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2021 Sir Ronald Wilson Lecture

The Perils of Independence: The Australian Human Rights Commission's role in protecting human rights in Australia

Emeritus Professor Rosalind Croucher AM
President, Australian Human Rights Commission

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Exclusive partner

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The Law Society of Western Australia
Level 4, 160 St Georges Terrace, Perth WA 6000 | **Postal:** PO Box Z5345, Perth WA 6831 or DX 173 Perth
Phone: (08) 9324 8600 | **Fax:** (08) 9324 8699 | **Email:** info@lawsocietywa.asn.au | **Website:** lawsocietywa.asn.au

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Abstract

The lecture is framed through the lens of independence in relation to the Australian Human Rights Commission and uses the Bringing Them Home Report, led by Wilson and Mick Dodson, the Aboriginal Social Justice Commissioner, as a case study. The inquiry into the forced removal of Aboriginal children from their families and communities led to conclusions that the removal of children could be considered 'genocide' and made recommendations for an apology and for reparations. The report became known as the 'Stolen Generations' report and is of continuing influence, although the reaction of government at the time was very negative. The report is illustrates the Commission's role in protecting human rights in Australia, including the rights engaged in the inquiry, and Sir Ronald Wilson's role as President of the Commission. The lecture then considers the broader question of protecting human rights in Australia – how commitments made through international treaties are translated into laws in Australia (domestic implementation) and the gaps that are left without domestic implementation. This leads into discussion about the lack of a federal Human Rights Act and the case for such protection.

Acknowledgements

Thank you Matthew McGuire for your welcome to country and Kendra Turner as MC.

I am speaking from the traditional lands of the Gadigal people of the Eora nation, in the city of Sydney, and pay my respects to elders past, present and emerging. I also acknowledge the Whudjuk people of the Nyoongah Nation, on whose lands I was hoping to speak today.

Thank you to the Law Society of Western Australia and Curtin University, the partners for this event, for inviting me to deliver such an important address. I acknowledge Professor Robert Cunningham, Dean of Law and, from the Law Society of WA, Greg McIntyre SC, Immediate past President and Rebecca Lee, Senior Vice President, as well as Counsellor Coster, and online, Law Society President, Jocelyne Boujous.

I am honoured by so many distinguished guests in attendance. I particularly want to acknowledge the Hon Robert French AC and the Hon Robert Nicholson AO (online) (both prior speakers in this Lecture series), and the Hon Ralph Simmonds (whom I have known in various roles over the years).

If I were to acknowledge everyone, I would eat up a goodly portion of my allocated time so let me acknowledge, generally, other members of the Western Australian judiciary, senior students and their teachers, colleagues, friends.

Introduction

In this lecture I hope to honour Sir Ronald Wilson in his role as President of the Australian Human Rights Commission—or Human Rights and Equal Opportunity Commission, or 'HREOC', as it was at the time.

I have deliberately chosen the title 'Perils of Independence' and linked it to the *Bringing them Home* report—the one most identified with Ronald Wilson, which he led jointly with Mick

Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner at the time. It was an inquiry into the forced removal of Aboriginal children from their families and communities and has become known as the 'Stolen Generations' report.

I will use *Bringing Them Home* as a case study of the Commission's role in protecting human rights in Australia

The report detailed the historical policy and practice of the removal of Aboriginal children from their families—something that had not been done in an official report before.

The report also concluded that these practices could be considered as 'genocide'. The stories told in the report, and this finding, were shocking and reverberated across the nation. The reaction of government was very negative. Funding cuts followed.

However, over time, the *Bringing Them Home* inquiry and its report demonstrate the power of independence and the ability of the Commission to contribute to change over a long horizon. The report is the Commission's most downloaded report and the educational resources about it also the most accessed.[1] It is a report of enduring and continuing influence.

There are clear connections with the year 11 and 12 Politics and Law units of the senior school curriculum—on accountability, the protection of rights in Australia and the status of international treaties in this regard, and democracy and the rule of law. I note also that the year 12 syllabus includes 'Aboriginal and Torres Strait Islander histories and cultures' as a cross curriculum priority.

I will start with Sir Ronald's journey to the role of President of HREOC.

Sir Ron—his journey to President of HREOC[2]

On 7 February 1990, Sir Ronald Wilson became part-time President of HREOC. He was 67 years of age. He served in that role for seven and a half years.

'Just call me Ron', he would say. So I will.[3]

At 5ft 4" in imperial measurements,[4] Ron was 'short in stature', but 'long in energy'.[5]

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1 See Bringing Them Home | Australian Human Rights Commission/. The series of resources were developed to mark the 20th anniversary of the report in 2017.

2 Biographical details of Wilson are drawn principally from: Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007); Antonio Buti, 'Sir Ronald Wilson: a brief view of his life' (August, 2005) *Brief* 16; 'From basement to bench: An interview with Sir Ronald Wilson, first published in *Brief* February 1994' (August 2005) *Brief* 6; Fred Chaney, 'Sir Ronald Wilson' (August, 2005) *Brief* 19; Robert Nicholson, 'Sir Ronald Wilson: An Appreciation' (2007) 31 *Melbourne University Law Review* 499; Antonio Buti, 'The Man and the Judge: Judicial Biographies and Sir Ronald Wilson' (2011) 32 *Adelaide Law Review* 47. There is also an entry on Wilson by Peter Durack, in Tony Blackshield, Michael Coper and George William (eds) *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001), 714–716.

3 Buti, *A Matter of Conscience*, 291.

4 Around 162.5cm.

5 Robert Nicholson, 'Sir Ronald Wilson: An Appreciation' (2007) 31 *Melbourne University Law Review* 499.

Born on 23 August 1922, the youngest of five children, he had lost both parents by the time he was 12, and left school at 14 and became a permanent public servant on his 15th birthday, in the Record Office of the Crown Law Department in Perth. He also learned to touchtype as part of his administrative exams. He had a strong work ethic and strove to be the best he could be, proudly reckoning himself as the 'best records clerk imaginable'.[6] In November 1941, Ron joined the Australian Imperial Forces and served in the Royal Air Force during the Second World War.

After the war, Ron went to the University of Western Australia and, in 1949, graduated with a Bachelor of Laws with First Class Honours and was articled to the Crown Law Department. In 1957, he was appointed the Chief Crown Prosecutor and built a 'formidable reputation as a forceful, and some would even say a ruthless, prosecutor'.[7] With increasing civil work, Ron was appointed Crown Counsel in 1961, a position created for him. In November 1963, at the age of 41, he became the youngest person to be appointed a Queens Counsel in Western Australia and, in 1969, he was made Western Australia's Solicitor-General. By the time of Ron's appointment to the High Court, in 1979, under the Coalition government of the Hon Malcolm Fraser MP, he was regarded as a leading authority on constitutional law.

Ron was the first Western Australian to be appointed to the High Court bench and brought considerable criminal law experience to the role. As was the usual course for appointees to the High Court, Ron was knighted. He was 56 years of age.

Human rights lawyers and academic, Frank Brennan SJ, then a theological student, attended Ron's swearing-in, which happened to be in Brisbane. At the end of Ron's remarks, Brennan recalls turning to a friend, saying, 'I think they have just put a saint on the High Court'.[8] (Not bad for a member of Uniting Church).

It was, however, an appointment that Ron accepted reluctantly, out of a sense of duty and loyalty to his State.[9]

During his tenure on the High Court, Ron marked himself out as a dissentient in the 4:3 decisions in the *Koowarta* and *Tasmanian Dam* cases.[10] He was a legal positivist. His decisions

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6 'From basement to bench: An interview with Sir Ronald Wilson', first published in *Brief* February 1994' (August 2005) *Brief* 6; Fred Chaney, 'Sir Ronald Wilson' (August, 2005) *Brief* 6.

7 Buti, 'Sir Ronald Wilson', 16.

8 Frank Brennan. 'The Law and Politics of Human Rights in an Isolated Country without a Bill of Rights' Sir Ronald Wilson Lecture 2003, 2.

9 He turned down the first invitation to be appointed to the High Court, and accepted 'out of a sense of loyalty to his State Premier, who had urged him to accept in the interests of Western Australia': Antonio Buti, 'The Man and the Judge: Judicial Biographies and Sir Ronald Wilson' ((2011) 32 *Adelaide Law Review* 47, 51. See Buti, *A Matter of Conscience*, 175–176.

10 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1. See, eg, the discussion of this period in Nicholson, 'Sir Ronald Wilson', 507–513. It is also considered in Durack's entry on Wilson in the *Oxford Companion to the High Court*.

in such crucial constitutional matters concerning the scope of the external affairs power earned him the label of a 'States-righter'.[11]

As Antonio Buti said of him in his biography of Ron, and on which I draw heavily in this paper,

> He did not much care for such labels. For him, what was important was to be honest to his oath to faithfully uphold the law and the constitution, which included the balance of the Commonwealth-State federal polity. This even meant making decisions that went against what his heart wanted: what he felt compelled to do was reach a decision based solely on reasoned analysis and the law as he saw it. This led him to make decisions that he was later often questioned about, particularly decisions that impacted on Aboriginal people.[12]

In 1989, Ron left the High Court early, at the age of 66, after nine years on the bench, shortly after he became the National President of the Uniting Church of Australia for a three-year term.

In February 1990, Ron was appointed as President of HREOC by the Labor Government led by the Hon Robert Hawke MP, to replace Marcus Einfeld,[13] an appointment that was suggested by some as 'calculated to save the Commission from abolition if the Coalition did gain power'.[14]

Ron also became Deputy Chair of the Council for Aboriginal Reconciliation. As Robert Nicholson observed, in that role 'he tackled some of the most difficult issues of justice facing the nation'.[15]

Speaking at the time of his HREOC appointment, Ron said, 'It never occurred to me I'd have an opportunity to enrich my retirement in this way. I'm delighted.'[16] His attraction to the human rights field was because of his involvement with the Uniting Church, of which he was then National President, and because of the time he had spent with Aboriginal people, 'listening to their concerns' and helping to start the Aboriginal Legal Service.[17] (I note in present company the central role also played by the Hon Robert French.)[18]

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11 Buti, *A Matter of Conscience*, 263.

12 Buti, 'Sir Ronald Wilson', 17.

13 Buti, *A Matter of Conscience*, 262. Einfeld had been criticised for a number of actions and had become estranged from his staff, including a public disagreement between Einfeld and his colleague, Brian Burdekin, the human rights Commissioner. Buti states that 'It was this disagreement that many within and outside HREOC saw as "life threatening" for the organisation, particularly in light of the stated objective of the Liberal-National Party Coalition opposition of wanting to abolish it': *A Matter of Conscience*, 262.

14 Chris Connolly and Paul Vout, 'A New Era for the Human Rights Commission?' 1990 (1) *Polemic* 20.

15 Nicholson, 'Sir Ronald Wilson', 514.

16 Buti, *A Matter of Conscience*, 261.

17 Chris Connolly and Paul Vout, 'A New Era for the Human Rights Commission?' 1990 (1) *Polemic* 20, 21.

18 Noted, for example, in the remarks on behalf of the Law Society of Australia marking the elevation of French J to the High Court: https://www.liv.asn.au/LIV-Home/Practice-Resources/Law-Institute-Journal/Archived-Issues/LIJ-October-2008/Welcome-Chief-Justice-Robert-French-(1).

Ron was charismatic. In contrast to the 'turbulent and tense tenure' of his HREOC predecessor, Ron was 'universally liked and admired'. He was welcomed warmly by HREOC staff and his fellow Commissioners.[19]

Susan Roberts, who joined HREOC as a senior legal officer in 1994, said that Ron 'engendered love and respect from the staff and he could light up a room with his presence'.[20] The Commission's Executive Director from September 1995, Diana Temby, said that Ron also had 'a wicked sense of humour and steely determination': he was 'absolutely impossible to resist and it was impossible to deal with him on a day to day basis and not love him'.[21]

Ron's approach to law and human rights

At the beginning of his time as HREOC President, Ron was described as 'circumspect', and not wanting to embroil the Commission in political controversy—particularly understandable given the concerns about his predecessor.[22]

But, in the ensuing years, Ron was to become 'more forceful' in expressing his views. Not only did he feel 'unshackled' from the restrictions of judicial office, but he also saw his responsibility as President to speak out on human rights.[23]

Ron found his role 'liberating'.[24] 'Once again,' he said, 'I could do what I loved doing the most—that is, advocating, and now I could do it for the disadvantaged'.[25]

In September 1991, gave voice to some of his thoughts about human rights, in delivering the Mitchell Oration, an initiative of the Equal Opportunity Commission of South Australia, in honour Dame Roma Mitchell, who had been, among other roles, the foundation President of the Human Rights Commission, the predecessor Commission to HREOC, from 1981 to 1986.

In this Oration, Ron's lecture title was framed as a question: 'Human Dignity for All: A Pie in the Sky?'

Ron referred to the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*—which together form what is described as the 'International Bill of Human Rights'. He also listed the other human rights instruments then in place,[26] and noted that a Declaration on the Rights of Indigenous Peoples was in the process of preparation.

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19 Buti, *A Matter of Conscience*, 291.
20 Buti, *A Matter of Conscience*, 291.
21 Buti, *A Matter of Conscience*, 291.
22 Buti, *A Matter of Conscience*, 296.
23 Buti, *A Matter of Conscience*, 263.
24 Buti, *A Matter of Conscience*, 293.
25 Buti, *A Matter of Conscience*, 293.
26 He referred to the *International Convention on the Elimination of All Forms of Racial* ***Discrimination***, the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of the Child*. He added the international standards for refugees, the Declaration on the Rights of Persons with Disabilities, the Convention against torture, the Declaration on the elimination of religious intolerance and discrimination, Principles on the rights of mentally ill persons.

All of this, he said, was a 'respectable body of "law" designed to encourage members of the UN to fulfil the hopes of 1945',[27] when the founding document of the UN, the UN Charter, was signed.[28]

In an address to Murdoch University students in 1993, Ron expressed his philosophy on human rights:

> It's a question of the inherent dignity belonging to every human being, simply and solely by virtue of his or her humanity. It's a question of equality of opportunity. It is a question of freedom, justice and peace for the whole world community. It is a question of international law and the obligations that Australia has assumed by its adoption and ratification of these instruments.[29]

To Ron, it was unacceptable for Australia to ratify international human rights instruments and then only *partially* enforce them. He considered that it was his obligation in his role as President of HREOC to advocate for human rights, particularly for the marginalised and disadvantaged sections of the community.[30]

In an address to the Press Council in Perth in 1991, Ron reflected on how Australia stood with respect to human rights and how our human rights record was 'relatively good by international standards':

> Compared with oppressive conditions in many other countries, we can derive some comfort from the way things are in this country. We can point to reasonable laws and considerable expenditure on social welfare. But welfare of itself does little for the human dignity of the recipient. If welfare is not set in the context of a recognition of human worth it will always be deficient. In any event, in assessing a human rights record, the legal framework and well-intentioned administrative measures are only the starting point. The ultimate criteria are to be found in what is happening to people and the attitudes towards each other of those who belong to the one community.
>
> One way of combating complacency is to cease dealing in abstractions, in the currency of noble sentiments and fine words detached from the immediacy and tensions of real life, and to remember that behind every human rights problem there are some people hurting, people longing for a sense of dignity and self-respect, of having a sense of worth in themselves.[31]

He had an acute understanding of his statutory role as President of HREOC and the 'respectable body' of international law that framed it.

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27 Ronald Wilson, 'Human Dignity for All: A Pie in the Sky?', The Mitchell Oration 1991, 3.
28 https://www.un.org/en/about-us/un-charter.
29 Ronald Wilson, 'Why Human Rights Matter for Everyone' (1996) 3(3) *Murdoch Electronic Journal of Law* [4].
30 Buti, *A Matter of Conscience*, 293.
31 Wilson, 'Human Dignity for All: A Pie in the Sky?', 4–5.

And through the exercise of the role in the context the *Bringing Them Home* inquiry, Ron was transformed.

Bringing Them Home

On 11 May 1995, the then Attorney-General, the Hon Michael Lavarch MP, under the Labor Government of the Hon Paul Keating MP, referred to the Commission an inquiry into the forcible removal of Aboriginal and Torres Strait Islander children from their families.[32] The report was completed in April 1997.

The Commission was asked to do a number of things:

To trace—

- the past laws, policies and practices which resulted in the separation of Aboriginal and Torres Strait Islander children from their families, by compulsion, duress or undue influence
- the effects of those laws, policies and practices

To examine—

- the adequacy of and the need for any changes in current laws, policies and practices relating to services and procedures available to those who were affected
- the principles relevant to determining the justification for compensation for persons affected
- current laws, policies and practices with respect to the placement of Aboriginal and Torres Strait Islander children advise on any changes required taking into account the principle of self-determination for Aboriginal and Torres Strait Islander peoples.

The inquiry was initiated, as the report explained, 'in response to increasing concern among key Indigenous agencies and communities that the general public's ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and the provision of services'.[33]

It was two and half years after International Human Rights Day 1992, when Prime Minister Paul Keating had said in an address at Redfern, to launch the UN International Year of the World's Indigenous Peoples, that 'We took the children from their mothers'.

The inquiry was led by Ron and Mick Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner. They took primary responsibility for conducting the hearings of the Inquiry. They were assisted by other HREOC Commissioners and by the Queensland Discrimination Commissioner. In each region that the Commission visited, the Commission appointed an Indigenous woman as a Co-Commissioner.[34]

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32 The Terms of Reference are included as an Appendix 1 to this paper.

33 *Bringing Them Home*, 18. Buti outlines the pressure that led to the inquiry: *A Matter of Conscience*, ch 13.

34 *Bringing Them Home*, 18. Appendix 12 of the Report, 21–72, lists them and other staff who worked on the Inquiry.

Hearings were held in every state and territory capital city, as well as 32 country centres. The Commission heard from 535 Aboriginal individuals and, in total, from 770 people and organisations. The Commission also received about 1,000 stories in writing and numerous other written submissions, including voluminous submissions from state governments.[35]

The inquiry led to the report, *Bringing Them Home*: *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997). The title for the report came from the evidence of Aboriginal poet, James Miller, at the inquiry hearings in Sydney, who said, 'We need to bring them home'.[36]

Ron's leading this inquiry, Robert Nicholson remarked, 'brought to the fore all his considerable personal talents and professional experience, as well as his beliefs and humanity as an individual'.[37]

But it was also to be his 'blowtorch moment'.

Blowtorch moment

In my first formal speech in my role as President of the Australian Human Rights Commission, at a conference of the International Bar Association in Sydney, I coined this phrase. I said:

> Having a 'Devil's Advocate' for human rights is a healthy, indeed necessary, thing in the context of the promotion and protection of those rights. Even if it means we should expect criticism—for calling out Government against the commitments made to the international community in signing up to the international treaties that set the benchmark for human rights. Even if it means that Government see us more of the Devil's Blowtorch than the Devil's Advocate.[38]

One of the questions I have been musing upon in reflecting on the history of the Commission, and especially this year, which marks the 40th anniversary of our establishment following Australia's ratification of the ICCPR, is the 'blowtorch moment' that may have faced my predecessors.

This was Ron's.

Among the recommendations of the *Bringing Them Home* report were that an apology should be given for separation, to be participated in by Parliaments and churches, as well as restitution, rehabilitation and monetary compensation.[39] Another recommendation was for a national 'Sorry Day' and that the Commonwealth should legislate to implement fully in

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35 Buti, *A Matter of Conscience*, 311.

36 Buti, *A Matter of Conscience*, 325. The suggestion for making it the title of the report is credited to Meredith Wilkie.

37 Nicholson, 'Sir Ronald Wilson', 514.

38 'National Human Rights Commissions — What's the point?', International Bar Association Section on Public and Professional Interests (12 October 2017), 9.

39 Human Rights and Equal Opportunity Commission, *Bringing Them Home*: *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997), 284–94, 302–13, 415–21.

domestic law the *Convention on the Protection and Punishment of the Crime of Genocide* (Genocide Convention), which Australia had ratified in July 1949.[40]

The Report also concluded that

> The Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law. Yet it continued to be practised as official policy long after being clearly prohibited by treaties to which Australia had voluntarily subscribed.[41]

A section of the report focused on international human rights.[42] It was here that the discussion on genocide is found.[43]

As explained in the *Bringing Them Home* report:

> The Convention confirmed that genocide is a crime against humanity. This expressed a shared international outrage about genocide and empowered any country to prosecute an offender. A state cannot excuse itself by claiming the practice was lawful under its own laws or that its people did not (or do not) share the outrage of the international community.[44]

The definition of genocide includes the forcible transfer of children from a racial, ethnic or national group to another group with the intention of destroying that group.[45]

The analysis of the application of the Convention's meaning of 'genocide' was a technical one, traversing policies of assimilation and 'mixed motives', including the evident 'good intentions' of some policies. The conclusion was that the label 'genocidal' could properly be applied to the 'forcible removal of children from Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people':

> Official policy and legislation for Indigenous families and children was contrary to accepted legal principle imported into Australia as British common law and, from late 1946, constituted a crime against humanity. It offended accepted standards of the time and was the subject of dissent and resistance. The implementation of the legislation was marked by breaches of fundamental obligations on the part of officials and others

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40 Human Rights and Equal Opportunity Commission, *Bringing Them Home*: *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997), 292–5.

41 *Bringing Them Home*, 266.

42 *Bringing Them Home*, 266–275.

43 It noted the obligations imposed on Australia under the UN Charter of 1945, as well as the UDHR 1948 and the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1965. It also noted that 'genocide' was declared to be a 'crime against humanity' by a UN Resolution of 1946, followed by the adoption of the *Convention on the Prevention and Punishment of Genocide* (Genocide Convention) in 1948.

44 *Bringing Them Home*, 270.

45 Article II. Australia ratified the Genocide Convention on 8 July l1949.

> to the detriment of vulnerable and dependent children whose parents were powerless to know their whereabouts and protect them from exploitation and abuse.[46]

Within the Commission, however, the question of whether to use the 'genocide' label, generated a 'significant debate'.[47]

Ron recognised the shock that would attach to the genocide label, but willingly agreed to it. As Buti explained, the inquiry hearings had been a lifechanging experience for him.

> He had heard story after story of sorrow and pain that had convinced him a major injustice had been done that needed to be understood by all Australian and measures taken to rectify the historical injustices. He, along with the other HREOC commissioners, believed that they had been trusted with the stories, and had to honour that trust. This meant ensuring that the report presented the story and the case for justice, no matter how uncomfortable it would be for White Australia. Wilson was prepared to proceed with and argue the case that the past removal policies and practices constituted genocide.[48]

Mick Dodson, however, was not so sure about the wisdom of using this label.[49]

At the November 1996 meeting in Sydney of all HREOC commissioners, inquiry hearing commissioners[50] and the Indigenous Advisory Council to discuss the final draft report, Dodson was 'sceptical of the genocide finding and was not prepared to agree to it'.[51]

Ron, however, 'passionately argued with Dodson that the removal practices and policies constituted genocide as proscribed in the Genocide Convention'.[52] As Buti explained:

> Dodson worried about the political ramifications of such a finding. His concerns were prophetic. However, after listening to Wilson's arguments he was persuaded to agree to the genocide finding, as were the other commissioners. It was decided that the term genocide was correct and appropriate and, as Wilson said, 'it gave greater force and persuasion the claims for reparations'.[53]

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46 *Bringing Them Home*, 275.

47 Buti, *A Matter of Conscience*, 321. Dr Sarah Pritchard and Meredith Wilkie, staff working independently on the research and writing, both concluded that genocide was relevant to the findings and conclusions of the inquiry. Wilkie was a law lecturer at Murdoch, who had been recommended by Chris Sidoti, HREOC's human rights commissioner to lead the work on the report within the Commission. She was seconded to HREOC for the duration of the inquiry. Under her guidance, consultants were hired to write research papers and draft chapters. Pritchard was briefed from UNSW to deal with the report's international law dimensions and to assist Wilkie in editing parts of the report. She had completed her PhD at the University of Tubingen in 1994. Buti, *A Matter of Conscience*, 318.

48 Buti, *A Matter of Conscience*, 324.

49 Buti, *A Matter of Conscience*, 324.

50 The Commission's Annual Report for 1995–96 lists 25 hearing commissioners across all states and territories.

51 Buti, *A Matter of Conscience*, 325.

52 Buti, *A Matter of Conscience*, 325.

53 Buti, *A Matter of Conscience*, 325.

The 'crux of the argument' was that the removal policy's *intention* was 'to destroy the Aboriginal race by assimilating the next generation of Aborigines into mainstream European society and culture. The policies intended to assimilate Aboriginal children into White society, so that they would lose their "Aboriginality".'[54]

The recommendation was a symbolic one: 'That the commonwealth legislate to implement the Genocide Convention with full domestic effect'.[55]

In his Sir Ronald Wilson Lecture, Robert Nicholson said that, 'These and other recommendations entered the political realm and became the subject of intense debate and, by some, intense anger'.[56]

Shooting the messenger

Where Terms of Reference are provided by an Attorney-General, as distinct from an inquiry at the initiative of the Commission itself, it may well be that governments change in the middle, so that the Attorney, and Government, that commissioned the inquiry, is not the one to receive its result. This was the case for the *Bringing Them Home* report.

The inquiry was given to the Commission by the Hon Michael Lavarch MP, of the Paul Keating Labor Government. On 5 April 1997 the 689-page report was delivered to then Attorney-General, the Hon Daryl Williams AM QC MP, of the Coalition Government of John Howard, which had been elected on 11 March 1996, ending a record 13 years of Coalition opposition.

The political environment could hardly have been more different than in 1992, when Paul Keating made his Redfern speech.

There were other elements in the environment: Pauline Hanson was elected in 1996; the *Wik* case was decided on 23 December 1996,[57] the High Court holding that native title could coexist on pastoral leases, and the Government's 'Ten Point Plan' was announced late in April 1997, watering down native title rights, in response.[58]

This was not an environment to be receptive of the *Bringing Them Home* report, let alone a finding of 'genocide'. As Buti observed:

> It was a report the government did not want, about an inquiry it did not call, at a time that could hardly have been less welcome.[59]

Buti's chapter that considers the aftermath of the report is titled, unsurprisingly, 'In the Eye of the Storm'.[60]

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54 Buti, *A Matter of Conscience*, 325.
55 *Bringing Them Home*, rec 10.
56 Nicholson, 'Sir Ronald Wilson', 514.
57 *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] HCA 40.
58 Buti, *A Matter of Conscience*, 330–331.
59 Buti, *A Matter of Conscience*, 330–331.
60 Buti, *A Matter of Conscience*, ch 14.

I describe this section of my presentation as a case of 'shooting the messenger'.[61]

The report was tabled on 26 May, the first day of the Reconciliation Conference in Melbourne.

However, leading up to the tabling, Buti describes the 'subterranean campaign … to discredit both *Bringing Them Home* and its principal author'. Although 28 commissioners had signed the report, it was Ron who was 'the focus of the media and critics of the report'.[62]

On 20 May, the *Sydney Morning Herald* ran a front-page story referring to 'unnamed government sources' condemning the report, even though it had not yet been tabled. Margo Kingston also wrote about the attempt to discredit Ron, in an article entitled, 'Report that Won't Stay under the Carpet'. Kingston referred to the advice of 'Yes Minister's' Sir Humphrey Appleby to his MP, Jim Hacker, about how to suppress an inconvenient official report. Hacker's advice: 'Discredit the man who produced the report. This must be done OFF THE RECORD.'[63]

In terms of Sir Humphrey's strategy of 'discrediting the man' Margo Kingston commented that the Government had a problem:

> [He] is a former Liberal-appointed High Court judge, widely respected and a man near retirement. Sir Humphrey's lines of attack—that the inquirer harboured a grudge against the government, was a publicity seeker or was trying to get a knighthood—were not available.[64]

A Government press statement was made on 21 May, referring to aspects of the as-yet-untabled report. The statement attacked the report's genocide finding and dismissed any suggestion of awarding compensation.[65]

This is a classic case of 'shooting the messenger'.

On 26 May, the opening day of the Reconciliation Conference, the report was tabled. But by then, as a result of the 'acrimonious buildup', many of the key findings and recommendations in the report—at least in general terms—had become public knowledge before its release.[66] As well as the genocide finding and the compensation recommendations, it was widely known that the report would call on governments to apologise for the child removal practices.

The mood at the opening of the conference was very heightened—the atmosphere, as Buti described it, was 'electric, and poisonous'.[67]

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61 Under the AHRC Act, the Attorney-General had '15 sitting days' to table it: *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46. Looking at the sitting calendar for 1997, 5 April was a Saturday and the House of Representatives did not sit again until 13 May. 15 sitting days, counting from 13 May, takes the window of tabling to 19 June. But there was much expectation that the report would be tabled by the time of the Reconciliation Conference in Melbourne on 26–27 May.

62 Buti, *A Matter of Conscience*, 331.

63 Buti, *A Matter of Conscience*, 332.

64 Buti, *A Matter of Conscience*, 333. *Sydney Morning Herald*, 20 May 1997.

65 Buti, *A Matter of Conscience*, 334.

66 Buti, *A Matter of Conscience*, 334–445.

67 Buti, *A Matter of Conscience*, 335–336.

The Prime Minister was jeered and heckled as he defended his 10-point plan on native title. He refused to make, or commit the government to making, an official apology, or to providing compensation.

Many turned their backs on him. The Prime Minister did make a *personal* apology for past treatment of Aborigines, but said that Australians should not engage in national guilt and shaming, 'rather we [Australians] should acknowledge past injustices and focus our energies on addressing the root causes of the current and future disadvantage among our Indigenous people.'[68]

As the report was now tabled, Ron could speak about it. In an ABC radio interview on the first day of the conference, he said that he and those involved in the inquiry

> would continue to 'fight' for justice for the 'stolen generations', irrespective of the Commonwealth's response. He also fervently defended the claim of genocide. He maintained that the removal process came within the definition of genocide in the UN Genocide Convention. He reiterated his determination to fight for the recognition of the plight of the 'stolen generations', saying: 'Governments come and go', and '[we] are on a long haul perhaps but we are heading for reconciliation'.[69]

Officially launching the report on the second day of the conference, Ron said it was no ordinary report. He was wearing a black sweater, emblazoned with Aboriginal art depictions and the words 'Walking Together'. He said the inquiry was a 'life-changing experience' and presented him 'with the greatest discipline' of his career:

> I had to learn to listen. Not just with my legally trained mind, nor my Presidential demeanour. But as a human being stripped bare of preconceptions and judgements, and available to be moved and changed.[70]

'Listening', he said, 'is the key to understanding. Understanding is the key to acknowledgement. And acknowledgment is the key to reparation.'[71]

On return to Canberra after the opening session of the conference, the Leader of the Opposition, the Hon Kim Beazley MP, suggested that the House of Representatives observer a minute's silence as a mark of respect to Aborigines who had suffered injustice. The Prime Minister said it would be churlish and insensitive to oppose the motion. All but one, the Western Australian Liberal member for Canning, Don Randall, rose to observe the silence.[72]

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68 Buti, *A Matter of Conscience*, 336.
69 Buti, *A Matter of Conscience*, 337.
70 Buti, *A Matter of Conscience*, 339.
71 Buti, *A Matter of Conscience*, 339.
72 Buti, *A Matter of Conscience*, 339.

Tony Buti wrote how the attacks on Ron and his role in the inquiry began to mount, and that the debate over the report 'raged across the land among politicians, columnists, in intellectual magazines like Quadrant, and at the dinner table'.[73]

What Ron was doing was using international law principles in the domestic context—his brief under his statutory mandate. The 'genocide' finding was a technical one in that context, and it was not accompanied by recommendations of specific actions against anyone or any body.

The inquiry also followed the 'van Boven reparation principles'—Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law,[74] with a focus on civil compensation, symbolic measures and guarantee of non-repetition of human rights abuses.[75]

To accusations that he followed a 'politically correct' line, Ron said:

> In a democracy, the majority can look after themselves. It's the people who are marginalised who need help. Political correctness is invoked as a term of abuse for those who have sought to bring marginalised people into the framework of a unified nation. I am happy to be seen as politically correct if that means being sensitive to the problems of the disadvantaged and working to overcome them.[76]

Despite the criticisms, there was a sympathetic reception by most of the media, the academy and many Australians.[77]

But the messenger was shot on other levels.

The Commission's Annual Report for 1997–1998 is most telling in this regard, reporting that budget cuts, taken over a three year forward period, represented a reduction of 40% of the budget of the Commission.[78] This was just after Ron had delivered the *Bringing Them Home* report.

In considering the criticism that Ron received in the wake of the *Bringing Them Home* report, I was struck by reflections of the Hon Robert French AC in his own Sir Ronald Wilson lecture of 2017. Its title was 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial independence'. It framed what I am calling as 'shooting the messenger' as the 'populist' response to judicial decisions.

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73 Buti, *A Matter of Conscience*, 341, 342.

74 See, Theo van Boven, The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', United Nations Audiovisual Library of International Law. https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf.

75 Buti, *A Matter of Conscience*, 343.

76 Tony Stephens, 'A Leader of Conscience' *Sydney Morning Herald*, 20 July 2005. In 1996 Ron expounded on this idea as part of, 'Why Human Rights Matter for Everyone' (1996) 3(3) *Murdoch Electronic Journal of Law* [12].

77 Buti, *A Matter of Conscience*, 343.

78 Human Rights and Equal Opportunity Commission, *Annual Report 1997–1998*, 12–13.

One aspect of French's speech concerned the importance of independent judiciaries and the dangers of attacking judicial officers for their judgments.

> While politicians, frustrated by judicial decisions, will often blame the law in question and seek legislative reform, the populist response to decisions hindering their political agenda is to blame the courts themselves.[79]
>
> ...
>
> Like all human institutions [the Courts in Australia] have weaknesses, they make mistakes and they may be criticised for their decisions and processes. However, criticism is one thing. Populist abuse is another.[80]

French noted the importance of judicial review of executive action in the responsibilities of Australian courts, at Federal and State levels. To illustrate his argument about the dangers of populism, French cited an example of an attack on US Federal Judge, Judge Robart, by then US President Donald Trump. Robart had issued a temporary restraining order against the implementation of the President's first Immigration Banning Order. It was a regular exercise of judicial review of executive action. But Trump tweeted, 'The opinion of this so-called judge, which essentially takes law enforcement away from our country is ridiculous and will be overruled'.

French found this deeply troubling, 'because it was expressed as a denigration of the judge and his judicial authority, carrying the implication that his decision was somehow undemocratic'.[81] He also added that,

> That kind of denigration from a political leader, whether in the United States or Australia, will not deter any judge or court worthy of the name from carrying out its function. Nevertheless, it can be seen as calculated to undermine public respect for the rule of law by calling into question the legitimacy of the institutions that supports it. In that sense, it undermines respect for a fundamental part of our societal infrastructure.[82]

French argued that 'the most effective protection against the pernicious effects of populist rhetoric is the work of the courts themselves, expressing in that work their independence, impartiality, competence and efficiency and affirming in every decision they make, the rule of law'.[83]

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79 Robert French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence', 2017 Sir Ronald Wilson Lecture (1 August 2017) 5.

80 Robert French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence', 2017 Sir Ronald Wilson Lecture (1 August 2017) 6.

81 Robert French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence', 2017 Sir Ronald Wilson Lecture (1 August 2017) 7.

82 Robert French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence', 2017 Sir Ronald Wilson Lecture (1 August 2017) 7.

83 French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence', 8.

The courts, he concluded, are 'indispensable to the rule of law in our society'.[84]

> There will always be debates about what the courts do, whether they are doing it well and whether they have kept to their proper constitutional function. Informed debate about such matters is a sign of a healthy democracy. That health is not enhanced by the use of populist rhetoric. The courts and our democracy are too important for that.[85]

There are deep resonances in French's speech, about the importance of independence and the courts, with the role of the Australian Human Rights Commission as an independent agency.

Having strong, independent, national human rights institutions is an expression of the robustness of the commitments of governments across the globe in signing and ratifying international conventions and treaties.[86]

Australia was a founding signatory to each of the major human rights instruments, as well as to the Charter of the United Nations itself. Overall, we have signed up to seven major treaties and a number of associated protocols.[87]

I note, in this respect, that if you look at the treaties Australia has committed to and their ratification, it is an *equal* split of Coalition and Labor support. It is neither a 'Labor' nor a 'Coalition' project.

The commitment to respecting, protecting and fulfilling human rights, therefore *should* be above politics.

But governments have had a love-hate relationship with the Commission, despite the commitment to the world beyond our shores.

The language of 'human rights' and international law

The adoption of the *Universal Declaration of Human Rights* of 1948 was one of the first decisions of the UN,[88] and Australia's own 'Doc' Evatt was in the Chair as President of the

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84 French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence', 16.

85 French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence', 17.

86 There is a process of accreditation for NHRIs, reflecting the centrality of the idea of independence, and principles concerning appointment and tenure of Commissioners and adequate funding to be able to operate independently of government, and not be subject to financial control: Paris Principles: https://humanrights.gov.au/our-work/commission-general/principles-relating-status-national-institutions-paris-principles-human/

87 The International Covenant on Civil and Political Rights- external site (ICCPR); the International Covenant on Economic, Social and Cultural Rights- external site (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination- external site (CERD); the Convention on the Elimination of All Forms of Discrimination against Women- external site (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child- external site (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

88 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

General Assembly on that significant occasion. It was an aspirational document, without binding effect. It was a moment that was also embraced and marked across Australia. Michael Kirby remembers clearly the UDHR being given to every schoolchild in Australia, on that flimsy aerogramme paper that some of you may remember.

While the act of ratifying subsequent treaties is a government commitment to give effect to human rights in Australian law, policy and practice, little has been done to enact the rights and freedoms protected by these instruments into Australian law—despite the aspirations perhaps encouraged in the schoolchildren of Michael Kirby's young years.

This means that the rights and freedoms enshrined in these international human rights instruments are not *directly* enforceable in Australia—no matter how loudly protesters over the past year and a half may invoke them.

While Australia has not 'domesticated' these international commitments, we did get anti-discrimination laws. On this subject I should note that the Commission is at the final stages of a major project and will be releasing our discrimination law reform agenda in the near future.

But looking at rights and freedoms more generally, the central piece—direct implementation in a Human Rights Act—never happened, despite repeated and current pressure to do so.

When the Commission was put on a permanent footing in 1986, as HREOC, it was designed in tandem with an accompanying Australian Bill of Rights Act. The Bill was passed in the House of Representatives, but did not pass the Senate. More recently, the idea was the principal recommendation of the National Human Rights Conversation led by Fr Frank Brennan SJ, over a decade ago.[89] The past President of the Law Council of Australia, Pauline Wright, in her Press Club address in 2020, called for an Australian Bill of Rights, joining many voices to do so, amplifying the conversation, to do at the federal level what the ACT, Victoria and Queensland have done in relation to State and Territory decision making and accountability.

While every other country in the Commonwealth of Nations has moved forward by introducing comprehensive human rights protections in legislation—commonly referred to as a Charter of Rights or a Human Rights Act—Australia stands alone for not having introduced such protection, at least at the federal level. Fr Brennan framed his Sir Ronald Wilson lecture in 2003 around the absence of such legislation.[90]

From the perspective of the Commission's jurisdiction, it is still unfinished legal architecture. We are like a doughnut—with a hole in the middle.

The functions under the ICCPR and other treaties for Australia are there, but essentially invisible to the general public. Even without a formal enactment of a 'Human Rights Act', people can bring a complaint to the Commission on the basis of the ICCPR and other rights in

89 *National Human Rights Consultation* (Report, September 2009).

90 'The Law and Politics of Human Rights in an Isolated Country Without a Bill of Rights'.

the instruments scheduled to our Act.[91] But it is not judiciable, nor can there be enforceable remedies.

So, for example, we have a particular and growing set of complaints invoking the right to return to the country and for children to enter or leave Australia for the purpose of family reunification.[92] These are complaints that do not sit under the category of 'unlawful discrimination' in the four anti-discrimination laws, but in what we describe as our 'human rights' jurisdiction that links to the treaties.

Complaints under our Act have increased 500% with COVID-19—masks, travel caps, travel bans, family reunion, people with disability and COVID restrictions, and vaccinations. Our overall complaint caseload has also more than doubled over the past year.

The beauty of a Human Rights Act, and other measures that frontload rights-mindedness, is that they are expressed in the positive: affirming rights and freedoms—not just implying them—and giving a clear anchor for decision making. It frontloads human rights thinking.

This is the focus of the other major part of the current project that I am leading, Free and Equal: the national conversation on human rights, advancing the case for a Human Rights Act and other complementary reforms.

International not domestic framing

But until such time, a challenge that the Commission must continue to navigate is that our entire functions are framed through the lens of international law.

Section 11(1) of *Australian Human Rights Commission Act 1986* (Cth) includes, for example, powers to examine laws and proposed laws, in terms of being consistent/inconsistent with or contrary to any human right. 'Human rights' in this context are directly referable to the international treaties. We can also seek to intervene, with the leave of the court, in proceedings that involve human rights issues.

While French was speaking of criticism of courts, and judges, in their role within the Australian legal system, applying Australian laws, the challenge in the role of the Commission is our relationship with international law and the instruments of the United Nations.

For the complaints that reference the international treaties, a challenge is also that the respondent is principally the Commonwealth, because the 'acts or practices' that we can consider are those 'by or behalf of the Commonwealth or an authority of the Commonwealth', which at many times places us in an oppositional position to government.

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91 Most notably, however, these instruments do not include the ICESCR.

92 For individuals alone – Art 12 ICCPR; for family groups – Art 12,17 and 23 of ICCPR; and family groups with children, all of the above plus Arts 3, 8, and 10 of the CRC.

Moreover, the acts or practices may well be *lawful* under domestic law, but contrary to international human rights obligations. So the Commonwealth has a clear answer to the complaints in domestic law. But in international law, that is no defence.

A classic illustration concerns 'arbitrary detention'.

In *Al-Kateb v Godwin* [2004] HCA 37 there was a challenge to the legality of administrative detention by the Commonwealth under the provisions of the *Migration Act 1958 (*Cth). Although there is much discussion about the implications of the case, the essential principle is that virtually indefinite detention may be lawful under Australian law.

In the context of our international obligations, however, article 9 of the ICCPR provides that 'No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

Article 9 has been the subject of a large amount of Commission work, particularly—but not only—in the context of immigration detention.[93]

Since 1992, Australia has had a system of mandatory detention. Any non-citizen who is in Australia without a valid visa must be detained according to the Migration Act. These people may only be released from immigration detention if they are granted a visa, or removed from Australia.

In a continuing series of reports in relation to human rights complaints, the Commission has sought to point out that the approach to mandatory detention, and particularly closed detention, is approaching the problem in the wrong way.

The question appears *not* to be asked whether an individual poses a risk to the community and, if there are risks, can they be appropriately mitigated through conditions? The approach has been rather to consider whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual.

I should note that, however, that we have established constructive and regular forms of engagement with the Australian Border Force and with the Department of Home Affairs as part of seeking to address these broader policy issues, within the current policy settings of government.

We are still continuing that conversation.

But, when it comes to our function to consider human rights complaints, domestic law and international expectations are at loggerheads.

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93 A recent example is *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, a grouped report involving a number of complainants raising similar issues. Because the complaints pre-dated the 2017 amendments, the Attorney-General was obliged to table the report. Some of the text here is drawn from this report.

The Migration Act also purports to expressly exclude procedural fairness in the exercise of a statutory power, by providing, for example, that natural justice does not apply to a particular decisions. This was also a topic that Fr Brennan considered in his Ronald Wilson Lecture.[94] I note here, too, that in the ALRC report on *Traditional Rights and Freedoms in Commonwealth Laws*, the ALRC considered that the laws in relation to mandatory cancellation of visas on character grounds and the fast-track review process would benefit from further review to consider whether the exclusion of the duty to afford procedural fairness is proportionate, given the gravity of the consequences for those affected by the relevant decision.

No ordinary report—no ordinary man

Ron considered that the *Bringing Them Home* report was 'like no other report he has been involved in'. He was determined that it should not 'gather dust on the shelf', and argued that a positive response to the report by the political leadership of the country and the public was needed.[95]

Ron openly confessed that the hearing of the *Bringing Them Home* inquiry changed him. In a speech on 28 October 1997, presented in the Senate chamber of Old Parliament House some five months after the tabling of the report, Ron said:

> I came to this inquiry a couple of years ago as a man over the hill at 73 with about 50 years or more behind me as a hardboiled lawyer mixing it with all sorts of antagonists and people in the courts here and in England and yet this inquiry changed me. The reason it changed me is that it penetrated the heart, it got away from my mind … .[96]

The *Bringing Them Home* report included the voices of people who have experienced removal. Ron and his colleagues wanted the report to tell a story.[97] It is 'laden with stories and quotes from Aborigines about removal as children from their families; their loss of culture; the abuse they suffered in receiving homes and missions; and their ongoing pain and suffering'.[98]

Ron spoke of the 'patent display of courage' in the sharing of stories in the inquiry, coupled with 'the pain associated with their utterance', which convinced him and his fellow Commissioners that they were involved in 'an exercise of the heart'—as if the words 'were being literally wrenched out of the heart'. He said, 'I had never been exposed to such pain before'.[99]

Ron considered that it was scandalous for people to speak dismissively of the accounts of trauma, by saying it was 'ancient history'—the 'tears of the storytellers convinced him that they were reliving the pain': it was 'current suffering'.[100]

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94 'The Law and Politics of Human Rights in an Isolated Country Without a Bill of Rights'.
95 Buti, *A Matter of Conscience*, 328.
96 Buti, *A Matter of Conscience*, 345–346.
97 Buti, *A Matter of Conscience*, 325.
98 Buti, *A Matter of Conscience*, 325.
99 Buti, *A Matter of Conscience*, 313.
100 Buti, *A Matter of Conscience*, 346.

In delivering the Commission's Human Rights Day Oration for 2019, the Hon Peter McClellan AM QC, Royal Commissioner into institutional abuse against children, made observations which resonate with Ron's remarks about pain, recollection and truth. McClellan referred to the common use of the expression 'historical sexual assault', as somehow implying a lesser offence or an allegation less likely to be true.

> Neither proposition is correct. As our research indicated, children are most unlikely to report a sexual assault until they are well into their adult years, in many cases more than 20 and often more than 30 years after the offence. That does not mean that some greater degree of scepticism should infect the determination as to whether the complainant is telling the truth.[101]

Grief and loss were the predominant themes of the *Bringing Them Home* report.[102] The removal as children and the abuse the individuals experienced at the hands of the authorities or their delegates 'permanently scarred their lives'. Moreover, the 'harm continues in later generations, affecting their children and grandchildren'.[103]

Ron's remarks in his Mitchell Oration of 1991 were to become the reality of the report—

> to remember that behind every human rights problem there are some people hurting, people longing for a sense of dignity and self-respect, of having a sense of worth in themselves.[104]

The focus of *Bringing Them Home* was on healing and reconciliation—for the benefit of all Australians. But this could only happen, if 'the whole community listens with an open heart and mind to the stories of what has happened in the past'.[105]

In terms of the ongoing impact of the report, apologies have now been delivered by every Australian Parliament. Compensation schemes have been established in most Australian jurisdictions, either directly for members of the stolen generation, for the stolen wages of Aboriginal domestic workers, or for victims of institutional child sexual abuse.[106]

There is also now an accepted understanding, demonstrated in the language of the National Agreement on Closing the Gap,[107] that the actions of the past affect the health and other

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101 Peter McClellan, 'Human Rights Oration 2019', https://humanrights.gov.au/about/news/speeches/2019-human-rights-day-oration?_ga=2.197168751.1901015406.1627797078-1372152560.1519977228.

102 *Bringing Them Home*, 3.

103 *Bringing Them Home*, 3.

104 Wilson, 'Human Dignity for All: A Pie in the Sky?', 4–5.

105 *Bringing Them Home*, 2, 3.

106 On 5 August, the day after delivering this Lecture, the Prime Minister announced the new Closing the Gap implementation plan would include a $378 million new redress scheme for Stolen Generations survivors. A $75,000 payment will be made to Stolen Generation survivors from the Northern Territory, ACT and Jervis Bay in recognition of the harm of their forced removal. Minister for Indigenous Australians Ken Wyatt said it is an important part of intergenerational healing. Other measures include $254 million to upgrade health clinics and $160 million for improving childcare and maternal services. PM to unveil $1 billion Closing the Gap Implementation plan (news.com.au)

107 https://www.closingthegap.gov.au/national-agreement.

outcomes of the present. The truth of what was reported in *Bringing them Home* is now accepted and taught across our schools nationally.

In 2000, over half a million people are estimated to have joined People's Walks for Reconciliation in cities and towns across Australia.

In addition to raising the awareness of the Australian public, the *Bringing Them Home* inquiry played an important role in raising the profile of the Commission among Aboriginal and Torres Strait Islander communities. Through their participation in the Inquiry, people learned about the Commission and its work. And through the ongoing dedicated and hard work of subsequent Social Justice Commissioners, the Commission has remained respected in Indigenous communities. In December 2020, the current Social Justice Commissioner, June Oscar AO, delivered her report, *Wiyi Yani U Thangani: Women's Voices*, is a singular example of that engagement.

For Ron Wilson, his experience as President of HREOC was 'the richest experience' of his life.

> To have been able to have a retirement in which I have continued to be an advocate—I loved advocacy. That is why I became a lawyer. That is why I enjoyed my legal life. But now, in retirement, to have spent seven years as an advocate for the disadvantaged is the most privileged experience that I can imagine.[108]

Robert Nicholson concluded his essay, from which his Ronald Wilson Lecture of 2005 formed part, by saying:

> Ron Wilson was a great Australian, a great Western Australian and a great lawyer. He led with humility and with talent. His memory is secure in Australian public and legal history and in the hearts of those who worked with him or observed him in his professional and public endeavours. It is fitting that after his life the vast reach of his ideals should be remembered both for his merit and its continuing inspiration.[109]

Nicholson said that the *Bringing Them Home* report still challenges our nation,[110] and as Buti remarked, 'The furore that followed the handing down of the report would forever change [Ron's] place in Australian history'.[111]

One former staff member also commented to me that men like Ron were 'men you would crawl over broken glass for'.[112]

Human rights, and the Australian Human Rights Commission, needs such champions.

Sir Ronald Wilson died on 15 July 2005. He was only 82.

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108 Buti, *A Matter of Conscience*, 325.
109 Nicholson, 515.
110 Nicholson, 'Sir Ronald Wilson', 514.
111 Buti, *A Matter of Conscience*, 330.
112 James Iliffe. Conversation with the author.

In his obituary for Ron, the Hon Fred Chaney AO, said Ron 'was always there when he was needed'. 'He used his great legal talent not to enrich himself but to serve and lift his country.'[113] He was, as Fr Frank Brennan remarked, 'Western Australia's gift to the nation'.[114]

113 Fred Chaney, 'Sir Ronald Wilson' (August 2005) *Brief* 19.

114 Brennan, 'The Law and Politics of Human Rights', 33.

Appendix 1: Terms of Reference

TERMS OF REFERENCE

I, MICHAEL LAVARCH, Attorney-General of Australia, HAVING REGARD TO the Australian Government's human rights, social justice and access and equity policies in pursuance of section 11(1)(e), (j), and (k) of the *Human Rights and Equal Opportunity Commission Act 1986*, HEREBY REVOKE THE REQUEST MADE ON 11 MAY 1995 AND NOW REQUEST the Human Rights and Equal Opportunity Commission to inquire into and report on the following matters:

To:

(a) trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies;

(b) examine the adequacy of and the need for any changes in current laws, practices and policies relating to services and procedures currently available to those Aboriginal and Torres Strait Islander peoples who were affected by the separation under compulsion, duress or undue influence of Aboriginal and Torres Strait Islander children from their families, including but not limited to current laws, practices and policies relating to access to individual and family records and to other forms of assistance towards locating and reunifying families;

(c) examine the principles relevant to determining the justification for compensation for persons or communities affected by such separations;

(d) examine current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children and advise on any changes required taking into account the principle of self-determination by Aboriginal and Torres Strait Islander peoples.

IN PERFORMING its functions in relation to the reference, the Commission is to consult widely among the Australian community, in particular with Aboriginal and Torres Strait Islander communities, with relevant non-government organisations and with relevant Federal, State and Territory authorities and if appropriate may consider and report on the relevant laws, practices and policies of any other country.

THE COMMISSION IS REQUIRED to report no later than December 1996.

Dated 2 August 1995

MICHAEL LAVARCH

Appendix 2: Timelines

The Bringing Them Home Report

Date	Event
May 1995	The then Attorney-General, the Hon Michael Lavarch MP, under the Labor Government of the Hon Paul Keating MP, referred to the Commission an inquiry into the forcible removal of Aboriginal and Torres Strait Islander children from their families; The Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families – see pages 8-9 for further details on the terms of reference and the format of the inquiry. The lead Commissioners were Sir Ronald Wilson and Mick Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner at the time. They were assisted by other HREOC Commissioners and by the Queensland Discrimination Commissioner. In each region that the Commission visited, the Commission appointed an Indigenous woman as a Co-Commissioner.[115] The inquiry was initiated, as the report explained, 'in response to increasing concern among key Indigenous agencies and communities that the general public's ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and the provision of services'.[116]
April 1997	The Bringing Them Home Report was completed – see pages 9-12 for further details on the recommendations that came out of the Report (Key words: forced removal, racial discrimination, genocide).
May 1997	The Bringing Them Home Report tabled in Federal Parliament – see pages 13-14 for further details (Note: There had been a change of Federal Government). The Report included a recommendation that the Commonwealth legislate to implement the Genocide Convention with full domestic effect'.[117]

The Human Rights Commission's role in protecting human rights in Australia

Date	Event
1948	The adoption of the Universal Declaration of Human Rights of 1948 was one of the first decisions of the UN, and Australia's own 'Doc' Evatt was in the Chair as President of the General Assembly on that significant occasion. It was an aspirational document, without binding effect – see page 17 for further details.
1986	Human Rights and Equal Opportunity Commission (HREOC), now the Australian Human Rights Commission, established as an independent statutory organisation, established by an act of Federal Parliament to protect and promote human rights in Australia and internationally.

115 *Bringing Them Home*, 18. Appendix 12 of the Report, 21–72, lists them and other staff who worked on the Inquiry.

116 *Bringing Them Home*, 18. Buti outlines the pressure that led to the inquiry: *A Matter of Conscience*, ch 13.

117 *Bringing Them Home*, rec 10.

1986	Australian Bill of Rights Act passed in the House of Representatives, but did not pass the Senate.
1997	HREOC's budget reduced by 40% over a three year forward period - – see pages 15-16 for further details. This was just after the Bringing Them Home Report had been delivered.
2020	President of the Law Council of Australia, Pauline Wright, called for an Australian Bill of Rights, joining many voices to do so, amplifying the conversation, to do at the federal level, what the ACT, Victoria and Queensland have done in relation to State and Territory decision making and accountability – see page 18 for further details.
2020-21	Human Rights Complaints under the Human Rights Commission Act (1986) have increased 500% with COVID-19—masks, travel caps, travel bans, family reunion, people with disability and COVID restrictions, and vaccinations. The Commission's overall complaint caseload has also more than doubled with COVID-19.
2021	There is still no Human Rights Act in Australia at the federal level. From the perspective of the Human Rights Commission's jurisdiction, it is still unfinished legal architecture. We are like a doughnut—with a hole in the middle - see pages 18-19 for further details. While every other country in the Commonwealth of Nations has moved forward by introducing comprehensive human rights protections in legislation—commonly referred to as a Charter of Rights or a Human Rights Act—Australia stands alone for not having introduced such protection, at least at the federal level - see pages 18-19 for further details.

How commitments made through international treaties are translated into laws in Australia (domestic implementation) and the gaps that are left without domestic implementation

Date	**Event**
1948	Adoption of the *Universal Declaration of Human Rights.* It was an aspirational document, without binding effect.
1949	Australia ratified the *Convention on the Protection and Punishment of the Crime of Genocide* (Genocide Convention).
1986	Passage of the *Australian Human Rights Commission Act 1986* (Cth)
1991	In the Mitchell Oration, Ron's lecture title was framed as a question: 'Human Dignity for All: A Pie in the Sky?' Ron referred to the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*—which together form what is described as the 'International Bill of Human Rights'. He also listed the other human rights instruments then in place,[118]

[118] He referred to the *International Convention on the Elimination of All Forms of Racial* ***Discrimination***, the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of the Child*. He added the international standards for refugees, the Declaration on the Rights of Persons with

	and noted that a Declaration on the Rights of Indigenous Peoples was in the process of preparation. All of this, he said, was a 'respectable body of "law" designed to encourage members of the UN to fulfil the hopes of 1945',[119] when the founding document of the UN, the UN Charter, was signed.[120] To Ron, it was unacceptable for Australia to ratify international human rights instruments and then only *partially* enforce them. He considered that it was his obligation in his role as President of HREOC to advocate for human rights, particularly for the marginalised and disadvantaged sections of the community – see pages 7-8.[121]
2021	When it comes to the Australian Human Rights Commission's function to consider human rights complaints, domestic law and international expectations are at loggerheads. While the act of ratifying treaties is a government commitment to give effect to human rights in Australian law, policy and practice, little has been done to enact the rights and freedoms protected by these instruments into Australian law.

Australia does not generally agree to be bound[1] by a human rights treaty unless it is satisfied that its domestic laws comply with the terms of the treaty. Australia has agreed to be bound by the ICCPR and the ICESCR as well as other major human rights instruments, including:

- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Political Rights of Women
- International Convention on the Elimination of all forms of Racial Discrimination
- Convention on the Elimination of all forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Reduction of Statelessness
- Convention relating to the Status of Stateless Persons
- Convention Relating to the Status of Refugees
- Slavery Convention of 1926
- Supplementary Convention on Slavery
- Convention on the Rights of Persons with Disabilities

Disabilities, the Convention against torture, the Declaration on the elimination of religious intolerance and discrimination, Principles on the rights of mentally ill persons.

119 Ronald Wilson, 'Human Dignity for All: A Pie in the Sky?', The Mitchell Oration 1991, 3.

120 https://www.un.org/en/about-us/un-charter.

121 Buti, *A Matter of Conscience*, 293.

While Australia has agreed to be bound by these major international human rights treaties, they do not form part of Australia's domestic law unless the treaties have been specifically incorporated into Australian law through legislation.[2] Some provisions of a treaty may however already exist in national legislation. For instance, many of the provisions contained in the Convention on the Rights of People with Disabilities are mirrored in Australian law through the *Disability Discrimination Act 1992* (Cth).

This principle reflects the fact that agreeing to be bound by a treaty is the responsibility of the Executive in the exercise of its prerogative power, whereas law making is the responsibility of the parliament. Section 51(xxix) of the Australian Constitution, the 'external affairs' power, gives the Commonwealth Parliament the power to enact legislation that implements the terms of those international agreements to which Australia is a party.[3][122]

[122] Australian Human Rights Commission, Human Rights Explained Fact sheet 7:Australia and Human Rights Treaties (2021), https://humanrights.gov.au/our-work/education/human-rights-explained-fact-sheet-7australia-and-human-rights-treaties .