

Australia's Morality Play 2017

John B Lawrence SC*

In June 2017, the Royal Commission into the Protection and Detention of Children in the NT was in full swing. Called by the Prime Minister of Australia on 26 July 2016 following the *ABC Four Corners* screening of 'Australia's Shame', it had completed the evidence in relation to Youth Detention and was moving into its second component, namely Child Protection.

Much had been discovered, most of it bad, and worse than what *Four Corners* had revealed. When publishing the Royal Commission's Interim Report dated 31 March 2017, Commissioner Margaret White said:

"What the Commission has heard over the last 8 months, and particularly over the last 3 weeks in this Courtroom and in Alice Springs, is that the system of youth detention in the Northern Territory has failed and, we think, is still failing [writer's emphasis]. At every level, we have seen that a detention system that focuses on punitive, not rehabilitative, measures, fails our young people".

The Interim Report made several other telling observations:

1. the Youth Detention System is likely to leave many children and young people more damaged than when they entered;
2. the Youth Detention facilities are harsh, bleak and not in keeping with modern standards. They are punitive, not rehabilitative; and
3. 94% of children in detention in the Northern Territory are Aboriginal, and therefore specific consideration must apply to Aboriginal children.

Amidst this, while the Royal Commission was sitting in Darwin in June 2017, the conduct of an NT Judge sitting in the Youth Justice Court in Tennant Creek dealing with a 13 year old Aboriginal boy received severe public criticism. That coincidence revealed a Youth Justice System riddled with systemic problems and needing radical repair, if not replacement.

Royal Commission

As you would expect with a Royal Commission tasked to investigate systemic problems, the whole Youth Justice System and its players have been placed under thorough scrutiny and few have emerged looking good. The evidence has revealed a crisis-ridden, dysfunctional "system". The evidence points not just to the obvious suspects – the untrained, casual Youth Justice Officers (YJO) and Corrections generally – but more, much more. It has revealed

a Youth Detention System that was and still is operating in a deliberately punitive and at times grossly inhumane way.

The essence of the Inquiry is to now find out how this can happen in 21st century Australia, a developed country which, in competition with Spain, is presently applying for a seat on the United Nations Human Rights Council. That question is largely answered by the systemic nature of the inadequacies. Responsibility for the system's shame can be traced all the way to the top. Everyone, including Corrections Minister John Elferink, Commissioner for Corrections Ken Middlebrook, Executive Director of Youth Justice Salli Cohen and the staff at Don Dale knew of the atrocious conditions that the children were being indefinitely detained in, and the inadequacy of staff training for those tasked with looking after them. It was during Ms Cohen's reign that the Behaviour Management Unit (BMU) at Don Dale was used to hold children in isolation, in cruel and medieval conditions for extensive periods.

Between 4 and 21 August 2014, six children were kept in the BMU which ultimately lead to their gassing on 21 August. It was that incident which led to the NT Children's Commissioner's report published in August 2015. That report clearly details the unbelievable conditions that Aboriginal children were being kept in at Don Dale during that time.

Ms Cohen gave evidence that the plan was to hold the children at Don Dale until the Berrimah Adult Jail was ready, namely another six months. Further, no alternative "high security" section had been identified for the interim. The BMU was the only option, and they were there indefinitely.

When Minister Elferink was questioned by the media in 2014 about the conditions in the BMU (their full extent unknown to the media at the time) he proudly defended them by saying that the children in question were "*The worst of the worst*". Just desserts for them.

The conditions suffered by these young Aboriginal boys were way beyond what any serial killer, rapist or paedophile would experience in an adult prison anywhere in Australia. This situation occurring in August 2014 in Don Dale graphically illustrates that the Department of Corrections, and others who knew all about it, had descended to a moral depth that you would not have thought possible even 10 years ago. In many ways that is the essence of what this Royal Commission has discovered as regards how this could occur.

Australia has lost its way, the Northern Territory has lost its way. The individuals who make these decisions, knowingly and deliberately, have lost their way as far as being responsible, moral, decent human beings.

It is the writer's view that if they were non-Indigenous, such inhumanity would not be allowed to occur. In other words, it's racism. Pat Anderson, presently Co-chair of the Referendum Council, Chair of the Lowitja Institute and former President of the North Australian Aboriginal Legal Aid Service (NAALAS) gave this evidence to the Royal Commission:

"There's this psychological barrier to any kind of acceptance that Aboriginal people are not... subhuman; we are, in fact, human beings and this is our place and this is our country".

concept, the psychological and human reality of Aboriginal people being of less worth still clearly exists.

The evidence has clearly established that not only was this happening to Aboriginal children in the NT at the hands of Don Dale staff, it was all being done knowingly – by the Superintendent of Don Dale Russell Caldwell, the Executive Director of Youth Justice Salli Cohen, the Commissioner for Corrections Mr Middlebrook, and the Minister responsible Mr Elferink. They all gave evidence admitting this, and these people were the legal guardians of the children, responsible for their welfare and owing them a duty of care. They all knew that, and yet they did this to these children.

But more. All those children had lawyers, either from the Northern Territory Legal



Detention Don Dale style: the image that shocked the nation.

And, 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' (report) 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"

Although we've just celebrated the 25th anniversary of Mabo and the extinguishment of terra nullius as a legal

Aid Commission (NTLAC) or the North Australian Aboriginal Justice Agency (NAAJA). Not only the jailors and their masters knew: so did the defence lawyers who represented these children. Further, much of the detail of the conditions at Don Dale was conveyed by these lawyers to Magistrates sitting in the Youth Justice Court who were making decisions about bail and sentencing.

The legal system's awareness is illustrated by the evidence of Mr Jonathon Hunyor, principal lawyer at NAAJA in 2014, that he and other NAAJA staff were actually shown the BMU at full capacity on 11 August 2014.

The reason for the visit in itself speaks volumes. It was the idea of Executive Director Ms Cohen. Her rationale appears logical, but reveals itself as



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startling on analysis. By that time, the Government had announced its decision to close Don Dale and reopen the derelict adult male jail in Berrimah to accommodate the boys and girls from Don Dale.

Berrimah jail was over 30 years old and had housed some of the Territory's most notorious criminals: killers, rapists, paedophiles, including Martin Leach, Andy Albury, Bradley Murdoch and the like – men who had slept in the cells that were now proposed to be occupied by Aboriginal children, most of them from the bush. The Commissioner for Corrections, Mr Middlebrook, had given sworn evidence at a Coroner's Inquest in 2011 that in his opinion Berrimah jail was fit only for a bulldozer.

But, during this policy of punity and hostility waged against Aboriginal children, the adult jail was to be reopened. There was to be no more Don Dale. Now the children, both boys and girls, were going to be kept in the former adult jail. In fact, the girls were now earmarked for the old B Block, the former Maximum Security Unit that truly used to hold "the worst of the worst".

Needless to say, the decision had come under criticism, particularly from Aboriginal groups, including NAAJA. So, Ms Cohen's rationale for the visit to Don Dale was this: in order to persuade NAAJA to agree with the Berrimah proposal, its senior members were to be shown the scandalous conditions in which these children were being indefinitely held in the BMU. So much for two wrongs not making a right! This type of thinking and, dare I say it, "logic", graphically illustrates the ethical sewer which the legal system had descended into.

The arranged meeting between Corrections officials and NAAJA staff was held at Don Dale on 11 August 2014, after which Mr Hunyor and others were shown the now infamous BMU. Mr Hunyor gave evidence that once taken to the BMU, he was shocked. He said it felt like a dungeon. It was dark, dank, smelt of urine and the group looked at each other and said, 'Hang on a sec, are there kids

in there?'. Although it was dark they had seen some movement through the bars. The following day Mr Hunyor wrote an email asking questions and expressing his concerns to Commissioner Middlebrook, who confirmed that kids were in fact detained there, and would be for the foreseeable future. On 12 August, NAAJA also raised concerns with the NT Children's Commissioner, and, after receiving the response from Mr Middlebrook on 14 August, lodged an official complaint with the NT Children's Commissioner on 20 August.

As it happens, the children's incarceration in this dungeon ended on 21 August, thanks to the liberating actions taken by 14 year old "AD" (see previous story on pages 10-11), who was able to get out of his cell after a Youth Justice Officer left it unlocked. I represented AD at the Royal Commission. He ran free in the small adjacent courtyard area, taking out his pent-up frustrations and rage against "the machine". He and the other kids were eventually gassed by the Immediate Action Unit, a specialised unit brought down from the adult jail and trained to quell riots in adult jails. That decision to deploy gas was approved on the night by the attending Commissioner of Corrections Mr Middlebrook. Ms Cohen was also in attendance watching this. That action, brought on by AD fighting back, was effectively the end of the BMU. A 14 year old's protest brought to an end an infamy that no one else had seemed able to end. That says it all really.

On all the evidence, including that of Ms Cohen about there having been no alternative to the BMU at Don Dale, it is clear that, but for AD's actions, the detainees in the BMU would have remained there indefinitely – six Aboriginal children, all legally represented but effectively abandoned in conditions in which you wouldn't place an animal. Again, how could this happen in 21st century Australia?

The legal system's knowledge of what was being done to these Aboriginal children was further evidenced by the President of the Criminal Lawyers Association of the Northern Territory (CLANT), Mr Russell Goldflam. He is the Principal Lawyer for

the NTLAC's Alice Springs Office where he has worked for 19 years.

Mr Goldflam gave evidence in the main as an expert to critique Government policies in the youth justice field, particularly those of the CLP Government from 2012-2014. Amidst his critique he revealed that the horrific practices were well and truly known to the legal profession:

"We all knew that there [were] terrible things going on in the youth detention facilities. Although Four Corners hadn't been aired, it wasn't a secret that spit hoods and chairs and all the rest of it were being used".

Further, as a leader of the lobby group CLANT who enjoyed a reputation for championing civil rights and being a stone in the shoe of the State, it emerged that he had not opposed the legislation which tried to legitimise the use of the Restraint Chair. His evidence on this was that he believed the Bill was a "significant improvement on the pre-existing law".

Mr Goldflam also told the Royal Commission that throughout his tenure as President since 2011 he deliberately pursued a policy of "cordial relations", "cooperation" and "collaboration" with the Department of Corrections – a "productive relationship". Well, the end product of this "productive relationship" was a Youth Detention System that treated Aboriginal children worse than animals, including gassing, restraint chairs and being cooped up in the BMU for 16 days at a time. Aboriginal children were abandoned by a legal system, which seemingly included their legal representatives.

All of this evidence was bad enough, but there was worse to come. In my opinion, the most dispiriting, negative and chilling evidence in the whole of the Royal Commission was that of Mr Goldflam on relative population projections, and what conclusions he chose to draw from the figures. His conclusions were what is often referred to as "The Malthusian Spectre". I set this out in full. On 13 December 2016, he was asked:

"So is it correct to say that part of – in your opinion, part of the reason for

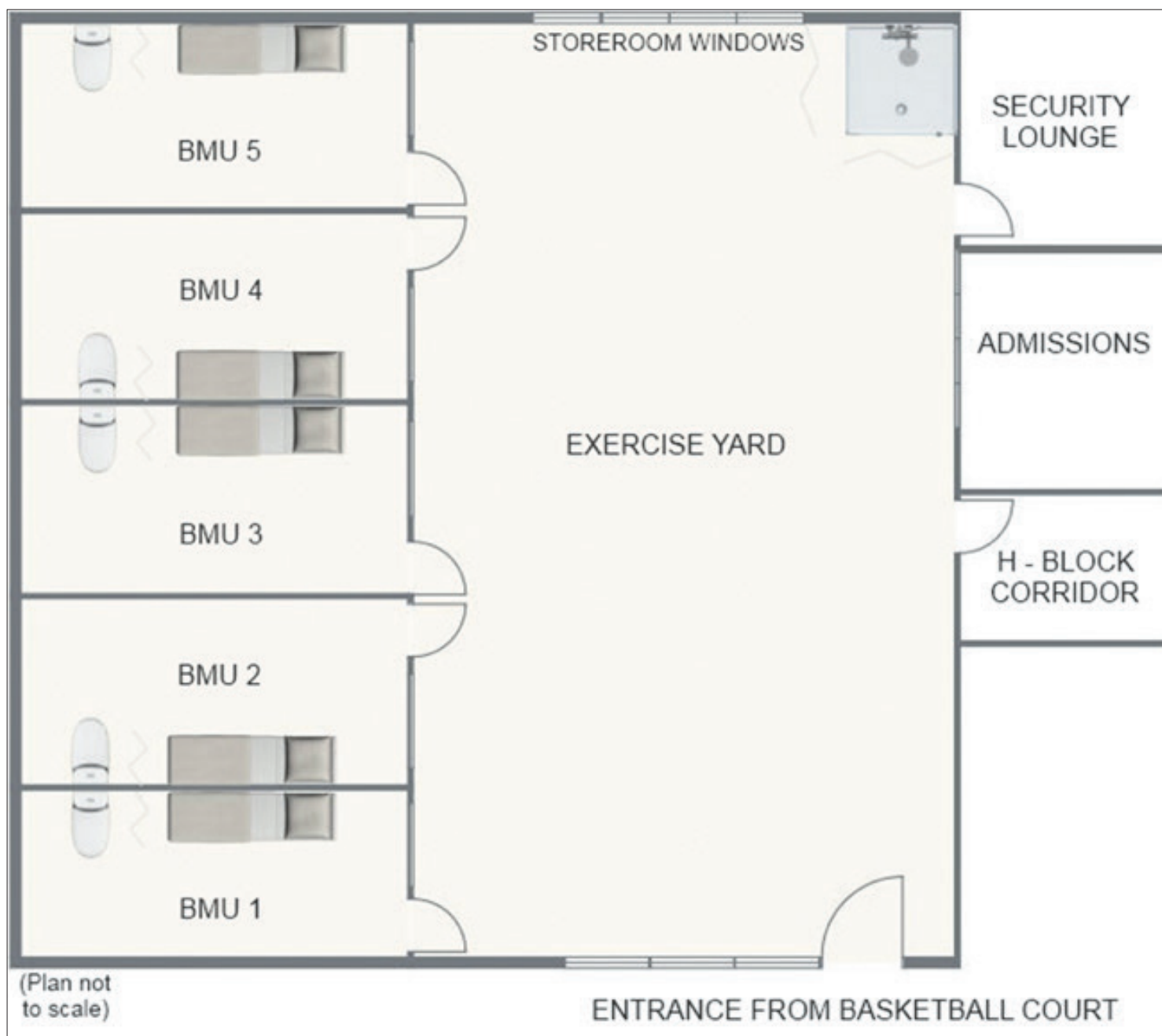
the increase in numbers of children in detention is because of the increase of children as a proportion of the population of the Northern Territory?"

Relying on a graph created by former NT Police Superintendent and now CEO of Territory Families Jeannette Kerr he gave this answer:

"Well specifically Indigenous children... The biggest single cohort of Aboriginal people is in the age group zero to four, whereas in the general population it's in the age group 25 to 29. And the effect of that is that we know that over the next 15 years there will be a very large number of Aboriginal people attaining the age at which they have the capacity to commit criminal offences. And we also know, tragically, that a very high proportion of those children grow up in families, households, communities with criminogenic circumstances. So it's obvious that we're going to see – whatever else we do, an increase in youth offending. We are going to see an increase in adult offending, and that demographic fact is a driver which we must not ignore. And – and it's important for a number of reasons, but one of the reasons it's important is we mustn't set ourselves aspirational targets which are impossible to achieve and set ourselves up to fail yet again. We have to recognise that, to an extent, the problems of offending, of violence, of property damage, of stealing and of incarceration and punishment are problems that are beyond the reach of governments or criminal lawyers, or any of us, and we have to cut our cloth accordingly. So I'm not trying to say that we should all just give up in despair and go away, I'm just trying to emphasise the point that there are these demographic facts which, to some extent, to a significant extent, drive the future of our society".

Such evidence is not only fatalistic and dispiriting, but it reveals a justice system that is in desperate need of a revamp, if for no other reason than it is in the hands of people who are now part cause of the malaise.

The good news is that during the Royal Commission that type of evidence was contradicted by witnesses such as Ms Olga Havnen, the CEO of Danila



Floor plan of the Dan Dale cell block where juveniles were held.

Dilba. Ms Havnen is an Aboriginal woman from Tennant Creek who has spent most of her life working on behalf of Aboriginal people, wrestling against systemic racism and non-Indigenous institutional policies. She has been the Coordinator-General for Remote Services, Head of Indigenous Strategy for the Australian Red Cross and Executive Officer in the Human Rights branch of the Department of Foreign Affairs. Her evidence showed that by the success of Danila Dilba and other Aboriginal health organisations, the future is in fact bright. Her evidence was positive, aspirational and compelling, contrasting greatly with the negative, resigned and bleak evidence of Mr Goldflam.

The evidence before the Royal Commission has clearly vindicated and confirmed Prime Minister Turnbull's reasons for calling it: "There are clearly systemic problems with the justice system in the Northern Territory". The evidence has comprehensively confirmed this. For further confirmation, look at observations in the Interim Report, which state that the system of detention in the Northern Territory "is failing our young people, it is failing those who work in the system and it is also failing the people of the Northern Territory who are entitled to live in safer communities".

Judge Borchers Rails at Teenage Criminal

While the Royal Commission was discovering, if not confirming, this shameful state of affairs, the whole country then learnt about the conduct of Youth Justice Judge Greg Borchers in the Youth Justice Court in Tennant Creek on 6 June.

It happened during a sentencing proceeding – i.e., the child had pleaded guilty to offences and his lawyer was presenting relevant considerations for sentence. The child was a 13 year old Aboriginal boy from Tennant Creek, whose mother earlier in the year had been brutally beaten to death in the family home. Her husband, the boy's father, had been charged with her murder and is now in the Alice Springs jail.

At the time of the homicide, the boy was in Alice Springs at boarding school. His two younger sisters were in the house and are now Crown witnesses in the prosecution of their father. The 13 year old boy and his sisters are left with no mother, and their father is in jail for the foreseeable future. Understandably, the boy's attendance at boarding school deteriorated and he returned to Tennant Creek, falling into the company of older youths, drinking alcohol, sniffing petrol,

wandering the streets and committing offences of breaking in, stealing and others. He was dealt with in March in the Youth Justice Court and placed on a bond. He reoffended in May and was brought from six days in custody into the Tennant Creek Youth Justice Court on 6 June to plead guilty to a number of other unlawful entry and stealings. He was dealt with by Judge Borchers.

In the court and for the boy were his CAALAS lawyer, his grandmother, a senior social worker and two volatile substance abuse nurses from Tennant Creek. At the beginning of the plea the defence lawyer, Mr Bhutani, made the point that there was some good fortune because the financial loss suffered by the victims of the boy's offending wasn't too great. The boy and others in the court then watched and listened to the Judge's response:

His Honour: *Client coming up with the money, is he Mr Bhutani?*

Mr Bhutani: *No, Your Honour.*

His Honour: *Family going to pay the money, are they, Mr Bhutani?*

Mr Bhutani: *Not that I know of.*

His Honour: *Who is going to pay the money, Mr Bhutani?*

Mr Bhutani: *Your Honour, it's a difficult situation. Unfortunately ...*

His Honour: *No. No. Tell me, who do you think might pay the money, Mr Bhutani?*

Service providers had indicated that the death of his mother had "obviously taken a significant toll" on the boy, including his decline in school attendance, alcohol abuse and failure to attend mental health services. His lawyer further said he:

"hadn't reached the point of last resort, taking into account his personal circumstances, the presumable grief and trauma he is going through". Mr Borchers' response to that was, "I'd like to know how they relate to breaking into people's property. Call one of them, anyone you like and get that person to tell me how grief results into breaking into banks".

Undeterred, the CAALAS lawyer again put to Borchers J the tragic circumstances of his parents and the fact it was relevant to his increasing absenteeism at school (79% attendance to 26% after the killing), drifting into bad company, drinking and committing offences. The Judge had this to say:

"There has been a bit of a breakdown in your family; a significant breakdown. But, you've ducked it. That means you've taken advantage of it. You're out and about on the streets with your mates, because no one is really in a position to look after you".

Mr Bhutani sought release on bail so the boy could engage in a number of support services, allowing him to remain and work there, and have the support of his remaining family. Mr Borchers told him this:

"You're not going back into the community. They can't afford you. It's quite clear that you and your family are not going to pick up the damages for what you've caused. And, presumably, and I infer this, you've got no understanding of that. You don't know what a first-world economy is... you don't know where money comes from, other than that the government gives it out".

Having given the lawyer and the boy sitting behind him that sustained tirade, he then remanded him in custody. A successful bail hearing was held one week later.

The whole performance by the Judge representing the NT Judiciary was one of sustained bullying, at times nasty. Such behaviour from a judge shames and undermines the authority, integrity and honour of the judiciary. Courts are called "This Honourable Court". There's no honour here, none. What trust can the community hold in a legal system where a judge speaks to children like this? This situation again reveals a legal system that has lost its way.

And so, amidst a Royal Commission into the Youth Justice System, how does that legal system react to the Judge's conduct? That sort of conduct by a judicial officer

anywhere, anytime beggars belief. To behave like that while the NT justice system is under a Royal Commission's scrutiny is staggering. The matter has been referred by the Central Australian Aboriginal Legal Aid Service, (CAALAS) to the Commission for consideration, and goodness knows what the Commission will make of it.

When interviewed as President of CLANT, Mr Goldflam, described Borchers J's conduct as "*unfortunate... unacceptable... inappropriate*" and that what he had said should not have been said. He said the "*apparent lack of empathy*" in Borchers J's accusations of dudding was "*sad*" but that they and his "*first world economy*" comments needed to be seen in a broader context! Further in the interview, Mr Goldflam revealed that the same Judge has been carrying on in such a manner before this incident. In 2012 he had told an Aboriginal juvenile that following his release from sentence, he would not be allowed to return to Alice Springs because he was "*not fit to live in a civil society*" and would instead be returned to the "*unregulated lands of Anangu Pitjantjatjaraku*".

What the Judge said and did to the boy was disgraceful. It was not "inappropriate", not "unfortunate"; it was disgraceful. It is symptomatic of a legal system which has lost its way. The treatment of this 13 year old boy by a non-Aboriginal man who has more than 10 years experience as a judge and 30 years experience as a Northern Territory lawyer is akin to the treatment of the Aboriginal child detainees with restraint chairs, or putting them into those isolation conditions of the BMU and then gassing them when they protest.

We all know from Woodward and Bernstein that it wasn't the break in of the Watergate Complex that ended Nixon, it was the cover up. Well, what is going to happen here? It appears that this same Judge has been carrying on like this before and the legal profession, including the Law Society, the Bar Association and whoever else is supposed to regulate the legal profession, seem to have been incapable of doing anything appropriate to address it. For too long, we have been agreeing with too much that was wrong.

To CAALAS' credit, as well as informing the Royal Commission of this conduct, they have made various complaints to the Chief Judge of the Local Court. In the writer's view, there is no dubiety about the way in which the Judge behaved towards the boy that day: in the writer's view, Judge Borchers is clearly unfit for office. Further, in the writer's view, he seems to mirror many of the personnel and "systems" which this Royal Commission have discovered that make up the now completely discredited NT Youth Justice System.

As to what happens to Judge Borchers, one can only wait and see. But every minute an Aboriginal juvenile is exposed



John Lawrence addressing the NAIDOC march gathering, Darwin July 2017.

to him is a minute too long. Whether this can be viewed as a cover up or just instinctive, classic institutional, defensive stalling, doesn't really matter. What the community can see graphically is a system that is not up to the task, and is not capable or willing to acknowledge the same. The whole thing is beginning to smell like some kind of Freemasons Society.

Some of the profession want these matters to be dealt with "discretely", out of the public domain. Their argument is not without some merit: if these things are discussed in the public domain, it will undermine the integrity of the Judiciary and will deny the individual involved "natural justice". Well, that has a logical ring to it, but the sad reality is that the NT legal system in 2017 has now gone past its tipping points; way past. Respect needs to be earned and maintained, not just individually, but also with the institution of the Judiciary within the separation of powers and the rule of law.

Situation Normal: "It's All Good"

As this was going on, the Royal Commission was sitting in the Darwin Supreme Court in the week beginning Monday 26 June. While the Commissioners were hearing evidence that day, having been alerted to the transcript of Mr Borchers' performance, the rest of the Supreme Court building was empty. CLANT was holding its 16th biennial conference in Bali. Ironies

abound and the symmetry was surreal.

So while the Royal Commission, appointed by the Prime Minister of Australia, was comprehensively investigating the systemic problems within the criminal legal system of the NT, much of the body of that legal system was over in Bali, attending the criminal law conference as if everything was "situation normal". While papers were being delivered on DNA evidence, motorcycle gangs in Queensland and Crown disclosure etc., there was very little, if any, acknowledgement that there was a Royal Commission looking into the NT Youth Justice System. There was little mention of "the war" or that herd of elephants grazing on the lawns outside. At this point in history, the NT legal system seems to be in a state of "hypernormalisation" – or, should I say, the catch-cry of contemporary Australia, "It's all good".

The concept of hypernormalisation comes from the book *Everything Was Forever, Until It Was No More; The Last Soviet Generation* by Alexei Yurchak (2006). Dealing with the period before the end of the Berlin Wall in 1989, the book argued that everyone knew the system was failing, but as no one could imagine any other alternative to the status quo, politicians and citizens were resigned to maintaining a pretence of a functioning society. Over time this delusion became a self-fulfilling prophecy and the "fakeness" was accepted by everyone as real, an effect that Yurchak termed *hypernormalisation*.

By the 1980s, it was clear to the Soviet Union that the dream had failed. No one believed in anything. No one had any vision. Technocrats pretended everything was going well. No one could imagine anything else. People became so much a part of the system that they could not see beyond it. Fakeness became hypernormal. The whole ambience was pessimism. There was no optimism for the future.

Conclusion

The Royal Commission has exposed unequivocally a justice system that is unjust. The extent of the inhumanity and racism that ran through the Youth Justice System; the participation and complicity of large parts of the legal system and the recent confirmation and continuation of that by Judge Borchers; and the pretence maintained by the legal system as evidenced by the CLANT Criminal Law Conference – all of that now demands wholesale change. This can and must happen, otherwise Aboriginal children will be facing no future.

The system has incrementally slidden into disrepair and dysfunction. Cooperation, complacency, compromise, collaboration and resignation all contributed to the further disempowerment of Australia's most valuable citizens, its Aboriginal children. "Australia's Shame" indeed.

*John Lawrence SC is a Darwin barrister. He is a former Principal Lawyer at the North Australian Aboriginal Legal Aid Service, a former president of the Northern Territory Bar Association and a former president of CLANT.