

# De Minimis

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## M68: Losing at the Courts, Winning in the Streets?

*Sarah Moorhead*

Last week, the #LetThemStay campaign arrived at Melbourne Law School. Staff and students assembled to hold banners depicting the campaign slogan, as members of many other organisations around Australia have done over the past few weeks.

For refugee advocates, popular movements like #LetThemStay are at once heartening and problematic. On the one hand, demonstrations of serious concern from the general public are enormously rewarding; on the other, there is always the fear that concentrating on finite battles — letting 267 asylum seekers stay in Australia — will distract and detract from the broader effort to end offshore processing entirely. *Anyone* subject to Australia's mandatory immigration detention is subjected to appalling and unjustified degradation, not just people returning after an arbitrarily granted reprieve.

This is a reasonable concern, and one common to many social justice causes. People can only care so much. Depicting little asylum seeker kids running about in Aussie school uniforms may effectively tap into most people's empathy. It's another matter to extend that compassion to less obviously sympathetic targets, such as the 929 single men Manus Island is slowly breaking. If a solution to the immediate problem is found, will the doctors, teachers, lecturers who waved banners and tweeted vociferously lose interest? If they do, without anything having really changed, the overall movement may founder.

However, the counterargument is at least equally compelling: what alternatives are there?

The #LetThemStay campaign arose in response to the High Court's decision in *M68/2015*. With this decision, a majority of the High Court affirmed the legality of the offshore processing regime set up via a series

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## Dreaming With a Disability

*Alex Holland*

Growing up I never felt disabled.

I was born with cerebral palsy and when I was younger, I used to walk a lot more and run around with the other kids at primary school. My friends used to give me 'head starts' in races, I had certain 'immunity spots' in monkey-bar tiggly and if I fell over, someone would offer me a hand up and we'd keep playing.

I wasn't 'disabled'.

I never connected with the disabled community. Coming from a small country town in Victoria, there weren't many opportunities other than sport to find people with similar experiences as myself. And if you have witnessed my hand-eye coordination, you would understand why sport wasn't really an option for me.

I didn't belong to the disabled community.

In fact, in my dreams — I am never disabled. Which is quite astonishing considering I've been disabled since birth and I've never actually experienced walking 'normally', yet in my dreams I run, jump and nothing holds me back.

But I am disabled.

The first time I really accepted this was when I met Emily Rose Yates. My kindred spirit. My best friend. My partner in crime.

Emily came on exchange from England and we met at St Mary's College. She had the same disability as me, but unlike me, had pink hair, a body full of tattoos and an attitude towards disability I had never

considered — uniqueness.

Befriending Emily changed my life. I realised there are people in the world like me, with similar experiences as me and who could identify with me. I was not alone. Instead of shunning the disabled community, I should be embracing it.

And now I am. But with a catch — I'm defying disability. Because even to this day, while I am aware I have a disability and identify as a part of the disabled community, I do things that neutralise the stigma. I travel to foreign countries and get astounded looks from airport staff when I tell them I'm 'lap-packing' by myself around Europe. I get odd looks from bouncers when I stand up and start climbing the stairs to a club when I'm informed all the alcohol is served upstairs. And I'm told I'm incredible when I tell people I'm studying law.

I don't deserve recognition for living my life — I'm doing what any 'normal' person would do. And in that respect I am defying disability because so many 'normal' people have this ridiculous misconception that disability stops you from living.

It's time we changed the attitude towards disability. I can do anything I put my mind to. I probably won't attempt climbing the Sydney Harbour Bridge anytime soon but if I was given the chance — I'd bloody give it a crack!

Being involved in the Disability Human Rights Clinic (DHRC) at Melbourne Law school last year made me realise something incredibly sad about myself — I am my own

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## M68 continued

of agreements between the Australian government and those of Nauru and Papua New Guinea.

Seemingly flying in the face of a key principle we learn at law school, the Court took a distinctly form-over-substance approach, holding — in brief — that the detention was not actually undertaken by the Australian government, and that the arrangements facilitating the detention were valid exercises of the government's power under section 61 of the Constitution. Not only has the decision confirmed the legal right of the government to transfer those 267 asylum seekers out of Australia, it has severely compromised future legal challenges to offshore processing involving detention.

This was a disappointing decision; conservative at best, cowardly at worst. Assuming that it is nonetheless legally sound (though this has been questioned by MLS' own experts among others), the decision illustrates the limitations of relying on the legal process to combat government policies. The power of the courts to interfere in acts of government and Parliament will always be constrained to policing the boundaries of constitutionally valid law. With litigation contingent on judicial interpretation, and the government constantly finding new ways to

expand its reach, those boundaries are always uncertain, and so are the prospects of success for those seeking to challenge the actions of elected politicians.

And if those politicians lie to their constituents? If they repeatedly make rules that flout international law, and have terrible consequences for the welfare of thousands of blameless people? Fear is a powerful political device, used by governments around the world to implement policies of exclusion and intolerance.

## 'demonstration of public disapproval strikes fear into politicians in a way that judicial challenges do not'

But in a democracy like Australia's, run by careerist politicians ever-conscious of the election cycle, it's a sword that can cut both ways: convince the politicians that their conduct will lose them their votes and their jobs, and ostensibly strongly-held personal convictions will fade quicker than you can say "Newspoll".

This is why popular campaigns like #LetThemStay are important; the literal demonstration of public disapproval strikes fear into politicians in a way that judicial

challenges do not. After all, if the government loses, it can just rewrite the law — in fact, M68 demonstrates that the government doesn't even wait for a loss before getting out the red pen: shortly after the challenge was initiated, the government rushed through a suite of retroactive laws aimed at distancing Australia from the offshore facilities.

Incremental change has its dangers. But provided advocates link the battles to the war — pointing out that we shouldn't send 267 asylum seekers back because no one should be detained like Australia detains people in the first place — it's the best way to end to offshore processing. Confronting the limitations of the judicial process as a means to end immoral and illegal practices is frustrating, especially for law students hoping to use their degrees in advocacy. But in a populist political environment, public engagement is the way to progress.

Australia's democratic structure limits the powers of the courts, ostensibly to enshrine the power of the people. Tapping into that power can bring about legitimate and lasting change to Australia's treatment of refugees and people seeking asylum in a way that appealing to the courts evidently cannot.

*Sarah Moorhead is a third-year JD student*

## Dreaming with a disability continued

worst advocate. Growing up with a disability, you learn to accept that the world was not built for you. You grow up seeing doctors, having operations and trying to achieve 'normalcy'. You are burdened by the medical model of disability, the idea that disability is a 'problem', an 'affliction', an 'impairment' that belongs to the individual and needs to be cured. You cannot access society in the same way as others and this is your individual issue.

What made me realise that I had become complacent when it comes to disability issues was an experience I had in early September last year. While working on accessibility to transport issues in my clinical project at university, I became enraged at the inaccessibility of the tram network in Melbourne. Despite living right near a raised platform tram stop down St Kilda Road where plenty of flat trams are meant to take route, some days I would sit there for 20 minutes or longer watching 8-9 inaccessible stair trams roll past. Putting my advocacy boots on, I wrote a letter of complaint, raising issues of discrimination and inequality.

But I never sent it anywhere.

It sits idly on my computer desktop. A document full of passionate prose that I felt uncomfortable doing anything with because my disability is my own individual issue — it is my disability that is the issue, not the trams.

My attitude needs to change. Learning about the medical model and the social



*Courtesy of Alex Holland*

model of disability has taught me to be more aware that I do need to start fighting — and not just for myself, for those who are like me and can't or won't speak up. I was really inspired by the last class of the DHRC when thinking of the ways in which I will be a rebellious lawyer. And I think the main way I will be a rebellious lawyer in the future is by challenging the perceived stigma surrounding disability and advocating more strongly for the rights of people with disabilities — including advocating for myself. I don't need to change, society does.

My main aim in writing this blog is to spread awareness of the types of issues

experienced by the disabled community, to give a voice to those often ignored and show the world that having a disability doesn't make you disabled — it just gives you a different perspective and a different way of doing things.

I hope you enjoy the blog.

Peace!

*Alex Holland is in her fourth year of the JD.*

*"Dreaming with a Disability..." was originally published on her blog on the 28th of January, 2016. Find her blog at <https://defyingdisability.wordpress.com/>*

# A Really Weird Show | A Month in Kununurra, WA



David Allinson

For the past four weeks I have been doing a legal internship as part of the Aurora Internship Program for the Yawoorroong Miriwoong Gajirrawoong Yirgeb Noong Dawang Aboriginal Corporation (MG Corporation) in Kununurra, Western Australia. Kununurra is the heartland of the East Kimberley region. It is surrounded by landscapes formed into impossible shapes and sedimentary compositions by the pressure of ancient tectonic forces. The earth is the deep red of postcard fame, but the flora is surprisingly lush in the wet season. Boab trees, icons of the Kimberley, curve at the hip in a strangely feminine way. Their branches, stretching like hands, wave cheekily from among the bushes. Each boab's greeting is unique, and they have been saying hello and goodbye to human passers-by for centuries: some are over 1500 years old. They are among the most ancient living beings on Earth.

Sitting atop the nearby Kelly's Knob at sunset is a front-row seat to Edmund Burke's sublime: on my second evening, from that vantage point, I watched a storm roll in – an unstoppable wall of water – raking the town from the earth to the sky. As the fat, tropical raindrops reflected the setting sun it turned them a light amber, as though it was raining gold. And you can smell the earth and the heat in everything you do. Kununurra is profoundly beautiful.

Like all beautiful things in nature, however, Kununurra is also dangerous. On a bush walk I followed a natural spring into a



cave. Above my head flew dozens of tiny cave bats. The muffled sound of their wings was punctuated only by the occasional punch of air as they were snapped up by (what I quickly realised were) *snakes dangling from the ceiling*. I had interrupted lunch... I didn't stick around for afternoon tea.

The biological cornucopia of fauna that can kill a person in the East Kimberley is just accepted as part of daily life. Along the banks of Bindoola Creek, near a ranch I visited, lives Cedric. Cedric is a 6m salt-water crocodile (that's the person-eating variety).

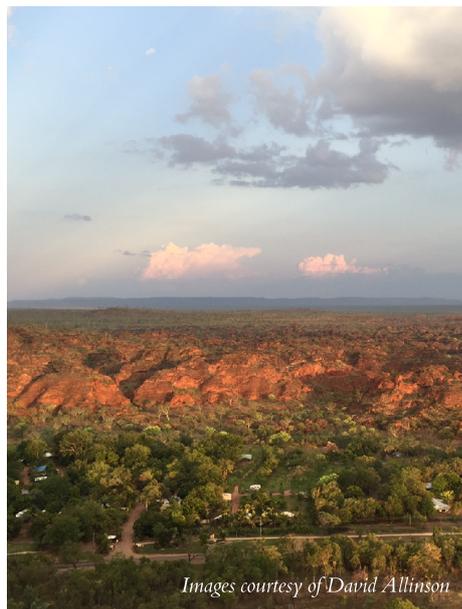
You can't let things like Cedric stop you from getting on with your life, however, and on the weekends the locals apply this logic by going camping or cooling off in the Ord River. There is a deeply romantic aspect of living in a frontier town, when the anxiety and tension of living a safe, comfortable suburban lifestyle evaporates. You embrace the heat. You embrace the latent danger. You embrace the alarm going off at 4:30am. You grit your teeth, or daily life becomes impossible.

The nearby Lake Argyle is visible from space. If you look for it on a weather report, it's the dark blob at the top-left corner of Australia, near the border between WA and the Northern Territory. To reiterate an important theme so far: 35,000 crocodiles call it home. A local community leader also told me he has seen catfish up to 3 metres in length (though, I am sorry Ben, that catfish might be as long as the tale you told me). Stories form a huge part of life here. Social gossip spreads fast. Really fast. And the dreaming stories are a privilege to listen to. In contrast against those ancient stories, Kununurra is a young town and the stories of its birth pangs are still being written. An important part of that narrative begins with the birth of Lake Argyle. It is a man-made structure: a dam.

The construction of the Ord River Dam, and the creation of Lake Argyle, were completed in 1971. The Miriwoong Gajirrawoong people that lived in the basin the dam now occupies were never consulted. The Commonwealth didn't give them so much as a 'hello, sorry your homes will be 63m under water a few weeks from now'. Lake Argyle is now home to those 35,000 crocodiles instead. The memory of the flood that came and never stopped is only one generation old. There are still people alive who remember the water lapping around their feet.

The native title cases brought by Ben Ward and others in *Ward v NT* and *Ward v WA* were successful. Miriwoong Gajirrawoong people were given native title rights over most of their traditional lands surrounding Kununurra. The establishment of Aboriginal corporations under the Ord Final Agreement, between the state of WA and Miriwoong Gajirrawoong people, set out the terms under which the land could be

developed. Government funding was allocated to support and strengthen the communities there. And that, in a way, is why I was in Kununurra in the first place. I was sent as part of the Aurora Internship Program as a legal intern with MG Corporation. The Program is an initiative that places students and graduates of anthropology, social science or law in organisations working to support the broader Indigenous sector that need assistance, and can support the experience of an intern.



Images courtesy of David Allinson

Coming from a philosophy, politics, and government background, I'm sensitive to the pervasive political aspect of everything I do. There are no secrets there. Gossip travels *fast*. Inter-family interests are so complicated from my perspective that it makes the patrician feuds of ancient Rome look like an episode of *Neighbours*. Meetings can be dramatic. This additional complication made the work I was doing more challenging and engaging, knowing that something was always at stake in the work I was doing. There was no small stuff.

The direct relationship between MG Corporation's work and the community relates to what I perceive as one of the benefits of working in a small organisation. Each individual bears a lot of responsibility. In my first week I jokingly described the Senior Legal Counsel as a one-woman legal army. Time revealed how correct that initial impression was. To be part of that has been an incredible learning opportunity, and for that reason (almost alone) I highly recommend it to any law student or graduate seeking a challenging and rewarding experience. For example, I expected to be doing at least a little bit of photocopying. Not so. Almost everything I did involved complex legal reasoning, and a deeply strategic element to accommodate the political environment of the community.

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## A Really Weird Show Continued

One of the most important aspects of the surrounding political environment is the need for consultation. Consultation is done notoriously badly with Indigenous communities. See, for example, the creation of Lake Argyle. Aboriginal organisations aren't given the time (even if they do have the legal expertise) to effectively and efficiently engage in legal processes that affect their interests. Consultation in Indigenous communities is also notoriously difficult. It is very important to get it right, however, both at the social level and one-on-one. I feel very strongly about wanting to do consultation right. And to do it 'right', consultation needs to meaningfully support the self-determination of those communities. One of the problems from my perspective as an ex-government policy worker in this area is that consultation is often approached as a process of rubber-stamping decisions that have already been made by organisations. That doesn't support the self-determination of those communities at all. That process may as well not even occur. Supporting self-determining communities is the only conceivable reason why such consultation would occur in the first place.

As Janet Hunt points out in her paper, 'Engaging with Indigenous Australia', consultation is (at its core) a relationship of trust, respect and honesty. Good consultation, I think, involves little talking. It involves a lot of listening. In that spirit, I feel the need to be very, very concise. Not simplistic – just concise. And to not hesitate in responding. Sometimes to hesitate comes across as being duplicitous, because it might give the impression I'm being sneaky by thinking up an answer, instead of giving the one I know is right. It seems important, too, to not advertise the fact that I think I'm acting in their best interests exclusively. In most of the communities I've visited, the Indigenous people are promised the world by white people who come and pretend to listen and make all the right noises and then nothing changes. In fact, most times, things continue to get worse... there just happens to be a new mine next door and a few members of the community get very rich very quickly. That might sound cynical, but look at the statistics. Things *aren't* getting any better. And every white person who has ever said 'I'm here for you' has tended to *not* in fact be acting in the best interests of the traditional owners exclusively. As Janet Hunt's work also points out, that manipulation and abuse leaves deep emotional and psychological wounds on the collective psyche of Aboriginal communities. And it doesn't do settler society any favours either.

*This article continues in the next edition of De Minimis.*

*David Allinson is a third-year JD student*

# Clerkship Diaries



Cartoon courtesy of third-year JD student Harley Ng

## Razor's Edge

*Ockham's razor dictates that in selecting the solution to a problem, the simplest such solution ought to be preferred. Now, there's a razor you could shave your proverbials with. It's something I like to think I wield well in the quest to vanquish my own little frissons.*

So, positioned snugly in the smug sense of security offered by one of the firm's 'presentations' (~~an initiating ritual indoctrinating one as to the corporate beast's views~~ a chance to come to know the culture and activities of the firm), I felt ready to bring the sharpened edge of old Ockham to bear. Diary, I was mistaken!

The context, diary, was thus: a charming woman responsible for the firm's efforts in regards to sustainable practices was rolled out to give us the four hundred and eleven on their smorgasbord of sustainable initiatives. Faces long with the fatigue and vertigo associated with tall, phallic office buildings suddenly alighted from the tram of forlornment, stepping out onto a platform of vigour and zest. The room, I feel it is appropriate to say, was brimming with vim.

She began with that most delightful of rhetorical opening gambits — the open question to the floor. Thus it was: "What do you think our biggest contribution to climate change is?" Straightforward, *non?* The floor rose to the occasion, offering several laudable suggestions. "All of the paper you print?", rang one voice, hysterical in the pursuit of truth. "It simply must be the printer cartridges expended!" screamed another, even more bent on wisdom than the first. Yet another person suggested the

power used by the lights, though all present mentally agreed this was a stupid suggestion. Several slight shakes of the head and a well-timed smirk by the presenter revealed the incorrectness of all of the above. It was at this exact moment that an idea issued forth from my upstairs thinking box.

I knew I had the correct answer. It just had to be right! I had kept Ockham at the forefront; swinging the razor with sophistication and skill. My answer was this:

*"The work you do facilitating the practices of clients that contribute significantly to the severe degradation of the natural world, at an increasingly alarming rate."*

If ever there was to be a study on the acoustics of jurisprudence, that was the moment for it. The room, silent. The crowd, hushed. The walls screamed in a fit of muted corporate fury.

The previously pallid presenter turned a risqué sort of scarlet — *quelle horreur!* It took more than several milliseconds for the mental sauce to flow to the far corners of the cerebral jukebox: *this was not the correct answer.* Grad job chances felt quickly evaporated. Ockham had failed me! An important artery or some such had been severed on the proverbials!

After an astonishingly exaggerated pause, the speaker spoke. The correct answer, diary, was this:

"All of the air miles our lawyers rack up"

*Have a funny clerkship story but still want a grad job? Send it to mlsdeminimis@gmail and we'll publish it anonymously*

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