The perils of positivism in the NT Royal Commission into Youth Detention: the case for a post-positivist frame for First Nations justice

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Abstract

The Royal Commission into the Detention and Protection of Children in the Northern Territory (2016-17) was set up by the Australian Government following a national television broadcast of guards inflicting tear gas, physical attacks, mechanical restraint chairs, hooding and indefinite segregation on First Nations children. Through an examination of the Royal Commission's establishment, proceedings and outcomes, this article identifies how First Nations people were not afforded justice. Legal positivism tainted public hearings through adversarial proceedings and the cross-examination of First Nations young people by a hostile NT Government. First Nations witnesses were examined in court houses and convention centres according to predetermined questions. A wide berth was given to guards and managers to justify violence in youth detention. Lines of inquiry were directed to reforming, rather than transforming, youth justice and state-centred approaches. In implementing the recommendations, the NT Government failed to listen to the calls of First Nations witnesses for self-determination and decarceration. Consequently, violence in youth detention has continued unabated since the Royal Commission. This study has international significance and broad lessons for inquiries directed to First Nations justice. It demonstrates how positivist frameworks undermine truth-telling processes and fail to promote structural change.

Torture in Detention and a Royal Commission

In July 2016, the *Four Corners* program 'Australia's Shame'[2] exposed horrific images of Aboriginal children at Don Dale Youth detention Centre in Darwin, Northern Territory (NT) being tear gassed, randomly attacked by guards, locked down in segregation units indefinitely, and hooded on mechanical restraint chairs – images akin to those of Abu Ghraib and Guantánamo Bay torture chambers. Evidence would later emerge of children, including girls, forcibly strip searched with knives by several male guards, children being watched in showers,

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[2] See Meldrum-Hanna (2016)

sexually degraded and hogtied. On the program, the Aboriginal children affected by these acts of cruel, inhuman and degrading treatment, amounting to torture,[3] expressed their sense of abandonment by a system that was supposed to be responsible for them.

The public outcry was instantaneous. Calls for justice came from families, human rights organisations, academics and public rallies. Among the demands were criminal investigations and charges against guards, the release of Aboriginal children from youth detention centres and the closure of detention centres.[4] The immediate response of the Australian Federal Government was to unilaterally, and without consultation, launch a Royal Commission into the Detention and Protection of Children in the NT (the Royal Commission),[5] which put on hold urgent government action to remove children from detention and improve facilities.[6]

These Federal Government originating processes set the stage for the Royal Commission's institutional agenda, adversarial proceedings and constrained outcomes. This article contends that legal and criminological positivism were invoked by the Royal Commission (2016-17). Positivism is a process of validating truths through facts generated by institutions. It confirms these facts through a narrow set of questions that neglects history and structural/power relationships. The Royal Commission enacted court-like proceedings and privileged the expert evidence of institutional actors while downplaying the testimony of Aboriginal survivors and their communities. This prohibited truth telling, Aboriginal healing and reparations and failed to eventuate in prosecutions for perpetrators or substantive changes to youth detention. Ultimately, the Royal Commission did not challenge the structures that enabled the torture of Aboriginal children. The NT Government's approach to implementation, thus, was to retain the institutions that inflicted harm and, contrary to the commission's recommendations, expand powers of youth detention officers to use force, restraints and segregation. The lack of justice following the Royal Commission aggrieved Aboriginal survivors who participated in the inquiry in the hope it would make a difference.[7]

[3] McSherry (2016)

[4] Sorensen (2016)

[5] Karp (2016); and Fernandez (2016)

[6] Dunlevie (2016)

[7] Bardon (2018)

The first section of this article considers the positivist stance of the Royal Commission's terms of reference and proceedings. Its hallmarks of *legal positivism* emanated from its narrow mandate, lines of inquiry and the parameters for adducing evidence received and selecting and examining witnesses. Public hearings were formal, legalistic and often adversarial. The NT Government acted as an adversary to the Aboriginal young people who were witnesses, scrutinising and challenging their evidence and statements in granular detail. It also displayed features of *positivist criminology*, which treats institutional facts and criminal justice apparatus as neutral. Where wrongs occur within them, they are capable of being fixed internally rather than through external sanction or transformation. Conversely, "offenders" are treated as deficit, to justify state interventions. Aboriginal people in the criminal justice system are perceived as deviant due to their over-representation, and thus need to be "fixed". Positivist criminology overlooks settler colonial dynamics that underpin the system and the ensuing institutional racism.[8] The Royal Commission did not interrogate the operation of systemic racism despite virtually all children in detention and all children who were harmed in custody belonging to an Aboriginal community. Instead, a substantial aspect of public hearings was dedicated to strategies for managing Aboriginal children's behavioural deficits.

The second and third sections discuss the limited findings of the Royal Commission and how their lack of recommendations to prosecute guards, decarcerate Aboriginal children, and/or accommodate Aboriginal self-determination reflects the limits of positivism. The fourth section outlines the government responses to the Royal Commission's recommendations, exhibiting a continuum in its punitive approach to Aboriginal children in detention. The final section discusses how the Royal Commission aligns with comparable inquiries in other settler colonial jurisdictions. Their positivist frameworks consistently limit their capacity for structural change and government accountability. This article argues for a post-positivist framework that enables First Nations bodies to oversee proceedings and the implementation of recommendations; privileges First Nations epistemologies in truth-telling; and has capacity to promote structural changes away from institutions and towards Aboriginal self-determination.

Royal Commission proceedings and positivist persuasions

Terms of reference

[8] See Anthony and Sherwood (2018)

The seeds of positivism in the Royal Commission originate in its terms of reference, directing the inquiry to:

- the failings of the NT's youth detention and child protection systems (the latter is not within the scope of this article, yet is also subject to systemic racism and is a pathway for Aboriginal children into youth justice and detention);
- the treatment of detained children and whether it breached laws or policies
- whether appropriate oversight procedures and safeguards were in place;
- what measures would prevent inappropriate treatment of children in detention.[9]

The terms of reference were formulated by the Federal Government in concert with the NT Government, and without consultation with Aboriginal survivors, their families or communities.[10] NT Aboriginal organisations were aghast that the NT Government, responsible for the 'barbaric practices', should have a role in developing or overseeing the Royal Commission.[11] The terms of reference did not address concerns raised by Aboriginal families and organisations, including why *Aboriginal* children are detained and tortured; the alternatives to detention; and consequences for officers who inflicted abuse.[12] Indeed, the terms of reference did not even refer to the harm in detention. Instead, they referred to the 'treatment' of detained children, which enabled competing institutional accounts to conceal the inhuman and degrading conditions.

The terms of reference ultimately had a race-neutral character that reflects a positivist tendency to regard institutions as impartial and free of systemic racism. However, Aboriginal children constitute 98% of the detention population on average,[13] despite comprising 12.8% of the

[9] Commonwealth of Australia (2016)

[10] Karp (2016); and Fernandez (2016); and Lane (2016)

[11] National Aboriginal Community Controlled Health Organisation (2016)

[12] Armstrong (2016)

[13] The proportion of the daily average detention population who are Aboriginal was 98% in 2018-19, up 2% from 2016-17. See Territory Families (2019) p21.

general NT youth population in the 10-19 year-old age category.[14] The inquiry was not directed to interrogate 'deep-seated social and political structures that contribute to the over-incarceration of Indigenous youth'.[15] There was also no inquiry into accountability measures for those responsible for harming children in terms of individuals, the NT Government, or the Federal Government that has enacted discriminatory policy in relation to NT Aboriginal communities since 2007 (see below).

Critical literature on commissions of inquiry identifies the role of terms of reference to deflect systemic issues and preclude transformative change. Salter in her study of inquiries in Canada asserts that they delineate 'very limited pragmatic policy goals'.[16] Postcolonial theorists Jean Comaroff and John Comaroff maintain in relation to South Africa's Truth and Reconciliation Commission that the limited investigative mandate meant it did not interrogate the politico-economic architecture of apartheid, its pervasive violence and its collaboration with corporate capital'.[17] Applying this lens to the Royal Commission, Hoole states that its terms of reference neglect 'fundamental questions going to the propriety of the youth detention system itself', and focus on reforms to constrain its radical potential.[18] In addition to terms of reference, the appointment of commissioners were foregrounded in top-down decisions – as discussed below.

Commissioner appointments

The original appointment of a Commissioner was former NT Supreme Court judge Brian Martin.[19] Sections of the Aboriginal community and broader public perceived the former judge as complicit, if not actively implicated, in the detention of young people, and that his appointment meant the Commission lacked integrity.[20] This perception forced the Federal government to replace the judge with Gangulu man and Aboriginal and Torres Strait Islander Human Rights Commissioner Mick Gooda and former Queensland Judge Margaret White.

[14] Australian Bureau of Statistics (2016)

[15] Anthony (2016)

[16] Salter (1989)

[17] Comaroff and Comaroff (2012), p146

[18] Hoole (2016a)

[19] Coggan (2016)

[20] Grattan (2016); and Farrell and Davidson (2016)

White's credentials, including representing the Queensland Government against Eddie Mabo's native title claim while at the Bar, made advocates for Aboriginal young people question her impartiality.[21] Ultimately Commissioner White managed the proceedings in a legalistic manner.

Legal positivism: Formal proceedings, adversarial traditions and curial methodologies

Procedures were formal and exhibited the trappings of a legal process. Public hearings were held in the Darwin Supreme Court, from which some of the children would have been sent to detention, and the Alice Springs Convention Centre. The NT Government were given a permanent place at the Bar Table alongside Counsel assisting the Royal Commission. This created an architecture of adversarialism. Counsel for the children were seated in the public gallery. Aboriginal families who were also pushed to the back commented that it was a circus of lawyers and legal procedure – debating the admission of evidence, vetting questions and allotting time to lawyers – while they felt completely left out.[22]

To match these court settings, Commissioner White conducted public hearings, which spanned 12 weeks between October 2016 to June 2017, in a court-like manner. This included instances when she attempted to apply the rules of evidence to protect abusive guards. This is indicated in one interaction, when Counsel for the North Australian Aboriginal Justice Agency, Peggy Dwyer, asked a guard 'Were you using steroids during the period that you worked at Don Dale?.' The Solicitor General of the NT, Sonia Brownhill, objected to this question. Commissioner White allowed the objection, stating, 'I need to warn the witness that he need not answer the question' because it might implicate him. Ms Dwyer intervened, 'Your Honour, with the greatest of respect I think the witness does have to answer the question. Section 7C of the *Royal Commissions Act* provides him with a protection as to information being used elsewhere.'[23] Commissioner White accepted that the guard was compelled to answer relevant questions. She additionally admitted that she previously erred in overruling a similar line of

[21] Gibson (2016)

[22] James (2016)

[23] Commonwealth of Australia (2017b), p. 1439.

questioning.[24] On the earlier occasion, she issued a warning that the guard need not to respond because, 'I would do it if it were in a court of law'.[25]

On another occasion, Commissioner White sought to shut down barrister John Lawrence SC, who was acting for a formerly detained child, on the basis that his questioning was indulging in 'theatre'. He denied this suggestion and conveyed that it was the manner in which the young person and his family instructed him to advocate.[26] These snapshots of the Royal Commission's proceedings demonstrate the imposed legal frameworks and constraints. They reflect, as Comaroff and Comaroff enunciate, how inquiries rely 'heavily on the language of jural facticity to give an imprimatur of disciplinary rigor', to ground truths and filter emotions.[27]

These interactions also signify the adversarial conduct of counsel for the NT Government against Aboriginal young people and in defence of the guards, managers and ministers. They had a wide berth to screen, interrogate and rebuke evidence and discredit young witnesses, including in aggressive cross-examination.[28] Meanwhile, lawyers for the young people were rushed through small windows of time to cross-examine witnesses and were supplied with copious government documents hours in advance of a witness appearing. Peter O'Brien, who was the lawyer for Dylan Voller – the young person at the centre of the *Four Corners* investigation and whose image restrained to a chair and hooded became the symbol of torture in youth detention – commented that lawyers for the young people were 'extremely limited in their ability to test the evidence', especially where it was adverse to the young person.[29] All evidence tendered by lawyers of formerly detained children was matched with a government

[24] Commonwealth of Australia (2017b), p. 1439.

[25] Commonwealth of Australia (2017b), p. 1413.

[26] Commonwealth of Australia (2017b) p. 1423.

[27] Comaroff and Comaroff (2012) p. 148.

[28] The NT Government's position resonated with its adversarial role it simultaneously adopted in seeking to defeat compensation claims by six Aboriginal young people in the NT Supreme Court for the violence and use of tear gas (CS gas) at Don Dale detention centre in 2014. In the first instance, this claim was unsuccessful on the grounds that the CS gas was lawful: *LO & Ors v Northern Territory of Australia* [2017] NTSC 22. This decision was overturned by the High Court of Australia in 2020: *Binsaris & Ors v Northern Territory* [2020] HCA 22.

[29] O'Brien (2017)

'responsive tender bundle' that was designed to discredit or contradict a young person's accounts and included the criminal records of the young people.[30] This coheres with Scraton's depiction of inquiries as the 'adversarial wolf in inquisitorial sheep's clothing'.[31]

Adversarial direct questioning discords with Aboriginal forms of information sharing and storytelling.[32] It is especially inappropriate for Aboriginal people who are enduring trauma from oppression and violence, as outlined by Jiman and Bundjalung woman Professor Judy Atkinson.[33] She writes about the importance of *dadirri* – meaning 'deep listening' in Ngan'gikurunggurr and Ngen'giwumirri NT languages[34] – for people who are suffering from grief: to accommodate their healing and for others to learn and take responsibility.[35] By contrast, the Royal Commission's quick succession of questions and cross-examination aggravated trauma. The practice of *dadirri* for young people especially requires a safe environment and a trust relationship.[36]

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (1988-91) demonstrated a sensitivity to deep listening through its relatively culturally safe and supportive hearings. They were held in places such as community halls and schools.[37] The RCIADIC recognised the 'negative connotations courts hold for Indigenous people', and the need to reduce formalities and cross-examination of Aboriginal witnesses.[38] Unlike the NT Royal Commission, which held all public hearings in Alice Springs or Darwin that could be hundreds of kilometres from the young person's home, RCIADIC sought to conduct hearings in each deceased's hometown to enhance family engagement.[39] Family and kin were granted leave to

[30] O'Brien (2017)

[31] Scraton (2016) p. 98.

[32] Weston (2001), p. 1032; Atkinson (2002); Corntassel et al (2009).

[33] Atkinson (2002).

[34] Atkinson (2013)

[35] Atkinson (2002), pp. 17, 96

[36] Doel-Mackaway (2016)

[37] Marchetti (2005), p. 115

[38] Commonwealth of Australia (1991a)

[39] Marchetti (2005), p. 115

appear in all RCIADIC public hearings,[40] which did not occur for any families of detained children in the Royal Commission. Its institutional hierarchy of witnesses alienated Aboriginal families (see below), despite their intimate knowledge of their children's experiences and needs and their own trauma and suffering.

Hierarchy of witnesses and institutional knowledges

The selection of witnesses reflects the truths examined and generated.[41] At the apex of the Royal Commission's hierarchy of witnesses were youth detention administrators and staff. Of the 214 witnesses in public hearings, the great majority worked within NT institutions.[42] They were given substantial time to clarify or justify their conduct. For instance, detention centre supervisor Trevor Hansen was given two days to refute evidence by six children that he abused them. He denied picking up children by their underpants and bra straps, but admitted to picking them up by the shorts, then removing their clothes and leg locking them, including young females. He explained these acts as a 'matter of their safety, your safety, and everybody's safety'.[43] He referred to the protection of children to legitimate his decision to segregate children for indefinite periods, referring to how he saved a child who attempted to hang himself.[44]

Legal positivism lends disproportionate gravity to a perpetrator's subjective accounts of their intentions.[45] Swain notes in her study of Australian inquiries into institutions charged with caring for children that individualised justice can blame victims as much as perpetrators.[46] This

[40] Commonwealth of Australia (1991a)

[41] See Ross (2003) p. 79.

[42] The Commission also received 480 witness statements from former government ministers, NT government officials, current and former managers and staff members of youth detention centres, case workers, foster carers, principals and teachers, lawyers, healthcare workers, Australian and overseas experts, vulnerable witnesses and relatives and family of vulnerable witnesses. They also contributed to the 400 public submissions. See Commonwealth of Australia (2017c)

[43] Hansen (2017a) p. 969.

[44] Hansen (2017b) p. 991.

[45] Comaroff and Comaroff (2012), p. 147.

[46] Swain (2014) p8

absolves governments and institutions of their responsibility.[47] It obfuscates systemic flaws and discriminatory policies. It also deflects institutional abuse where intention is not established, especially where the perpetrator claims to be acting in the child's 'own good' or 'best interests'. Gomeroi scholar Alison Whittaker explains how this trope undermines Aboriginal victims because it depicts state perpetrators as not only as 'blameless' but 'benevolent'.[48]

Next in the 'witness hierarchy' were outside 'experts', including detention administrators and experts, researchers and social workers, largely from south-east Australia and overseas. They spoke primarily to the possibilities for reforming youth detention and justice. For instance, a director of youth justice in the United Sates gave evidence on Missouri detention centres becoming 'more decent, humane, and home-like' by installing better beds, providing 'nice, pretty blankets' and painting walls. He referred to training guards becoming 'more like counsellors than like correctional officers' and providing children with certificates to reinforce positive behaviours.[49] These accounts lacked a place-based appreciation of the circumstances and needs of Aboriginal children in the NT. Blagg and Anthony describe how superimposing models from the Global North on Aboriginal cultures discounts Indigenous epistemologies:

> Strategies and solutions lifted from the growing international smorgasbord of 'world best practice', or, 'whatever-is-trending-in-the-USA works' literature … onto the Indigenous domain, may unwittingly perpetuate rather than reduce the problem. … [They nurture] a colonial mind-set, unable to rid itself of the belief that only Euro-north American knowledge is 'real' knowledge, and anything else is mere anecdote.[50]

Accounts of Aboriginal people comprised a small portion of evidence in public hearings. The relatively few Aboriginal witnesses received shorter periods of time in examination. Other than two young people, Aboriginal youth did not come forward to give evidence in public, for reasons discussed below, and families were not called to appear. This contrasts RCIADIC's heavy dependence on survivor testimony vis-à-vis other *experts*.[51] It reflected the Royal

[47] Swain (2014) p11

[48] Whittaker (2018)

[49] Schiraldi (2017) p. 5082.

[50] Blagg and Anthony (2019) p. 42.

[51] Swain (2014) p. 10.

Commission's focus on institutions rather than survivors, their Aboriginal families and communities. Furthermore, Aboriginal people were not able to defend criticisms levelled at their cultures. For instance, former Attorney General and Corrections Minister John Elferink returned to the witness stand in the final days of hearings to claim Aboriginal ceremonial practices harm children,[52] and his claims were picked up in the final report and Recommendation 3.2. Yet Aboriginal people were not able to respond to Elferink and their evidence of the value of culture and ceremonies was lost.[53] An Elder had stated that ceremonies help 'young people who get into trouble'[54] and Yolgnu people expressed their concern with their 'kids being taken to Don Dale' because 'they miss out on ceremony and funerals' that connect children to 'their family and ancestry'.[55]

Institutional accounts also drowned out Aboriginal people who spoke about the effective Aboriginal-run programs in communities to protect their children.[56] They highlighted the need for Aboriginal self-determination and funding for Aboriginal organisations.[57] They spoke to how the system had let down their children, especially as a result of the Federal Government's 'NT Intervention' policy that laid the foundations for state violence against Aboriginal children. This policy was intended to 'save Aboriginal children' from their communities. It was marked by the military's arrival in remote communities in 2007 and required the suspension of the *Racial Discrimination Act 1975* (Cth). It placed discriminatory controls on Aboriginal peoples' lands, welfare income and rights to fair criminal processes, and increased police powers in remote communities.[58] Alyawarre woman Pat Anderson provided evidence that the racist torture of Aboriginal children in Don Dale was a symptom of the racist NT

[52] Elferink (2017a) p. 5178.

[53] Fejo-King (2017) p. 4665; Jangala (2017) p. 4551; Dowardi (2017) p. 4577.

[54] Commonwealth of Australia (2017e) p. 108.

[55] Commonwealth of Australia (2017e) p. 107.

[56] See Anthony (2018a), pp. 67-8.

[57] See Behrendt (2017) p. 3996; Bamblett (2016) p.189; Anderson (2016) p.156; Wala Wala (2017) p. 4555.

[58] Since the NT Intervention in 2007 until 2016, the NT Aboriginal youth detention population almost doubled (from 25 to 49) and there emerged a female detention population. Northern Territory Department of Justice (2008) p. 7; and Department of the Attorney General and Justice (2017) p.8.

Intervention.[59] Rather than elevating these truths of systemic deficit, the focus of the Royal Commission was on Aboriginal children's deficit – as examined in the following section.

Positivist criminology and the Aboriginal Other[60]

The impact of the hierarchy of witnesses was that knowledges produced about Aboriginal children were tied to positivist criminological notions of Aboriginal risk and deviance.[61] Witnesses from institutions gave evidence that detention centres can play a role in fixing children's shortcomings through, for instance, screening and treatment of health issues; mental health programs; trauma-informed approaches; and educational supports. Failures of detention to improve children were attributed to operational matters, which could be cured with better management, staffing, policies, record keeping and oversight.[62] This line of inquiry led to a forensic analysis of procedures in government and detention centre documents. These positivist approaches deny Aboriginal epistemologies, which identify the strengths of Aboriginal children, the structural failures of institutions for Aboriginal wellbeing, and that solutions lie outside of detention – in family, culture and community.

The lines of questioning enabled perpetrators to give evidence about Aboriginal children's behaviours in detention to deny abuses of power. Detention centre manager Derek Tasker who had been prosecuted for acts of violence against Dylan Voller, although acquitted on grounds that they were 'reasonable and necessary',[63] referred to children's misbehaviour to condone violence, deprivation and segregation.[64] Detention Supervisor Trevor Hansen explained his presence in forcible strip searches of female children, and in manhandling and segregating children, as warranted because the children were being 'abusive and threatening'[65],

[59] Anderson (2016) p. 157

[60] "Other", a term that denotes the social construction of a people to objectify and inferiorise them: Said (1978).

[61] See Kitossa (2014).

[62] E.g. Middlebrook (2017) p. 2974.

[63] *Police v Tasker* [2014] NTMC 02, [72].

[64] Tasker (2017) pp. 1070, 1083, 1092.

[65] Hansen (2017a) p. 971.

disobedient[66], defiant[67] and 'troubled'.[68] Former Minister Elferink, who defended the gassing of Aboriginal children, described them as 'villains' and 'ratbags'.[69] Salter critically regards commissions as 'staging grounds'[70] for government participants 'to protect themselves' as if 'they were already facing a court of law'.[71]

Commissioner White gave oxygen to the standpoints of perpetrators and at times expressed empathy with detention staff for the understandable 'difficulties' in managing Aboriginal children.[72] She allowed Counsel for the NT Government to cross-examine Dylan Voller about the credibility of his statements and interrogate his own wrongdoing in order to find the 'truth' of the matter. As Commissioner White expounded, cross-examination would provide 'the context in which the Youth Justice Officers and the system and the school teachers were attempting to manage this young man'.[73] She dismissed concerns raised by Voller's lawyer that the NT Government's questions about his self-harm would trigger Voller's post-traumatic stress disorder:

> Well, Mr O'Brien, if I can say bluntly: I don't think [your] interventions are very helpful. The questions, in light of the evidence that's been provided by your client, are entitled to be tested.[74]

Commissioner White's position resonates with Ethan Blue's analysis of 'microsolidarities' of power between those conducting inquiries and state agents responsible for harms, 'microsolidarities' which preclude imputations of state responsibility.[75] Ultimately, cross-examination was a means to foreground justifications for the torture of Voller and to recast detention staff as the victims. Nonetheless it was Voller who best articulated the relevant truths:

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[66] Hansen (2017a) p. 959.

[67] Hansen (2017a) p. 955.

[68] Hansen (2017b) p. 991.

[69] Elferink (2017b) p. 3139.

[70] Salter (1989) p 173.

[71] Salter (1989) p 175.

[72] White (2017a) p. 2950; White (2017b) p. 3465.

[73] White (2017c) p. 2641.

[74] White (2017c) p. 2660.

[75] Blue (2017)

> The truth is – the truth is what it is. I was a young person, and I used to play up, but nothing justifies what happened to me and other young people inside the detention centre.[76]

The cross-examination, alongside the NT Government's alleged leaking to the mainstream media of damaging information about Voller,[77] deterred any other young person subsequently coming forward to give evidence in public, and some were deterred from appearing before closed hearings.[78] Where they did come forward, young people gave anonymous statements and appeared in closed hearings. The effect was to give the voices of perpetrators a much more prominent platform than those of the victims. The NT Government's strategy with cross-examination was not accidental. It is well-rehearsed across truth telling processes and trials for state crimes, including in South Africa, Rwanda and Yugoslavia. Martha Minow describes how cross-examination detracts from victim's stories because they cannot 'be heard without interruption or scepticism'.[79]

Aboriginal witnesses provided an antidote to the prevailing positivist criminological lens of children's deficit. Rather, they identified their strengths and potential. Aboriginal lawyers examined Aboriginal witnesses about their perspectives on what needs to change to enhance children's wellbeing. Aboriginal Community Engagement Officers[80] worked with communities to broker Aboriginal community input, including in 13 meetings in Aboriginal communities. Marius Paruntatameri, a Tiwi Island Elder who was part of the Don Dale visiting Elders programs, described detained children as:

> … special kids who can become good leaders regardless of what their situation is. They are good natured persons and can be respectful of culture. With guidance, they are our potential future leaders and are necessary for the survival of our culture.

[76] Voller (2017) p. 2681.

[77] See Cunningham (2017a) p. 5.

[78] Peter O'Brien (2017). The only other young person who appeared at a public hearing, prior to Voller, was Jamal Turner.

[79] Minow (1998) p. 58.

[80] Hoole (2016b) p. 251-2

For Aboriginal people in the NT, their children were not the problem but the solution for their communities, and culture was the solution for children. They needed to be supported and 'grown up' in Aboriginal families, communities and cultures. Andrew Dowardi from Maningrida stated that taking away children from community constitutes the loss of their soul, future, identity, culture, hunting skills and family relations.[81] Olga Havnen, CEO of Danila Dilba Aboriginal Health Service in the NT, said that successful programs for Aboriginal children need to be embedded in Aboriginal 'cultural authority and legitimacy'.[82]

Royal Commission findings

The findings of the Royal Commission were a product of its positivist methodology and epistemology that privileged institutional contributions and knowledges. The primary findings related to systemic failures of institutions – both the abuses and the lack of effective service provision. They did not identify harms flowing from the detention of Aboriginal children *per se*, including impacts on families and communities. Findings identified the need to reform detention centres and youth justice systems, rather than decarcerate Aboriginal children. None of the findings imputed responsibility towards individuals or the government, which Aboriginal families hoped for from the Royal Commission.

Overarching findings: failures of detention and deficits of children

The Royal Commission handed down its four-volume final report on 17 November 2017. It found 'systemic and shocking failures' in youth detention and child protection systems.[83] Its opening paragraph read:

> Children and young people have been subjected to regular, repeated and distressing mistreatment and the community has also failed to be protected. The systemic failures occurred over many years and were ignored at the highest levels.[84]

[81] Dowardi (2017) p. 4552.

[82] Commonwealth of Australia (2017d) p.10.

[83] Commonwealth of Australia (2017e) p. 9

[84] Commonwealth of Australia (2017e) p. 9

The Final Report found 'harsh, prison-like' conditions in the two youth detention centres in the NT: Don Dale and Alice Springs.[85] These old, decommissioned adult prisons[86] were 'oppressive', 'appalling' and 'dangerous'.[87] Within these centres, children experienced humiliating and degrading treatment, verbal abuse, excessive control and the deprivation of food, water and hygiene.[88] There was excessive use of restraints, spit hoods, strip searches (including with knives) and isolation for up to 23 hours per day.[89] Force was used that encompassed 'controlling the detainee's head and neck areas'; 'throwing or tackling'; 'applying body weight pressure' and 'applying force or pressure to a child's genital areas, colloquially known as the "wedgie"'.[90] The report quoted a child who described an attack by a guard:

> I was being slammed onto the concrete really hard and having four or five guards on top of me … there was a knee on the back of my neck. I felt like there was heaps of weight on me and I couldn't breathe. I started coughing and I said, 'Get off me, get off me, I can't breathe'.[91]

The Final Report not only highlighted the failure of institutions for mistreating and neglecting children, but also their failure to fix the *problems of children*. This deficit approach towards Aboriginal children and families permeates the final report and is noted in its Executive Summary:

> The systems have failed to address the challenges faced by children and young people in care and detention. Indeed, in some cases, they have exacerbated the problems the children and young people faced. The Commission was told about children born to families in crisis, struggling with addictions, mental health issues, domestic violence and the many challenges of poverty.[92]

Archive of oppressive practices and absence of liability

[85] Commonwealth of Australia (2017e) p. 12

[86] Commonwealth of Australia (2017a) p. 92

[87] Commonwealth of Australia (2017a) p. 80

[88] Commonwealth of Australia (2017a) p. 13.

[89] Commonwealth of Australia (2017e) p. 15

[90] Commonwealth of Australia (2107e) p. 14.

[91] Commonwealth of Australia (2017e) p. 14.

[92] Commonwealth of Australia (2017e) p. 9

The Royal Commission did not implicate governments or individuals in the systematic brutalities in detention in its final report. Rather, it laboured inadequate and out-of-date policies and procedures in detention and a failure by staff to follow existing requirements.[93] It blamed record keeping for a lack of consistency, bad decision making and the arbitrary application of force, segregation and restraints.[94] Poorly written manuals, such as with respect to restraint procedures, precluded young people from obeying the rules.[95] The poor conditions in detention were found to create a safety risk to children *and* staff alike.[96]

The Final Report expressed sympathy with the challenges presented to youth detention officers. For instance, the decision to segregate a child with mental health issues was treated as understandable because officers had the 'harrowing and difficult experiences' of managing 'self-harm and suicide attempts'.[97] This obscures how segregation creates and compounds mental health issues for children. The commission's portrayal of perpetrators denotes *good intentions*.

The final report did not find grounds for civil or criminal liability against perpetrators, forcing the young people to bring civil claims against the NT Government.[98] It did not present findings for each child harmed in detention, with merely four brief case studies.[99] Its supplementary booklets on the 'voices' of children[100] were simply extracted quotes without any holistic treatment or context. By contrast, RCIADIC set out in detail the 99 investigations into Aboriginal people who died in custody, covering their background, experiences, how they were

[93] Commonwealth of Australia (2017e) p. 9

[94] Commonwealth of Australia (2017e) p. 21; Commonwealth of Australia (2017a) p. 122-145.

[95] Commonwealth of Australia (2017a) p. 121.

[96] Commonwealth of Australia (2017a) p. 101

[97] Commonwealth of Australia (2017a) p. 18.

[98] See, for example: *LO & Ors v Northern Territory of Australia* [2017] NTSC 22; *Binsaris v Northern Territory; Webster v Northern Territory; O'Shea v Northern Territory; Austral v Northern Territory* [2020] HCA 22. This failure contrasts the approach of the contemporaneous Royal Commission into Institutional Sexual Abuse in 2017. See Davey (2017)

[99] Commonwealth of Australia (2017a) p. 5-31

[100] E.g. Commonwealth of Australia (2017f)

failed by the criminal justice system and necessary changes.[101] Comaroff and Comaroff describe how commissions excise stories of victims to create an archive that reduces their truths to 'standardized objects'.[102] The effect is that victims do not have the fullness of their story and their strengths recounted. Scraton notes that inquiries are places of illusion for justice and victim's rights: 'one minute beckoning, the next rejecting.'[103]

Sidelining systemic issues

The findings gave cursory attention to the racism rooted in detention. While they recognised frequent 'racist remarks' by guards[104] and attempts to censure children speaking in Aboriginal languages,[105] they did not identify the role of systemic racism in the over-representation of Aboriginal children in detention and their mistreatment. The section on racism comprised fewer than three pages with no findings or recommendations.[106] It described racism in general terms, decoupled from the detention system:

> Over the past 20 years, a number of Northern Territory and Commonwealth laws have disproportionately impacted Aboriginal people in the Northern Territory. Most commonly, this occurs through laws that appear to apply equally to all citizens, as they do not make distinctions based on race.[107]

This did not honour Aboriginal witnesses' accounts on the direct line between racism, heightened by the NT Intervention, and Aboriginal children in detention.[108] Instead, the final report explained that locking up children was due to bail refusal,[109] without explicating why Aboriginal children are refused bail or before courts in the first place. These findings would

[101] Commonwealth of Australia (1991b)

[102] Cormaroff and Comaroff (2012), p.147

[103] Scraton (2016) p. 135

[104] Commonwealth of Australia (2017a) p. 159

[105] Commonwealth of Australia (2017a) p. 401

[106] Commonwealth of Australia (2017e) p. 169-171

[107] Commonwealth of Australia (2017e) p. 172

[108] Anderson (2016) p. 157

[109] This accounts for between 68 and 90 per cent of children in detention. Commonwealth of Australia (2017a) pp. 54, 57

translate into recommendations that were predominantly confined to institutional fixes, discussed in the ensuing section, rather than de-institutionalising Aboriginal children.

Royal Commission recommendations

Corresponding with the positivism in Royal Commission proceedings and findings, the recommendations primarily sought to reform institutions, rather than shift the paradigm from institutional control and towards Aboriginal empowerment. The recommendations reflect a faith in the institutions that harmed Aboriginal children and their capacity for improvement. A stance in favour of Aboriginal self-determination has precedent in the RCIADIC. Although its terms of reference were confined to investigating deaths in custody, it made 29 recommendations for self-determination (including in relation to land, culture and education[110]) and linked them to reducing Aboriginal imprisonment and deaths.[111] A consideration of the role of self-determination, and ensuing recommendations, were equally available in the Royal Commission. It had heard evidence from Aboriginal witnesses that self-determination would improve the wellbeing of Aboriginal children and reduce their incarceration.[112]

The Royal Commission set down 227 recommendations on youth justice and child protection. Two hundred and eighteen of these were the responsibility of the NT Government and the remainder for the Federal Government. Of the total of 227, 205 (90%) were aimed at improving criminal justice and child protection systems, including detention centre facilities and procedures; court processes; parole conditions; bail services; government coordination; data collection; and monitoring and oversight. The remaining recommendations sought to divert children from criminal justice systems (4%); enhance Aboriginal community and youth engagement in government decision making on criminal justice and child protection (4%); amend the *Royal Commissions Act 1902* (Cth) (1.5%); and direct Aboriginal communities to review their cultural practices and ceremonies (0.5%).[113] The weighting of the recommendations directs resources to fix institutional settings (operations, facilities, staff and

[110] Commonwealth of Australia (1991c) See Recommendations 36.5, 36.7, 38.1-38.3, 78, 188-213, 299.

[111] Commonwealth of Australia (1991c) Recommendation 38.1.

[112] E.g. Behrendt (2017) p. 3996; Wala Wala (2017), p. 4544.

[113] Commonwealth of Australia (2017g).

government programs) rather than to keep children out of these settings by funding Aboriginal programs, organisations and communities. Missing were recommendations that heeded to Aboriginal evidence on the need to claw back the race-based policies and practices of the NT Intervention and its contribution to rising detention rates and racist treatment of Aboriginal children.

The Commission's key recommendations directed to the NT Government with respect to the youth justice system are:

- Immediately close Don Dale and Alice Springs detention centres and replace them with a new 'purpose-built' detention centre
- Restrict the use of force, strip searching and segregation
- Prohibit tear gas, spit hoods and restraint chairs
- Provide bail support and non-custodial sentencing options
- Enhance health screening, programs and education within detention
- Lift the age of criminal responsibility from 10 to 12 years old
- Expand independent oversight and complaints mechanisms for children in detention
- Facilitate partnerships with Aboriginal Peak Organisations to oversee criminal justice responses.[114]

Consistent with the lack of findings on individual liability (see the foregoing section), the Royal Commission did not recommend prosecutions for officers responsible for abusing and torturing children. It referred a number of matters to the NT Police to investigate 'potential criminal conduct of youth justice officers'.[115] The final report did not provide details of these matters. Within six months, the NT Police Force declared that it would not bring charges.[116] There were no recommendations with respect to institutional responsibility nor a redress scheme as proposed by the concurrent Royal Commission into Institutional Reponses to Child Sexual Abuse.[117] This set a relatively low bar for government implementation. Yet the subsequent

[114] Commonwealth of Australia (2017g)

[115] Commonwealth of Australia (2017e) p. 75.

[116] Holmes and Nedim (2018)

[117] Commonwealth of Australia (2015), p. 5

section demonstrates that government inertia towards Aboriginal children's and families' wellbeing has precluded forthright action or resulted in regressive outcomes.

Government response to recommendations

The adversarial role that the NT Government played towards children in the Royal Commission informed its approach to implementing the Royal Commission's recommendations. At first blush, the NT Government conveyed an in-principle willingness to support all recommendations.[118] However, when push came to shove, the NT Government reasserted its partiality towards officers and disregard for the needs of Aboriginal children. In 2019, it amended the *Youth Justice Act 2005* (NT) to broaden officers' powers to control children in detention and in 2018 it defended the use of tear gas in detention. These acts countermanded the Royal Commission's recommendations. The NT Government has also failed to reduce racism in the youth justice system, with the proportion of Aboriginal children in detention continuing to hover at 100%.[119]

Initial government reforms to youth detention curbed the excesses of abuse, such as removing 'discipline' as a justification for the use of force, restraints, isolation and strip searches.[120] Although not committing to financing all recommendations,[121] the NT Government set aside $229 million for 'strategic priorities' such as replacing Don Dale detention centre with a purpose-built facility[122] and preventing youth crime.[123] It provided bail accommodation to keep children out of detention,[124] and introduced amendments to bail laws to enhance the right to bail and deter arrests.[125] However, bail accommodation in Darwin does not exhibit community

[118] The NT Government classed 126 of the 218 assigned recommendations as 'supported', meaning that it would take active steps to start the implementation, with the remaining 92 earmarked as 'supported in principle', indicating that further consultation was needed prior to implementation. See Wakefield (2018a)

[119] Allam (2019)

[120] Youth Justice Amendment Bill 2018 (NT) (no. 48 of 2018) See clauses 153, 161

[121] Davidson (2018)

[122] Wakefield (2018a)

[123] Thorpe (2018)

[124] Gunner and Wakefield (2017)

[125] See recommendations 25.7 – 25.14 – Commonwealth of Australia (2017g). The *Youth Justice and Related Legislation Amendment Bill* (No. 85 of 2019) introduced several amendments in line with the Royal

integration or cultural safety. It is located adjacent to the Don Dale detention centre[126] and is a former foster care facility in which children were abused.[127] Children are made to wear electronic monitoring devices on their ankles.[128] While the number of Aboriginal children in detention declined, there were commensurable increases in children being detained in this harsh bail accommodation.[129] The NT Government also enacted the *Monitoring of Places of detention (Optional Protocol to the Convention Against Torture) Act 2018* (NT) to mandate visits to places of detention and access to information.[130]

These relatively progressive commitments were tested, and found wanting, in the following years. While most recommendations have not been implemented in the three years since the Royal Commission wound up,[131] including raising the age of criminal responsibility, some have been overtly flouted. The closure of Don Dale detention centre has been delayed until

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Commission recommendations. For example, the proposed amendments to s 16 provides that a police officer may only arrest a young person as a last resort (though this was not reflected in the *Youth Justice and Related Legislation Amendment Act* (No. 32 of 2019) passed by the NT Parliament the same year). The proposed amendments also included a presumption in favour of bail for children (s 8A(1)), the possibility for bail for those who fall outside the presumption (s 12) and youth specific criteria which must be considered by police and courts when deciding bail (s 24) (See *Youth Justice and Related Legislation Amendment Act* (No. 32 of 2019). It also sought to decriminalise breach of bail conditions for young people (ss 37A, 37B). Amendments to s 39 and s 64 broadens the referral pathways for diversion including the court's powers to divert a young person at any point in proceedings. A new s 64A introduces the court's power to dismiss charges upon completion of court-referred diversion under s 64 without having to decide whether a charge was proven or not. (See *Youth Justice and Related Legislation Amendment Act* (No. 32 of 2019).

[126] Northern Territory Government (2019a)

[127] Zillman (2018) and James (2017)

[128] Hind (2020)

[129] For example, one accommodation housed 86 children in 2018-19. See Territory Families (2019) p. 45 The decline in the number of children who spent at least one night in youth detention has gone from 218 in 2014-15 to 168 in 2018-19, totally 50 children fewer in youth detention. See Northern Territory Government (2019b) p. 11.

[130] This followed on from the Australian Government becoming a signatory to the Optional Protocol for the Convention Against Torture, which provides UN oversight of places of detention, in late 2017. The announcement was a response to public outcry in response to acts of torture at Don Dale. See Australian Human Rights Commission (2020)

[131] The NT Government reported that it had 'delivered on' 90 of the 218 recommendations in late 2019. Initiatives it had introduced include number of new youth justice programs and diversionary measures.

2022,[132] despite the Royal Commission calling for its immediate shut down. The planned new facility will be located in the same precinct as the adult prison,[133] also contrary to the Royal Commission recommending that, 'new facilities should not be located on, or in close proximity to, adult prison precincts'.[134] For the remaining Aboriginal children at Don Dale, they have continued to be subject to segregation, force, restraints, strip searches and surveillance in showers.[135] Overborne by these inhumane conditions, the children exhibited unrest in November 2018, the first anniversary of the Royal Commission's Final Report. Dylan Voller explained this as a 'cry for help'.[136] The NT Police Territory Response Group responded by storming Don Dale and deploying tear gas on the children,[137] defying Royal Commission Recommendation 13.3. Deputy Chief Minister Nicole Manison described the police as doing 'a wonderful job in a very trying situation'.[138]

In 2019, the NT Government enacted a suite of amendments to the *Youth Justice Act 2005* (NT) to expand powers to use force, restrain, strip and segregate children in youth detention.[139] These applied retrospectively to protect staff against legal action for past abuses of powers. The minister responsible for youth justice, Dale Wakefield, provided NT Parliament with the following rationale:

> We need these amendments to apply retrospectively to ensure that any ambiguities which allow lawyers to pursue technical arguments about breaches of laws are addressed … We must ensure that staff in detention centres can operate with certainty, secure in the knowledge that if they do their job well the law will back their actions.[140]

[132] Vivian (2020)

[133] Law Council of Australia (2019)

[134] Commonwealth of Australia (2017a) p. 446.

[135] Hayman-Reber (2018)

[136] Allam and Davidson (2018)

[137] Marks (2019)

[138] State Government Career (2018)

[139] See *Youth Justice Amendment Act 2019* (NT).

[140] Dale Wakefield in Legislative Assembly of the NT (2019a) p. 5712

The expanded powers provide guards with greater discretion over the *extent* of force they can employ by inserting a subjective element to the test.[141] Minister Wakefield stated that there needed to be support for the 'professional judgement of staff'.[142] She explained the reforms are about 'backing our frontline staff to make sure they have clear ability to make decisions under difficult circumstances'.[143] The grounds for using force were also expanded. Section 154(1)(b) was amended to allow force to prevent a detainee (i) endangering the safety of any person or (ii) seriously threatening the security of the detention centre. Newly legislated powers allowed a superintendent or authorised person to employ force without pursuing all other 'practical measures' or providing the child with a clear warning, as recommended by the Royal Commission (Rec. 13.5). Previously, the use of force was only available in an 'emergency situation where the threat was imminent'. The government justified the change as necessary 'to maintain the good running of the centre'.[144]

The amendments also expanded discretion to use restraints by inserting section 155(1)(b). Handcuffs, ankle cuffs, and waist restraint belts can be used where the superintendent or authorised person '*believes* on reasonable grounds that restraint is necessary' to prevent the child: (i) 'endanger[ing] the safety of any person', including him/herself, or (ii) 'seriously threaten[ing] the security of the detention centre'. This amendment removed the requirement of an emergency, which is contrary to Royal Commission Recommendation 13.6. It found that this use of restraints outside of emergency and exceptional situations 'was contrary to the human rights standards'.[145] The legislation also authorises transfers of children over 1500 kilometres from Alice Springs to the Darwin detention centre 'where the superintendent considers appropriate,'[146] and provides greater powers to lockdown children in their cells[147] and to pat-search children.[148]

[141] *Youth Justice Act 2005* (NT) s 10(b)(iii).

[142] Legislative Assembly of the NT (2019b), p5909

[143] D. Wakefield in Legislative Assembly of the NT (2019b) p. 5905

[144] Legislative Assembly of the NT (2019b), p. 5928

[145] Commonwealth of Australia (2017a) pp.235, 242

[146] *Youth Justice Amendment Act 2019* (NT) cl. 11, contrary to Rec. 11.2.

[147] *Youth Justice Amendment Act 2019* (NT) cl. 9.

[148] *Youth Justice Amendment Act 2019* (NT) cl. 10.

The prevailing practices in youth detention and the youth justice system retained their punitive tenor. Guards continued to be confrontational, rather than therapeutic, in their dealings with children[149] and to use segregation as a management device.[150] Police arrested children while asleep in their home.[151] Force continued to be used excessively by police, most tragically in the killing of 19-year-old Warlpiri man Kumanjayi Walker. The teenager was shot by police at night in his Yuendumu home in late 2019.[152] The NT Government introduced a youth justice policy in 2020 that would impose 'immediate consequences' for young repeat offenders, expand police in schools and toughen bail and monitoring conditions.[153] Lawrence SC attributed the ongoing detention and violence towards Aboriginal children and young people to 'racism: systemic, direct, indirect and historical'. He states that if a royal commission had exposed harm to 'white Australian children', 'it would have been fixed and replaced within months', but the government lacks the will to do it for Aboriginal children. [154]

In relation to the Federal Government's responsibility over implementing the 28 recommendations that were fully or partially applicable to its jurisdiction, it tended to offer support only where it aligned with existing policy or coordination.[155] There was no funding or services committed to implementation.[156] Its hands-off approach is in stark contrast to the urgency with which the Federal Government introduced the NT Intervention to *save* Aboriginal children in 2007. It immediately passed legislation and earmarked approximately $600 million, over the first year alone, to enforce control measures (including funding Australian Federal Police, Defence and Centrelink staff) on Aboriginal communities that it deemed responsible for harming children.[157] Yet, when the state was implicated in physically and mentally abusing Aboriginal children, the Federal Government refused to commit any funds or take any action beyond establishing the Royal Commission. This highlights the way the Royal Commission

[149] Zillman (2019)

[150] Hanifie (2019)

[151] Legislative Assembly of the NT (2019c) p. 22

[152] Hinkson and Anthony (2019)

[153] Gunner and Monison (2020) and Allam (2020a)

[154] Lawrence (2019)

[155] Department of Social Services Cth (2018a)

[156] Department of Social Services Cth (2018b)

[157] Commonwealth of Australia (2007)

was used as a decoy, and the limits of its positivist processes for creating structural change. The following section considers the particular barriers for Aboriginal justice that arise from positivist inquiries.

The perils of positivism for Aboriginal justice

'I want to give evidence about what happened to me because I don't want anyone else to go through what I went through during my time in detention.'[158]

These are the words of one young female who was detained at Don Dale. They echo the sentiments of many young people in their statements to the Royal Commission. Yet the positivist techniques of the Royal Commission precluded their voices from being elevated. The adversarial role of the NT Government discredited young peoples' accounts and their integrity. It defended those in charge and elicited sympathy for the perpetrators' circumstances from Commissioner White. Substantive change and accountability did not materialise because the government charged with making changes to detention was also responsible for the abuses in detention. The Royal Commission could have made findings and recommendations for a paradigm shift towards Aboriginal self-determination, but instead opted for a reformed detention system.

Aboriginal young people felt disappointment at and betrayal by the Royal Commission. They were made to relive their trauma without just outcomes, including consequences for perpetrators.[159] Voller pointed to the ironic injustice that while children are locked up for minor matters, officers of the state who commit acts of violence against children are immune.[160] Aboriginal families similarly expressed outrage that no officers or managers were held to account, including one family who continue to endure grief for the isolation and dehumanisation of their 10-year-old son.[161] Families perceived the Royal Commission as giving a 'green light' to further harm because it sent a message to 'other guards that they can

[158] AN (anonymous) – 'Statement', Exhibit 159.001 on 24 March 2017 in Commonwealth of Australia (2017h)

[159] Breen (2018)

[160] Breen (2018)

[161] Bardon (2018)

just keep doing it and getting away with it.'[162] Lawrence SC concluded that the NT Royal Commission

> will go down as one of the most unsuccessful and ineffective in Australian history. To date it has changed nothing and it's clear now that it never will. People responsible for the mistreatment at the highest levels were exposed but, unlike Indigenous prisoners, there were no consequences for their actions. Most remained in the job or were moved sideways.[163]

The Director of Engagement for the Royal Commission, Larrakia, Wadjigan and Arrente man Eddie Cubillo, wrote publicly on the toll that the Royal Commission took on Aboriginal community members who had attended meetings to share their experiences of the system. He described how Aboriginal people came forward to speak about how their children were taken and how they 'are losing connection to family, culture, language and country'.[164] However, having suffered the painful process of telling their stories, there was no follow up by the Royal Commission and no return of their children. The Royal Commission had taken what it needed and left open the wounds of Aboriginal families.[165] Cubillo regarded its failure to discuss recommendations 'with those most affected' as extending the state's 'historic policies' of disempowering Aboriginal people.[166]

The fast-paced and functional format of the Royal Commission, without cultural respect in the follow-through or meaningful outcomes for Aboriginal people, also took an 'emotional toll' on Aboriginal workers.[167] The recruitment of Aboriginal lawyers, community engagement officers and other staff was regarded as one of the signs of the Royal Commission's success.[168] Yet Aboriginal staff received little support when hearing stories of trauma that, in Cubbilo's

[162] Bardon (2018)

[163] Lawrence (2019)

[164] Cubillo (2018)

[165] This is fly-in-fly-out approach by institutions in Aboriginal communities is likened to seagulls that take what they need and leave mess in their wake. See: Anthony and Blagg (2013) p. 49

[166] Cubillo (2018)

[167] Cubillo (2018)

[168] Hoole (2016b) p. 251

words, 'trigger our own trauma'.[169] Worse still was their frustration when nothing changed.[170] Aboriginal staff were left feeling powerless when Aboriginal people conveyed their feelings of being undermined by the process. In the aftermath of the Royal Commission, Cubillo was approached by Elders on the streets of Darwin expressing their grievances, which made him feel ashamed of its failures. Cubillo expressed, 'It is hard working for change within the system when that system is so stacked against our people'. He refers to the term 'boundary riders' to describe Aboriginal people who work between 'our peoples and governments'. They are exposed, according to Cubillo, when promises are made to Aboriginal people and changes do not materialise.[171]

Positivism assumes that justice is done when the legal process is complete. Yet the wounds from the initial injustice were reopened, rather than healed, with the re-telling of stories and lack of validation. In the Royal Commission, guards and managers offered excuses rather than apologies. Wacks states that failure by perpetrators to acknowledge trauma and express remorse inhibits healing of survivors.[172] By contrast, admissions by perpetrators can restore survivors' dignity and confirm their traumatic experiences 'as real and not illusory', according to Desmond Tutu.[173]

Instead of coming to terms with ongoing harms, positivism separates past wrongs from current practices. It fails to scrutinise underlying structural deficits and historical continuities. Aboriginal people thus feel that nothing changes in their circumstances, even when wrongs are identified. The lack of substantial outcomes flowing from Royal Commissions have been documented by Indigenous people in other settler colonies. A study by First Nations scholar Corntassel and Holder of Canada's Truth and Reconciliation Commission (2008-15) found that it produced a 'politics of distraction' from the underlying issues facing First Nations children who were placed in residential schools. It maximised 'political/legal expediency' while compromising First Nations claims,[174] which is reminiscent of the colonial

[169] Cubillo

[170] Cubillo

[171] Cubillo

[172] Wacks (2000), p. 212.

[173] Desmond Tutu cited in Comaroff and Comaroff (2012) p.148

[174] Corntassel and Holder (2008) pp. 471-2

'compartmentalization' of justice. Corntassel describes this as isolating past injustice from ongoing injustice and government justice-making from Indigenous justice-making.[175] Corntassel, Chaw-win-is and T'lakwadzi point to Canada's Truth and Reconciliation Commission as failing to do the necessary justice work of reunification and regeneration of 'families and communities dispersed and dislocated by the trauma of [residential] schools' and restoring First Nations homelands.[176]

Similar criticisms have been levelled by Comaroff and Comaroff at South Africa's Truth and Reconciliation Commission. They identify that it did not mitigate 'the enduring effects of structural violence and suffering' and make good 'on the "restitutionary equality" at the core of the new national constitution'.[177] Equally in the NT, the punitive structures and governance frameworks that circumscribe the lives of Aboriginal people went unchallenged in Royal Commission recommendations and implementation. The 'structural violence'[178] at the heart of the detention and 'justice' system remained intact. Consequently, within weeks of the Royal Commission's final report, a 'unit of camouflaged, specialised police with military-grade assault weapons' was established to target 'youth offenders'.[179] The NT Government continued to label Aboriginal children as 'problem youth',[180] consistent with ideas of positivist criminology. By late 2019, a report based on 120 consultations with Aboriginal communities found that racism persisted in everyday interactions with the justice system.[181] Communities were not served by the 'legal-positivist' framework of the Royal Commission, which, according to Wilson, ignores how local needs for justice require redressing 'sociological-historical' injustices.[182]

Conclusions on commissions: the need for post-positivist and decolonising techniques

[175] Corntassel (2012) p. 88

[176] Corntassel et al (2009) pp. 140-1.

[177] Cormaroff and Comaroff (2012) p. 149.

[178] Galtung (1969) pp. 168-171.

[179] Zillman (2017)

[180] Manison (2018)

[181] Department of Attorney General and Justice – NT (2019) p. 92-3

[182] Wilson (2001) p. 59.

Commissions of inquiry have proven a hollow gesture for Indigenous justice, and the Royal Commission is no exception. The limits of their positivist methods signal the need for truth telling and accountability to be designed, owned and run by Indigenous communities. They need to be coupled with Indigenous oversight in the implementation and enforcement of recommendations.[183] In settler colonies such as Canada, Guatemala and Peru, First Nations scholars and advocates have highlighted the weaknesses of positivist inquiries that re-enact colonial methodologies towards Indigenous people and reinstate colonial structures. They note that commissions need to embed 'decolonization strategies',[184] which include restorying and transforming ways of doing, and generating 'action via recovery of indigenous homelands and regeneration of cultures and community'.[185]

Instead, positivist procedures of commissions confine the involvement of Indigenous people and the considerations of justice-making. The NT Royal Commission was constrained by a legal-positivist mandate and methodology that enlivened court-like procedures of adversarialism and technocratic treatment of evidence. Yet it did not possess the liability mechanisms available to courts. The impact was that children were subjected to court environments without being vindicated with apologies or consequences for those responsible for cruel and degrading acts in detention. In these settings, children were put to the test on their histories and conduct. Their experiences were individualised rather than treated as part of a bigger picture of structural injustice and systemic racism that required a seismic shift in Aboriginal policy making. The Royal Commission's blueprint for change was state-centred, rather than honouring Aboriginal strengths, place-based strategies and self-determination. These alternative strategies were discussed in Aboriginal testimony[186] and encapsulated in the protest catchcry that surrounded the Royal Commission: 'Kids on Country, not in custody'.[187]

Listening to First Nations stories and weaving them into truth telling about the past and the present, according to Corntassel, Chaw-win-is and T'lakwadzi, is crucial to the 'cultural and

[183] See generally: Balint (2014)

[184] Corntassel & Holder (2008) p. 470.

[185] Corntassel & Holder (2008) p. 472.

[186] Behrendt (2017) p. 3996; Wala Wala (2017), p. 4544.

[187] Voller (2018)

political resurgence of Indigenous nations'.[188] Decolonisation requires counter-narratives to institutional orthodoxies through elevating First Nations perspectives.[189] Positivism needs to be turned upside down by asking the question, as Wiradjuri Professor Juanita Sherwood poses, 'who are the real criminals?'[190] Assumptions of deviance by Aboriginal children, which were employed by the Royal Commission,[191] distracted from the deviance of guards, detention managers and the state.[192] The government's 'implementation plan', consequently, did not involve making guards accountable for abusing children, but sought to 'hold young people accountable for their actions'.[193] Critical researchers Burton and Carlen point to commissions of inquiry as restoring *not* the victims but state authority.[194] Scraton notes how victims are excluded and their demands for accountability are unmet while state agents and structures are legitimated.[195]

The emerging pathways for Aboriginal truth telling as part of the NT's treaty process,[196] Victoria's Truth and Justice Commission[197] and the Uluru Statement from the Heart[198] can signal new ways to inquire into historical wrongs and set down meaningful change. Change requires the adoption of a *post*-positivist approach to truth telling and justice making and the decolonisation of procedures. Features of this shift can include:

1. First Nations people and organisations determine the mandate, scope, time frames, budgetary allocations and commissioners for truth telling processes. The scope needs to account for community input in planning and community feedback at each stage.

[188] Corntassel et al (2009) p. 137

[189] Regan (2006)

[190] Sherwood, 'Foreword', in Blagg and Anthony (2019) p. ix

[191] Eg. See Commonwealth of Australia (2017a) pp. 42, 44

[192] See Anthony (2018b).

[193] Wakefield (2018b)

[194] Burton and Carlen (1979) p. 51.

[195] Scraton (2004) p. 49

[196] Jenkins (2020)

[197] Allam (2020b)

[198] See Referendum Council (2017)

2. Adoption of First Nations methodologies, axiologies and epistemologies where relevant to honour First Nations storytelling and justice.[199] This may involve eclipsing legal formalities with community engagement meetings.[200] Equally, legal processes for individual and state crimes, and full disclosure of government documents, need to be coupled with engaging First Nations justice mechanisms (e.g. *Ngarra* Community Court[201]) and attributing gravity to First Nations oral evidence in legal proceedings.

3. Findings and recommendations to speak truth to structural injustices and colonial histories rather than be constrained by policy objectives.[202]

4. Establishment of Independent Aboriginal statutory bodies to investigate and prosecute those responsible for state harms, similar to the powers of the Aboriginal Areas Protection Authority NT in relation to breaches of sacred sites legislation. They should also have input on models for civil redress that emerge from the truth-telling process. Aboriginal bodies should monitor the governments' implementation of recommendations and inform government decision-making in relation to recommendations.

When the Royal Commission's final report was handed down, NT Chief Minister Michael Gunner said the findings were 'a stain on the Northern Territory's reputation'.[203] This stain runs deep in settler colonial history and continues to leak into state institutions and practices. Truth telling plays an important role in reckoning with Australia's colonial past and present, and committing to wide-reaching change. But it requires eschewing positivist epistemologies and methodologies. Positivism narrows the lens of inquiries to individual problems and state-based solutions. A post-positivist approach widens the gaze to structural injustice and strategies to decolonise the state's relationship with First Nations peoples. It is the latter that will allow

[199] See Balint, Evans and McMillan (2014) p. 215.

[200] This is consistent with Warlpiri people's calls in 2008 for government ministers to come before their community following police violations of sacred sites and ceremonies at Lajamanu. See Anthony and Chapman (2008)

[201] E.g. Gaymarani (2011), p. 299

[202] See McGill (2017), p. 79

[203] Vanovac (2017)

commissions of inquiry to transcend the colonial biases that have repeatedly curtailed First Nations justice, including in the inquiry process itself.

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