

## **'Night Will Fall'**

The Royal Commission into the Protection and Detention of Children in the Northern Territory

Paper by John B. Lawrence SC

Castan Centre for Human Rights Law Conference

21 July 2017, Melbourne

### **Introduction**

On the 25<sup>th</sup> of July 2016 the *Four Corners* program 'Australia's Shame' did its job and more. The Prime Minister of Australia calling a Royal Commission within 24 hours of its screening was even a first for *Four Corners*. Congratulations to them are deserved, as they are to the Prime Minister, whose instincts in making the decision have been more than vindicated by the evidence that has now been completed. The Report and Recommendations are to be delivered on the 30<sup>th</sup> of September 2017.

This Royal Commission, unlike most others, has been the subject of much criticism, from general nay-sayers to direct political interests trying to kill it off, or at least marginalise it and render it ineffective. The conduct of the people trying to prevent this Royal Commission from making a difference by bringing in real changes has been interesting as well as revealing. The purpose of this paper is to explore the moral collapse which was manifested by the startling evidence in the Royal Commission ; **why** and **how** we as a country have come to this; and how this Royal Commission, at this point in Australia's history, **can** provide a way of stopping this decline and effectively improve the Australia/Indigenous relationship.

The Royal Commission was established to look into the NT Child Protection and Detention systems. The evidence has confirmed and compounded the fact that the entire Youth Justice System in the NT is a disgrace on this country's claim to being an advanced, developed and humane society. The chronic situation in NT Corrections reveals a jurisdiction that has gone directly and significantly backwards. The deterioration in the Northern Territory is merely reflective of the deterioration in Australian society generally. We all live in a country now which has seriously lost its way. The Youth Justice System in the Northern Territory is merely a manifestation of that chronic state of affairs. Similarly, many of the reasons why the Youth Justice System has so deteriorated are the same reasons why this country has stooped to its present low ebb.

The last 20 years in some ways could be described as an 'Age of Acquiescence'. As Richard Flanagan said in his Alan Messen Oration in 2011; ***"We have agreed with too much that was wrong for too long"***. That approach of acquiescence across the board in Australia is partly responsible for its parlous position now as regards human rights, civil society and basic decency. The metaphor of gatekeepers keeping barbarians from entering the citadel has real application here. One of the major traditional gatekeepers protecting the Citadel is the legal profession. They have singularly failed in doing so. In fact, many of them have willingly opened those gates.

No analysis of the Youth Justice System in the NT can be done without looking at its backdrop, namely the gross levels of Aboriginal imprisonment that exist in the Northern Territory.

### **Aboriginal Incarceration Levels**

The overrepresentation of Aboriginal people within the justice system has been an ongoing issue for years. The statistics show that this rate is now a catastrophe.

- In the Northern Territory, 86% of people incarcerated are Indigenous, yet they only make up 25% of the general population.
- Since the Royal Commission into Aboriginal Deaths in Custody Report noted this overrepresentation as an issue in 1991, the Indigenous imprisonment rate has more than doubled (14% to more than 28%).
- When it comes to Indigenous juveniles, they are 23 times more likely to be incarcerated than non-Indigenous.

86 per cent of adults and 97 per cent of juveniles jailed in the NT are Aboriginal. These figures bear analysis and comparison interstate and internationally. They are calculated per capita, i.e. per 100,000 of the subject jurisdiction's population.

The country with the highest imprisonment rate in the world is Seychelles. Its rate per capita is 799 per 100,000; second is 'the land of the free', the USA with 666; followed by El Salvador with 586 and Turkmenistan with 583. Compared with these international figures, Australia's national adult imprisonment rate is 169 (28 per cent being Aboriginal). Of interest in the comparison is New Zealand (210), England (146), Scotland (137), Canada (114) and Denmark (59)<sup>1</sup>.

---

<sup>1</sup> International Centre for Prison Studies Report, 2016

The NT per capita imprisonment rate is **958**. This jurisdiction gaols more people per capita than any other country in the world. And again, this is the point: more than 85 per cent of that imprisonment rate is Aboriginal<sup>2</sup>. The next highest rate in Australia is Western Australia at 225.

These statistics are real and they confirm what is now a national catastrophe. They can't be published enough and need to be broadcast and emblazoned across Australia. They are a continuum and are regressing at an ever increasing pace. No one needs to be a statistician to see the projection as to where this is going and what the end game will be.

This disastrous situation was confirmed and amplified by the 2014 Productivity Commission Report which informed Australians that nationally, Aboriginal juveniles are imprisoned at 24 times the rate of non-Aboriginal juveniles. Further, there had been a 74 per cent increase in the national imprisonment rate of Aboriginal women since 2000.

That Report also recorded that one in four deaths in custody was an Aboriginal person compared with one in seven at the time of the 1991 Royal Commission into Aboriginal Deaths in Custody.

### **Royal Commission**

We would do well to remind ourselves that it was luck, more than anything which established this Royal Commission. Royal Commissions are not easily established. They are important events in a country's history. This one will now sit in Australia's narrative, along with the Royal Commissions into the Chamberlain Convictions, into Institutional Responses to Child Sexual Abuse and others. If the *Four Corners* program hadn't had the effect it did, and if the Prime Minister was not so affected as to make this decision, then the whole issue most likely would have blown over and continued. After all, the gassing incident of August 2014, which formed a major part of the program had been reported back in 2014 both nationally and internationally, but to no great effect. The 24/7 news cycle, together with the culture and strength of the Establishment allowed it to ride the storm and come out the other side; business as usual. Questions were asked and answered at the time. No one even came near to losing their job, and so it was 'bat on'. In fact, within months of the gassing incident, the NT Department of Corrections continued their war against youth detainees by shutting down the purpose-built juvenile facility and reopening the derelict former adult male jail to house Aboriginal children, both male and female. The females were placed in the notorious B Block, which was formerly the Maximum Security section, home to mass killers, rapists and paedophiles. Along with the move, the practices and conditions meted out towards these Aboriginal children from unqualified, casual Youth Justice Officers at Don Dale continued. And so the Restraint Chair, isolation

---

<sup>2</sup> Australian Bureau of Statistics, Prisoners in Australia 2016 released 8/12/16

cells, spit hoods and shackles, as well as indiscriminate harassment and filming by the guards continued. It only changed once *Four Corners* created the reaction which brought about the establishment of the Royal Commission.

### **The Conditions**

***“A society’s attitude towards its prisoners, its ‘criminals’, is the measure of the stored up strength of a nation, and the sign and proof of the living virtue in it”*** – Winston Churchill, Home Secretary speaking in the House of Commons 1910

***“The degree of civilisation in a society is revealed by entering its prisons”*** - Fyodor Dostoevsky

I represent AD in the Royal Commission. He was kept in the BMU for 16 consecutive days in August 2014. He was the child that was seen in *Four Corners* having exited his BMU cell on the 21<sup>st</sup> of August 2014, running amok in the adjacent courtyard area, smashing windows, swearing and throwing things around in an emotionally charged and out-of-control condition. He gave evidence as to the conditions in which he had been kept in isolation. They were the following. At the time he was 14 years old. His cell was 3m x 2m, concrete, steel bars and iron mesh<sup>3</sup>. In the cell was one steel toilet, no toilet seat. No bed, just a mattress, sheet and pillow on a slightly raised concrete area. No table or chair. No furniture. One CCTV camera in the top corner of his cell, operating 24 hours a day, 7 days a week. No privacy. No natural light. One fluorescent ceiling tube in his cell. No natural ventilation. No fan or air-conditioning. Extremely hot. The isolation rules required him to be kept in his cell alone for 23 out of 24 hours a day. He was only released for 30 minutes to an hour per day for a shower, which was situated in the adjacent courtyard and not private. There were no shower curtains around the open shower, therefore he was visible to all the other children in their cells. When released each day, he was on his own with no other kids to enjoy some company. The rules required that he eat all his meals in his cell. There was no hygiene in his cell. No running water, no hand basin, no drinking water. He could not wash himself when he wanted. That meant that after doing the toilet, he could not then wash his hands. This also meant that he couldn’t wash his hands before his breakfast, lunch or dinner.

AD was kept like this for 16 consecutive days up until the 21<sup>st</sup> of August 2014 when he himself managed to escape and vent his pent up rage within “the machine” he had been incarcerated in. On

---

<sup>3</sup> AD had escaped Don Dale with four other boys on the 2<sup>nd</sup> of August 2014. After being recaptured on the 6<sup>th</sup> of August 2014, he was placed straight into a cell of the BMU on his own. In the other cells were the four other boys, and later another juvenile was placed in a cell for unrelated issues. Six Aboriginal children in isolation in the BMU. Each cell was only 3m x 2m. Measure that out in your living room or office. It’s small. Two were kept in one cell and the other four kept in a cell on their own.

the evidence, his isolation was **indefinite**. Ms Cohen, then Executive Director of Youth Justice gave evidence that the plan was to hold the children at Don Dale until the Berrimah Adult Jail was ready, namely another six months<sup>4</sup>. Further, no alternative “high security” section had been identified for the interim. The BMUs were the only option, and they were there indefinitely. Every day during this experience AD asked YJOs **why** he was being kept like this and **when** he would be let back into mainstream detention. No one could answer his question because no one knew. As revealed above, they were all in there indefinitely. Throughout this period, his lawyer was the NT Legal Aid Commission.

The key issue for the Royal Commission and the country is **how** the NT Justice System descended to this level of inhumanity.

Ms Pat Anderson, presently Co-Chair for the Referendum Steering Committee and long term Aboriginal activist, gave this evidence to the Royal Commission when asked to suggest an explanation for the children being treated like this in 2014, she said:

***“You know, 10 years ago when we did the ‘Little Children are Sacred’, it was inconceivable that that might happen here, even here in the Northern Territory. I watched [the Four Corners Program], like most of Australia that night, and... that was my thought, you know, 10 years ago this would not have happened. So I think it is part of this general moral decay. Australia’s... in a really bad way here, and I don’t know how you return it to a mature, sophisticated, civil society”<sup>5</sup>***

This moral collapse can be seen in various forms over the last twenty years.

The toxic, dishonest and destructive relationship between the media and politicians of both parties which exploits the issue of law and order, has descended to a level which is now obscene; for example the demonization of children therein. In Darwin, the local paper calls children **“Dirtbags”** in front page headlines. Australia now is a country which treats its most precious commodity thus. We are a country that doesn’t like children. Further, the level of racism that exists and is countenanced in Australian society is at a level not seen in recent times. The treatment of Adam Goodes and Yasmeen Abdel-Magied is living proof of that. Comparing the treatment of Adam Goodes now with that of Michael Long 22 years ago surely illustrates how we have deteriorated. Michael Long’s actions in combating racial vilification was, if anything, lauded by the Australian community. Adam Goodes, for outing racism, has been hounded out of the game. Australia now is not what it used to

---

<sup>4</sup> Royal Commission transcript, 30 March 2017 at p2378

<sup>5</sup> Royal Commission transcript at p164

be. The Australian policy towards asylum seekers and refugees is deliberately cruel, expensive and yet popular. Disguising such immorality on the basis of saving people from drowning is taking the moral collapse to another low level in the basement. Australia, one of the world's richest countries and unlike any other, continues to reduce its Foreign Aid Budget. What kind of message does that send out from our political leaders to the citizenry? Sadly, it seems that Australian citizens are, if anything, in favour of this policy. This illustrates that the descent is not limited to our political and institutional leaders. Sadly, the Pauline Hansens and Phillip Duttons of this world actually do reflect a lot of Australian men and women, young and old. Our citizenry have become less ethical than they were 20 years ago as a consequence of what has transpired during this period. Akin to the law and order auction, the exploitation by politicians and others concerning the "terrorist threat" to society, upon any objective and historical analysis is a complete hoax. The "terrorist threat" to society now, compared to 30 years ago, is miniscule. Yet citizens have been deliberately scared and exploited by their elected representatives and other interest groups. Moral and ethical standards have to be created and maintained by our leaders, political and institutional. Our political leadership over the last 20 years has been disgraceful. One of so many examples can be exemplified with former Prime Minister Tony Abbott's declaration that what ISIS was doing was "**worse**" than what the Nazis did in the Holocaust, not to mention the explanation of Jesus' teachings from the good Samaritan as being "**misguided altruism**". I understand Mr Abbott is a Roman Catholic.

One could go on and on and on. Our media, of course, don't. They report a press conference live outside of Parliament on nothing, followed by a cat stuck up a tree, live from St Kilda road, rather than what's causing Australia's ever rising suicide rate, domestic violence levels, obesity levels and mental health problem. Not to mention the threat of the Ice Age and the effect of the Digital Age upon our young. The media, or lack of it of course, is very much part of this malaise.

### **Post- Royal Commission**

The Royal Commission, of course, has seen and heard vast amounts of evidence. It is not within the scope of this paper to go into that. However one observation must be noted, which was very obvious throughout much of the evidence. The observation is that in dealing with Child Protection and Youth Detention, which is dealing largely with Aboriginal Families, the present mainstream Australian and NT institutions have clearly failed. Like the moral collapse outlined, our relevant Departments, whether they be Education, Health, Child Protection or Youth Justice, have deteriorated in their ability and willingness to address the great difficulties in the interface and disadvantage experienced by Aboriginal people. We are worse at this now than we were. And that's a fact. Further, we seem less willing and up for it. But don't despair.

***“The antidote for despair is action”*** – John Baez.

What countered the evidence condemning mainstream Australia’s inability to deal with Indigenous Australia, was the large amount of impressive evidence called from Aboriginal leaders, organisations and individuals on their superior abilities and appropriateness in dealing with these matters.

Comprehensive evidence was heard from Aboriginal organisations and leaders on issues like Child Protection, Aboriginal Health and Justice. These subjects must now be handled by such Aboriginal-controlled organisations. In this regards, the evidence before the Royal Commission was, dare I say it, black and white. That is the good news, and it must be the future.

### **Conclusion**

This Royal Commission is reporting in a period of history where rapid change is occurring. It is an ideal moment to seize the moment and have its Recommendations effected. The Recommendations, in the writer’s view, will be appropriate, including conveying the control and organisation of these important areas to empowered and effective Aboriginal organisations and leadership. For this to be effective, it needs to be taken to the Federal Parliament and legislated there accordingly. Federal legislation is necessary to ***“firewall”*** the Recommendations in order for theme to be effective. From there, machinery can and will be established to streamline the same into appropriate Aboriginal-controlled organisations and leadership.

Therefore, the message is positive. This lucky break in giving this country the Royal Commission can, in fact, be the ***“breakthrough moment”*** that the whole nation desperately requires.

**‘Night Will Fall’** comes from the horrific footage taken of Belsen-Bergen Concentration Camp in North Germany by the liberating British Army in 1945. When screened, the narrator Richard Crossman said the following: ***Unless the world learns the lessons these pictures teach, Night Will Fall”***. Similarly with the *Four Corners* screening, we should adopt such an approach.

Ron Castan was a great lawyer and a great activist for Aboriginal people. He once said ***“A belief in justice is empty if it is not expressed in action”***. It’s now 2017. Justice cannot and will not be achieved for Aboriginal people unless there is action.



John B. Lawrence SC

21<sup>st</sup> July 2017