
TAKING RESPONSIBILITY FOR DON DALE

by Dr Gabrielle Appleby and Prof Alexander Reilly

Video footage depicts a guard running into a young boy's concrete cell, pinning the boy against the wall by the neck, throwing the boy to the ground, pushing the boy's face hard into a bare foam mattress while another guard strips the boy. The guards leave as quickly as they entered. The now naked boy writhes in despair, alone, with no hope of consolation.

Five years later the camera captures that same boy, still not a man, again in a prison cell. This time, on camera are four guards around the boy, who sits, naked from the waist up, in a chair. The boy's arms, legs and neck are strapped to the chair. A white hood completely covers the boy's face and a guard holds the boy's head, adjusting it within the restraint. The four guards leave the room. The boy is left, alone, restrained and hooded. Hours pass. The camera rolls on.

These images, haunting the television screens of Australia,¹ shattered any pretence of a functioning justice system. The images tell a story that cannot be sanitised through contextualisation. It does not matter what the boy was doing immediately prior to being pinned to the floor and stripped. What we witnessed could never be a justifiable human response.

The images are undeniably human, but they make us question the inherent dignity of human beings. As beings capable of such callous acts of violence and as beings so vulnerable to suffering and aloneness. These images make us question the possibility of a civilised society, in which the sanctity of youth and bodily integrity are respected and protected by the state. The images implicate us all. They shame us all.

We cannot unsee these images. They raise questions that demand answers.

And so the government responded. It set up an inquiry.² Better than that, it set up the most powerful inquiry at its disposal—a 'Royal Commission' into the abuse of this boy and other children who are supposed to be looked after, and rehabilitated, by the government.

Initially, the government appointed a former Northern Territory Chief Justice. He was not right for the job; the government had been a little too hasty, but was forgiven because it was trying to do the right thing. The Commission will now be headed by a former female Supreme Court judge and the Aboriginal and Torres Strait Islander Social Justice Commissioner.³

The Commissioners are detached, 'impartial', appointees under the authority of the state. The inquiry resembles a court with all the trappings that accompany it. The Commission examines a great list of issues that ring with gravity and sincerity. 'Terms of reference' cover the abuse in the sanitised, direct language of the law. The Commission is tasked with investigating, among other things, the 'failings in the child protection and youth detention systems of the Government of the Northern Territory', the 'effectiveness of any oversight mechanisms and safeguards to ensure the treatment of detainees was appropriate', the 'cultural and management issues that may exist within the Northern Territory youth detention system' and 'whether the treatment of detainees breached laws or the detainees' human rights.'⁴

The Commission provides a public space for the stories from the children and others who witnessed or perpetrated the abuse and from those who knew of or should have known of it.

The time comes for the young boy—whom we have seen stripped, strapped, hooded and assaulted—to give evidence to tell his story to the Commissioners. Again, we see the boy broadcast around the country. But this time we could not be further from the prison cells. We *hear* stories of brutality and institutional failure of care. But we *see* a young man speaking. He sits in a sterile, white witness box. He is answering questions from a suited lawyer acting on behalf of the Commission. The boy's hair is now combed. His own suit looks new, and the knot of his tie sits awkwardly at this throat.

The Commission has reduced the trauma, violence and injustice perpetrated on the young boy to evidence and words. The words

are safely contained when delivered in a courtroom. We can listen to, read, and respond to them with rationality and detachment.

The Royal Commissioners will write a report. Conclusions will be reached as to who was to blame. Changes to the state's detention and child protection systems will be recommended to prevent the abuse happening again.

The report will confirm that what happened was wrong, intolerable, unacceptable. But it will also act as a way to discipline future responses. The images will be given an interpretation. Those responsible will be named and required to account for their actions. The report will salve the wounds caused by the images we have seen so we can get on with our lives. We do not need to see those images again.

A new image emerges. An ugly cartoon of a disengaged Aboriginal father not knowing the name of his son. This image throws into question our hasty, comfortable response of establishing an inquiry. It asserts a complexity. Maybe there is a different location for blame? Abuse of children in detention is not only the result of a highly dysfunctional, uncaring and violent justice system, but of the social and cultural causes that led to children being in that system in the first place.

There are strong reactions to this cartoon. It is experienced as a further act of violence. Its interpretation of events deeply offends people at a time of great vulnerability. It opens a new conversation on the limits of free speech that distract from the institutional atrocities.

This image is met by still more images. People post on social media photos of loving Aboriginal fathers and their beaming children, challenging the stereotypes of Aboriginal families.

Image upon image, laying bare a dark underbelly of prejudice and counter-prejudice. Shining a light on failed institutions, failed families, on violence begetting violence. Then shining with human faces reminding of our capacity for hope, love and dignity.

Where does it end? Asking this is our first fundamental mistake. The law too easily produces neat resolutions. It allows us to forget and move on. But what is required is not closure but opening. The images, all of them, take from us the safety of words and resolution.

As T S Eliot reminds us 'We shall not cease from exploration, and the end of all our exploring will be to arrive where we started and know the place for the first time.'⁵The abuse of the boy at Don Dale Youth Detention Centre is not a new issue. Abuse in custody has been around ever since people have been detained within four

walls. The more particular issue of abuse of Aboriginal Australians in detention was uncovered and investigated in depth in the Inquiry into Aboriginal Deaths in Custody in 1991. We have comprehensive recommendations from that time: some have been implemented, many gather dust on the shelf. So we are back where we started.

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So how do we start? We must acknowledge our own horror, sit with it, and not try to make it go away. We need to look again at those CCTV images and reflect on our own humanity, on the terms of our community living, of our social contract. We are compelled, as Arundhati Roy's puts it, 'to try and understand, 'to never look away' and 'never to simplify what is complicated.'⁶ Richard Flanagan has explained the difficulty of Roy's challenge, that we are driven by cowardice and inertia and conformity to be blind, deaf and uncaring. But, '[w]hether we wish it or not, these things belong to us, are us, and we are diminished because of them.'⁷

After watching these images with his son, Stan Grant called for a 'reckoning.'⁸ He says this could be achieved through a truth and reconciliation commission capable of holding a 'mirror into our soul'. This is not the first time that calls have been made for an Australian commission of this sort.

Such processes have proved powerful in other contexts. The post-apartheid Truth and Reconciliation Commission in South Africa was the foundation for the new democratic state. The Commission was able to reveal just how widespread and violent was the Apartheid state. It provided a public space for perpetrators to admit to their crimes, to express their sorrow, and to take a place in the new democratic order. The Commission allowed them first to be seen for who they are and what they did. Institutions of the new state were thus built in the full knowledge of the injustices of the past.

So we have the possibility of two commissions. The Royal one looking for a final legal resolution, including recommendations for better institutional design, stronger safeguards against the abuse of children in youth detention. And the Truth one, providing a reckoning, looking for healing and reconciliation, confronting the darkness in our collective souls, staring directly at the horrors perpetrated in our name, to leave us feeling emotionally drained, but purged.

The deeper and more uncomfortable truth is that this is not just about abuse at Don Dale, or about a corrupt criminal justice system, or about dysfunction and disadvantage in Aboriginal communities and families. While they each have a complexity that belies this list, they may each be investigated, recommendations for the future can be formulated, reconciliation might even be able to be achieved. But that would leave the system as it is.

Through all the darkness, we have an opportunity to engage in a more broad-ranging, confronting, complex response. A response that does more than patch up a small number of institutions and programs and makes us feel better. A response that changes the fundamentals of the system.

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The 'system' is our constitutional order. It is a sophisticated order that has developed notions of fundamental human rights, and accountability mechanisms to protect those rights against the excesses of government action. It has allowed us all to participate in the formation and reform of the institutions that govern us through representation in our parliaments.

But it has also allowed this abuse to happen in our name and on our watch. How could our system have failed so fundamentally?

The answer, like the facts that make us ask the question, is complex. It requires us to look beyond Don Dale, beyond the Northern Territory government, beyond Indigenous Australia. We must look at the abuses that are perpetrated in our name where we have previously looked, but now forgotten, or where we have been prevented from looking, where we have happily allowed the government to close the door.

The system is now one in which government officials act with brutal, unemotional efficiency. The state operates with limited resources and no compassion. The response of the guards can be seen not necessarily as an evil response, but an unthinking response. We need to get his pants off quickly and without him hurting us. You hold him down, I'll strip him. It is a response required by the system, or if not required, the easiest way to satisfy the difficult and demanding requirements of the job.

Of course there is an edge. The guards may have enjoyed the violence they perpetrated; but seen in its complexity it should also be acknowledged as potentially institutionally created. It is the state in which guards and youth are placed in a dangerous power dynamic. Youth are set up as no-hopers and criminals, constrained, and frustrated. They lash out. The guards respond. And all this happens in the closed loop of the Don Dale Centre.

Our state attitude to offending youth is that they must be tamed and restrained because of the public's expectations in this area. We have an unhealthy detachment from events that are happening in detention. The closed doors protect us not only from 'dangerous', 'undeserving' and 'unwanted' people, but also shield us from the responsibility for their rehabilitation. But the final responsibility must always lie with us. Closing our eyes and allowing the state to close the doors does not absolve us of responsibility for the institutional culture in the prison system.

We must open our eyes to the other abuses committed in our names behind the state's closed doors. There are images equally horrendous that lay behind the fences of the offshore refugee processing centres on Manus and Nauru. For too long we have been happy for the government to remove these images from our sight. We have been complicit in allowing a 'nation-sized spit hood' to be pulled over our heads and our hands strapped uselessly to a chair.⁹ We have let the government do things beyond our sight. We must take responsibility for these images that we have now seen, and confront the complexity that they tell us about them, about us and about our constitutional system.

Accountability needs to be more immediate, less process driven and more about the participants in the system: the state actors and the individuals. It requires us to see what is happening. It cannot be achieved in the same way through sanitised, sterile and intellectualised questioning of bureaucrats. It cannot be achieved by the release of thousands of pages directly documenting the abuse, no matter how horrendous the events documented in these words.

We need to reclaim our democracy and our sovereignty. We must insist on feedback loops that will reveal to us the way in which government is practised in its raw and human complexity. We must insist on seeing what is happening. We cannot offer blind trust in government. Only in the full knowledge of what happens in our name can we have the necessary conversations about whether we want a state that prioritises ruthless, inhumane efficiency; whether government funding and training is adequate; whether we are willing to sacrifice human lives and human dignity to increase our 'security'.

We cannot leave it to under-resourced investigative journalists to take responsibility for the health of our civic institutions. We must step up to Roy's challenge and watch, listen and try to understand the stories and histories of those subject to abuse.

We must also try to understand, no matter how instinctively abhorrent, the stories of the people who work in a system in which such abuse continues to occur. Flanagan has called on us to name these things. Cruelty. Evil. A Plague.¹⁰ And so the Commissions have their place.

But more fundamentally, we need to be aware at all times, and not just after the fact, of the operation of systems carrying out the uncomfortable work of government. These systems cannot be allowed to operate outside our democratic scrutiny.

Undoubtedly investigative journalism will continue to have its place in this loop. Journalists working on the ABC Four Corners program brought the Don Dale images to us. Journalists working at The Guardian have been working to access and release information about what is happening on Nauru.¹¹ But journalists should not be—and cannot be—the primary source of revelation. And journalists themselves are inhibited by the institutional barriers that prevent them bringing these images and stories to us.

We need to break down the institutionalised secrecy and culture that gives prison guards the sense of impunity that we witnessed in Don Dale.

Secrecy provisions scar legislation across Australia. Commonwealth officers confront a criminal offence, punishable by two years jail, for releasing 'any fact or document' that comes to their knowledge in the course of their employment.¹² Whistleblower protections for those who witness abuse of state power are riddled with technicality and exceptions.¹³ Those working in offshore detention centres, including private doctors and social workers working under contract, are prohibited from speaking out about what they have seen, again with the threat of a two-year jail term hanging over their head.¹⁴

Doctors challenged this last law in the High Court of Australia. They claimed it breached the constitutionally protected implied freedom of political communication. As our former Chief Justice Sir Anthony Mason explained, 'government by the people', as dictated in our Constitution, requires not only that we get to vote for the government, but that the government tells us what it is doing.¹⁵ The courage of these doctors led to the government changing its laws. Health professionals may now speak out about what they have seen in these places. But that is as far as the government has gone.

A small and insufficient reaction to the fundamental principle at stake. There is still no way of us seeing what is happening on Nauru and Manus. There are still criminal sanctions for others who speak out about what they have seen there. We have not demanded more from the government.

It is these laws that keep stories, images and complex realities of government policies off our television screens. The Australian people have been complicit in the proliferation of these laws. We have been happy for doors to be closed on images that we do not want to see or to talk about. Only when we take responsibility for the wrongs that are being perpetrated in our names can we start to restore dignity to the young boy in the cell, and to us all.

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- 6 Arundhati Roy, *The Cost of Living* (Flamingo, 1999) 135.
- 7 Richard Flanagan, 'Does Writing Matter?' *The Monthly Essays* (October 2016) <<https://www.themonthly.com.au/issue/2016/october/1475244000/richard-flanagan/does-writing-matter>>.
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- 9 Flanagan, above n 7.
- 10 Ibid.
- 11 See, eg, The Nauru Files, *The Guardian*, <<https://www.theguardian.com/news/series/nauru-files>>.
- 12 *Crimes Act 1914* (Cth) s 70.
- 13 *Public Interest Disclosure Act 2013* (Cth).
- 14 *Border Force Protection Act 2015* (Cth) s 42.
- 15 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 139.