

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[13] Moira Rayner, 'Political Pinballs: the Plight of Child Refugees in Australia' (Speech delivered at the Walter Murdoch Lecture, Murdoch University, Perth, 31October 2001).

[14] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('UNCRC').

[15] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

[16] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984 , 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention against Torture*').

[17] *Convention against Torture*, Art 1.

We are detaining children to deter people-smugglers they have never met and asylum-seekers of the future, in conditions calculated to do them permanent harm. That is why the Family Court determined that Australia's ratification of the UNCRC gave it the jurisdiction to oversight the detention of children who were being permanently damaged by our draconian laws and their parents' audacity, and so brought down the wrath of the government upon its head. The High Court, earlier this year, determined that the Family Court had no such power because our international human rights obligations cannot override the constitutional limitations of a 'Family' court.

All other legal challenges have failed too. In one case in 2001,[18] two children in immigration detention in Western Australia asked for more time to apply for visas despite the mandatory and fixed time limits set by the *Migration Act*[19], which they had missed because they were unaccompanied children and did not know their rights until it was too late. As unaccompanied children, their interests should have been protected by their guardian, the Minister for Immigration, under the *Immigration (Guardianship of Children) Act*.[20] They tried to argue that the Minister was under a duty to protect their interests and that this included giving advice on their entitlements and opportunities in a timely way, which should take priority over the Minister's conflicting interests in applying immigration legislation that mandated and legitimated their detention.

The case failed because the judge found that the legislation did not create a conflict between the interests of the Minister as immigration minister and children's guardian. The Minister had successfully delegated his 'child care' responsibilities to state welfare authorities. However, child welfare authorities had not established a regime to ensure they knew which children were under their responsibility in detention or to give them timely or any legal advice or support. It was remarkable that one particular child had sought a visa at all in the circumstances, but even that worked against him. He had shown he was mature by making the application (late) and so he did not need 'special protection'. Catch 22. Really, I am embarrassed that our legal system has failed these children so entirely, that the Bakhtiari boys, who sought 'asylum' in the UK consulate two years ago and were summarily sent away, have been able to sue over the British government's breach of their rights to claim asylum, and in the UK, not in Australia. Here, there is no avenue of judicial review of administrative action, but the court of public opinion, and in that court, when they were whisked back to detention in Woomera in tears and distress, the media and the government crowed, and the opposition stood silent.

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[18] *W444 v Minister for Immigration & Multicultural Affairs* [2002] FCA 605 (10 May 2002).
[19] *Migration Act 1958* (Cth).
[20] *Immigration (Guardianship of Children) Act 1946* (Cth).

The title of this paper came from a short story by Ursula LeGuin about the utter happiness of the people of a utopian city called Omelas, which she described as:

> A boundless and generous contentment, a magnanimous triumph felt not against some outer enemy but in communion with the finest and fairest in the souls of all men everywhere and the splendour of the world's summer ...[21]

There was a price to be paid for the happiness of the civilised, compassionate, artistic and spiritually enlightened citizens:

> In a basement under one of the beautiful public buildings of Omelas, or perhaps in the cellar of one of its spacious private homes, there is a room. It has one locked door, and no window. A little light seeps in dustily between cracks in the boards, second-hand from a cobwebbed window somewhere across the cellar. In one corner of the little room a couple of mops, with stiff, clotted, foul-smelling heads, stand near a rusty bucket. The floor is dirt, a little damp to the touch, as cellar dirt usually is. The room is about three paces long and two wide: a mere broom closet or disused tool room. In the room a child is sitting. It could be a boy or a girl. It looks about six, but actually is nearly ten. It is feeble-minded. Perhaps it was born defective, or perhaps it has become imbecile through fear, malnutrition, and neglect ... The door is always locked; and nobody ever comes, except ... sometimes ... the child, who has not always lived in the tool room, and can remember sunlight and its mother's voice, sometimes speaks. "I will be good," it says. "Please let me out. I will be good!" They never answer. The child used to scream for help at night, and cry a good deal, but now it only makes a kind of whining ... and it speaks less and less often.
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> They all know it is there, all the people of Omelas. Some of them have come to see it, others are content merely to know it is there. They all know that it has to be there. Some of them understand why, and some do not, but they all understand that their happiness, the beauty of their city, the tenderness of their friendships, the health of their children, the wisdom of their scholars, the skill of their makers, even the abundance of their harvest and the kindly weathers of their skies, depend wholly on this child's abominable misery.[22]

Children in detention are an obviously unacceptable price for border protection and electoral advantage. But the rights of all children are readily overlooked when they have no voice and we are all 'expert' on their best interests and the law that gives others authority over them.

Let me give you another domestic example of where this thinking takes us. We should all be aware that the 'stolen generation' of Aboriginal and Torres Strait Islander children have failed, in all court cases so far, to

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[21] LeGuin, above n 1.
[22] Above n 1.

prove that they are entitled to compensation for their removal from their families, loss of cultural identity, and in some cases abuse in the care of strangers. This is primarily because it has been impossible to prove they were taken 'illegally', in pursuance of a genocidal policy, or for reasons other than child protection reasons. But that was not the case in Western Australia. About this time last year I published the results of research done for the publication of Rene Powell's biography by Bernadette Kennedy, which established that in that state, at least, hundreds of 'mixed blood' Aboriginal children were illegally taken and kept from their families.

The Western Australian *Aborigines Act 1905* originally defined a 'native' in terms of descent, physical characteristics and lifestyle. The Chief Protector (later the Commissioner) was made guardian of any native child. The Minister could, by warrant, direct any 'native' to be removed to and between reserves, districts, institutions or hospitals, 'and kept therein' without judicial or other review. Then in 1936 the Act was amended so clumsily that many children were no longer 'natives' at law. In 1948 the Acting Commissioner for Native Affairs was advised by the Crown Prosecutor that he did not have the right to refuse to release children who were not 'native' children under the Act. He decided to seek such powers, but did not get them for ten more years. He told the Minister and identified where the children were being unlawfully detained. The Minister acknowledged and initialled the Commissioner's advice and asked for a copy for his own records. Two years later he gave similar advice to a new Minister, who told his Premier:

> It is, in my opinion, questionable if the use of the Ministerial warrant is permissible in the case of children being removed to a Settlement or Mission in the interests solely of their physical and spiritual welfare, education and training. Fortunately it has never yet been challenged, but native parents are rapidly becoming more enlightened on the matter of what may be their just and lawful rights within a white community and it would not surprise me if the Department was called upon soon to defend its action by the issue of a Writ of Habeas Corpus before a Court of Law. Such legal action would, I think, have quite a reasonable chance of success ... [T]he Department would be placed in an embarrassing position by the mere fact of its administrative act, however well-intentioned, being challenged by the very people whose welfare and protection represents its most important function.[23]

He acknowledged that certain country JPs had 'already quite illegally committed children and natives' directly to certain native institutions, and the need for ensuring that such illegally removed children be brought before a children's court, as if that could retrospectively validate unlawful

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[23] Moira Rayner, 'Who Cares About Facts: More Evidence Emerges for The Stolen Generation' (2002) *Eureka Street* <http://www.eurekastreet.com.au/articles/0310rayner.html> at 2 November 2004.

removals and detention. The Minister directed that they be removed only through the courts by the proper child protection processes. This did not happen either. Four years on in a 1958 memorandum to the Commissioner about suggested amendments to the *Child Welfare Act 1947* (WA) (ie, eight years after the initial revelation that children were being illegally removed) the next Minister was advised that child protection proceedings had been and were still being 'initiated and carried through' by native welfare officers who did not have the power to do so.

To cure such a litany of serious procedural defects one might expect authorities to have reviewed the apprehension, detention and circumstances of all Aboriginal children and to ensure that any anomaly be brought to their parents' attention. This did not occur. Instead, the Commissioner directed his officers to 'encourage' parents to sign 'voluntary agreements' for the admission of their children to missions to be educated. The agreements were then used as a basis to refuse to return the children, though the Commissioner knew they were unenforceable. Most disturbingly, in 1958 the Acting Commissioner advised that when it came to the discharge of children from missions, '[t]he laws should be used as a broad guide for procedure, but in our work the most important factor is what is in the best welfare interests of the native or natives concerned.'[24]

The pattern is clear enough. From 1 January 1937 it would seem that a kind of benevolent inertia continued to drive a native welfare bulldozer over the civil and human rights of uncountable (because uncounted) Western Australian Aboriginal children and their parents. Their removal, transfer and detention without hearing or right of review was, to the knowledge of the Crown Law Department, the Commissioner for Native Affairs, the Minister for Native Affairs, the Attorney General and the Premier, against the law.

This is a small spotlight upon the fragility of the rule of law in our times. Rights can be ignored when their 'owners' have nowhere to stand and no voice, because of racism, colonialism and (even if benevolently meant) authoritarianism. From 1 January 1937 until about 1960, government officers broke laws meant to protect Aboriginal people; severed the bond between parents and children without a proper process and sometimes with neither right nor need to do so; flouted the absolute human right not to be subject to arbitrary arrest and detention; and failed to rectify grave wrongs when they became aware of them, persuaded that this was in their best interests, as they (the government officers) defined them.

You will have noticed, as I did, how they used the language of the law, while deliberately breaking it, rather than human rights, because they were not the 'currency' of debate at the time, just as our government does in speaking of the legitimacy of the detention of children and asylum-seekers. And so I come to my next point: that we must use 'rights' language,

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[24] Ibid.

without apology – especially when we are told that higher considerations call for silence. Using this language means being disapproved of, and being subjected to what Marilynne Robinson called in an essay in *Harpers Magazine*, 'the tyranny of petty coercion'.[25]

What I'm going to say now borrows heavily from her timely and important essay. We are not often courageous unless someone gives us permission to be. We internalise prohibitions, and enforce them on ourselves – prohibitions against, for example, expressing an honest doubt, or entertaining one, which is clearly what happened in Western Australia during the 1940s and 1950s, even in the face of illegal behaviour and ministerial directives! This ought not to be the case in a country like Australia, with our traditionally somewhat irreverent, anti-authoritarian approach. But today Australia has become very much deferent to authority.

Physical courage is easily recognised, as is the opportunity to show it – a fire fighter who gives his life to save a child, for example, or a saint who treats lepers – even at greatest risk to themselves. Moral and intellectual courage are not nearly so easy to identify because they require disapproval, even though the risks they entail – professional disadvantage, ridicule, ostracism – are comparatively minor. These forms of courage suffer from the disadvantage of needing to be generated out of individual judgments and perceptions. These courages threaten group cohesion and identity, the very recognition of the rules and values that keep it together: this is something over which there can be no 'consensus'.

A group is formed and stays stable because of a significant degree of like-mindedness. It does help when we are in general agreement about basic things, such as that the family is good, violence is bad, freedom of religion is necessary, or bread should be affordable. Consensus is such a powerful call that it probably goes back to the dawn of human society, when small and vulnerable family groups fell into tribes and larger communities for self defence. But we should not ignore the fact that communities suppress by consensus as well: a community that is formed by excluding others because of their race or religion feed from, and feed, division; inequality; exclusion and suffering to those not 'in'; the poisonous glue beneath apartheid; racism; genocide; the oppression of women and killing of children.

Our own modern Australian society is a case study of how to enforce consensus through the mild disincentives of disapproval, denial and ridicule. The sort of courage I'm talking about here is loyalty to truth – by which I do not mean what whistleblowers wreck their lives over – but statements of the obvious: that the emperor has no clothes, that the suffering of one child to support my sense of security is morally obnoxious.

Australia has a set of values, I am sure, but we don't really know what they are, until we listen to the uncensored views of the diversity of all of us and the lived experiences of the other.

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[25] Robinson, above n 3.

Consensus creates and supports 'truths' that are nothing of the kind. Objective truths – such as that the removal of aboriginal children in WA from 1 January 1935 was illegal to the knowledge of the government of the day, and continued to the knowledge and deliberate obfuscation for another 35 years – can be 'ignored' by consensus, and cease to be 'true' until a more honourable time. That time is now. It is not enough to say the truth once. I published my little article on Rene Powell's research last year, the first evidence I'm aware of actual illegality, and proposed that the people affected seek a declaration from the WA Supreme Court. There was no response other than an unseemly disagreement over whose research it was. Perhaps when we read her story, which is to be published this year, the reality may hit home. But it is more likely that it will be ignored, by consensus, as another 'whinge' by an Aboriginal, despite the true horror of consciously illegal behaviour; the deliberate law-breaking she has apparently disclosed.

By treating as partisan or tendentious statements that are straightforwardly true or false, by allowing something that is objectively true or false to be dismissed as the slur of a hostile subgroup, great harm is done to the body politic. Perfectly sensible people are shamed out of saying what they believe to be true and thus, as Robinson writes,

> ... [s]o the exchanges that political life entirely depends on, in which people attempt in good conscience to establish practical truth and then candidly assign value to it, simply do not take place. This is a failure of courage on both sides ... [and we are relieved to know that we] need not consider the issue on its merits.[26]

She goes on:

> Why critics are so flummoxed I can only speculate. Perhaps it is because most of the people in this country who take on public issues are educated and middle class. As is true of their kind anywhere, they are acculturated to distrust strong emotion, so they are effectively rebuked when they are accused of harbouring it. Oddly, they seem often to be shamed out of defending the poor and vulnerable on the grounds that they themselves are neither poor nor vulnerable, as if there were properly no abstract issues of justice, only the strategies of interest groups or, more precisely, of self-interest groups. That their education and experience prepare them to think in terms larger than their own immediate advantage makes them an 'elite' and ipso facto they are regarded as a self-interested subgroup of a particularly irksome kind ... their position is dismissed as nothing more than elitists, though the polls and pollsters who use the term have identical credentials and much greater power. To be intimidated in this way is a failure of courage, and to abandon democracy from an excess of self-doubt and good manners is no different, in its effect, than to abandon it out of arrogance or greed.[27]

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[26] Robinson, above n 3.
[27] Robinson, above n 3.

V Giving Human Rights a Voice

The present Commonwealth government will not act to protect the rights of children and other vulnerable people by establishing a human rights regime. I doubt, frankly, that any federal administration will. The courts are having problems with their powers and discretions to do so. I find it unacceptable that there is no remedy for such great wrongs. I have a proposal to make.

One of the reasons children's rights are taken seriously in the UK is that they have been taken to the European Human Rights Commission and later to the European Court of Human Rights in Strasbourg for many years. Under the *Human Rights Act*,[28] they can now be argued as entitlements in the mainstream British courts. There is a mechanism by which the law will find someone and place the responsibility upon them to claim children's and other human rights.

In Australia, each State and Territory could change their statutory interpretation Acts in a uniform way, to require judges to consider the obligations that Australia has undertaken under international human rights treaties set out in the Schedule. The Schedule would reproduce the *International Covenant on Civil and Political Rights*.[29] That is very like the *European Convention on Human Rights* ('ECHR'), which is implemented in the *Human Rights Act 1998* (UK), which provides for basic guarantees such as fair trials; and freedom from arbitrary arrest and detention. This would enable the High Court, when considering appeals against the decisions of state courts, to take those human rights obligations into account. In this way, those obligations would be taken into account by judges and magistrates and government officials in each of the states and territories where they have political and constitutional power, and thus part of the common law of those states and territories, in a 'common' or shared way. This would be a very simple step, and could happen at once.

My second proposal, which I do not have time to develop today, is to work upon an Australian Human Rights Act regime. This is how it works in the UK: the *Human Rights Act*,[30] creating a uniquely common law approach to human rights, places requirements on 'public authorities' to act in a way that is compatible with all ECHR rights: this includes 'any person certain of whose functions are functions of a public nature'.[31] New legislation must be introduced into Parliament with a statement by the relevant Secretary that it does – or does not – comply with the ECHR. British Courts must interpret UK law so it is, if at all possible,

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[28] *Human Rights Act 1998* (UK).
[29] *International Covenant on Civil and Political Rights*, opened for signature on 25 March 2002, 999 UNTS 171 (entered into force 29 October 2003).
[30] *Human Rights Act 1998* (UK).
[31] *Human Rights Act 1998* (UK) s 6(3)(b).

consistent with the Convention. This does not subject British courts to foreign notions of fairness. In many instances the courts have to take account of the 'margin of appreciation' in applying Convention rights to British culture and circumstances – that is, the differences in how those principles operate in different social and legal frameworks. If primary legislation is incompatible with ECHR rights, a higher court can make a 'declaration of incompatibility'. All that does, if the government accepts the declaration, is enable Ministers to change incompatible legislation by a speedy 'remedial order' without need to take an amendment through Parliament. In that way, parliamentary sovereignty is preserved. If the government does not agree with the court's declaration, an aggrieved person may take the matter to the European Court of Human Rights in Strasbourg. This is the element we do not have in Australia. The UK has long been subject to the (non-binding but politically embarrassing) findings of the European Human Rights Commission and Court. This has had a remarkable educational effect – the language of human rights is not 'strange' to the reading population.

Some of the ECHR articles are absolute, such as the right to life and prohibition of torture, or inhuman or degrading treatment or punishment. Others are limited in their terms – the right to liberty and security and the right to participate in a fair, public and impartial tribunal (articles 5 and 6). A third, broad group contains 'qualified' rights – those that must be balanced against the wider public interest. These include the right to respect for private and family life; and freedom of thought, conscience and religion. If, on its face, such a 'right' under one of the ECHR provisions has been interfered with the court must consider:

- Is the interference in accordance with the law?
- Is the interference in pursuance of a legitimate aim?
- Is it necessary in a democratic society? and
- Is it proportionate (to the risk or harm it is intended to meet)?

These are the debates Australia needs to have, outside the poisonous political arena. The new process is democratic, inviting public scrutiny and debate on crucial issues of trust and responsibility. It seems not to have initiated a landslide of trivial litigation. It has, at times, inconvenienced administrators. But it has resulted in faster decisions, in an impartial arena, on key issues which we deal with very poorly in the political one.

For example, in September 2001, a single judge in the Administrative Court ruled that it was unlawful for the government to automatically detain asylum-seekers upon entry to the UK pending 'fast-track' determination of their claim.[32] The right to liberty of the person is a

[32] *R (on the application of Saadi and others) v Secretary of State for the Home Department [2001] 4 All ER 961* (Queen's Bench Division (Administrative Court), Collins J).

qualified right under the Convention. The Secretary of State for the Home Office appealed, and won the appeal. What was exemplary was the process of decision-making, and how it contributed to a public understanding of the issues.[33] The Court assessed the lawfulness of the initial detention; and the purpose, necessity (in a democratic society) and proportionality of a policy of detaining asylum seekers for up to 10 days to expedite decisions on their applications for asylum; the likelihood of absconding and the effect on efficiency; and whether detention conditions were appropriate for asylum seekers rather than convicted prisoners. Having considered it all the appeal court concluded that a (very short) period of detention was not an unreasonable price to pay for speedy resolution of asylum claims.

We could, and should, be able to review our treatment of refugees in the same way in Australia. This isn't possible, because Australia has no human rights regime, no 'Bill of Rights', no settled understanding of how Australia's international human rights obligations should direct government administrators in their responsibilities, and no limits on draconian laws.

VI Conclusion

I put these issues to you – that human rights are essential to civil society and the stability of governments; that we cannot afford to impose a 'consensus' view of what is and must be a moral absolute; and that we must be courageous in voicing these views, and pushing for constitutional, legal and social change – knowing that I will be ridiculed for it. I do so because I am a liberal. That means I believe in truths. I believe that society exists to nurture the human spirit and enable the realisation of the full potential of every human being, and the world we share with others.

I believe that generosity is a guiding principle, by which these things are achieved. I believe that we should take every opportunity to advance the wellbeing of other people, and the responsible use and protection of the created world. I believe that 'human rights' means advancing the well being of people, without discrimination, and treating them all with respect. I believe that the 'invisible hand' that keeps communities alive is not the market or big government but the faith of the people in their fellows and the survival of their children.

Liberalism in this sense is what makes civilisation worth fighting for. That is why I am a passionate advocate of the rights of children and a rule of law that includes international human rights obligations. I choose to

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[33] *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2002] 1 WLR 356 (Court of Appeal (Civil Division), Lord Phillips of Worth Matravers MR).

be 'liberal' when that name has been stolen. Trivial failures to stand up and be countered, courage deficits, change history and society. Ursula LeGuin ends her short story like this:

> At times one of the adolescent girls or boys who go to see the child does not go home to weep or rage, does not, in fact, go home at all. Sometimes also a man or woman much older falls silent for a day or two, and then leaves home. These people go out into the street, and walk down the street alone. They keep walking, and walk straight out of the city of Omelas, through the beautiful gates. They keep walking across the farmlands of Omelas. Each one goes alone, youth or girl, man or woman. Night falls; the traveler must pass down village streets, between the houses with yellow—lit windows, and on out into the darkness of the fields. Each alone, they go west or north, towards the mountains. They go on. They leave Omelas, they walk ahead into the darkness, and they do not come back. The place they go towards is a place even less imaginable to most of us than the city of happiness. I cannot describe it at all. It is possible that it does not exist. But they seem to know where they are going, the ones who walk away from Omelas.[34]

[34] LeGuin, above n 1.