
IMAGERY OR INERTIA: THE RATIFICATION OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN RESPONSE TO DON DALE

by Professor Dennis Eggington and Alex Walters

'We travel into or away from our photographs.'

Don DeLillo, Mao II

INTRODUCTION

On 25 July 2016, ABC's *Four Corners* program broadcast a video of young Dylan Voller, strapped to a restraint chair with his head immersed in a spit-hood inside Don Dale Detention Centre ('Don Dale'). The video shows guards holding Voller's head still while he is strapped to the chair. The guards leave the cell but the filming continues; Voller's head lurches forward ever so slightly and seems to turn to the camera—defeat, resignation, or defiance?

eerily similar to the images of prisoners inside Baghdad's Abu Ghraib Prison, the image of Voller, and the ABC's exposition of the solitary confinement and tear-gassing of juveniles at Don Dale, prompted urgent calls for a response to the crisis inside juvenile corrections across Australia. Within 24 hours, and in the face of national and international media scrutiny, Prime Minister Turnbull announced a Royal Commission into the Protection and Detention of Children ('Royal Commission'), however it would only look at relevant institutions in the Northern Territory. The terms of reference were settled within three days. For many who work within Aboriginal legal affairs, the crescendo of outrage in response to these images represented an opportunity to reaffirm the unheeded messages of the 1991 Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'). At the heart of the RCIADIC recommendations was the understanding that many of the deaths were a consequence of the imbalance that sees First Nations people¹ overwhelmingly represented in custodial environments. In 2016, First Nations people over 18 constituted approximately two per cent of the population, yet represented 27 per cent of the total Australian adult prison population.² At June 2016, 55 per cent of young people in detention on an average night were First Nations young people and were 26 times more likely to be in juvenile detention than their non-First Nations counterparts.³ It is a lingering injustice and a repugnant stain on this country that mistreatment of people in custody inevitably affects First Nations people the most.

The response to the imagery of the *Four Corners* story was swift, but there had been a number of previous reviews of the events within Don Dale, including a report by the Northern Territory Children's Commissioner in 2014, the 2015 'Vita Report' and a further report from the Northern Territory Children's Commissioner in August 2015. Legal issues affecting First Nations people often face political inertia. Years of calls for reform to reduce First Nations incarceration rates have been diminished by mandatory sentencing regimes, imprisonment for fine defaulters, continued over-policing, lack of culturally competent diversion and rehabilitation programs and funding cuts to organisations that seek to reduce incarceration rates for First Nations people. Encouragingly, in February 2017 the Federal Government announced that Australia intended to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT') by December 2017.⁴ This is significant because ratification of the OPCAT requires Australia to establish, designate or maintain at the domestic level one or several investigative bodies (known as National Preventative Mechanisms ('NPMs')) for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.⁵ This article considers the possible ratification of the OPCAT, the historic experience of detention monitoring bodies in Australia, and asks, is Australia inert to the brutalisation of First Nations people even when confronted with violent imagery?

MISTREATMENT IN JUVENILE DETENTION

Almost every Australian jurisdiction has recently had significant issues related to the mistreatment and management of juvenile detainees.⁶ The use of solitary confinement and isolation of juvenile detainees from the general population of a detention centre as punishment and as part of management plans is widespread across Australian jurisdictions. Juvenile corrections within the Northern Territory, through the investigative powers of the Royal Commission, is currently subject to the most significant scrutiny. In the Interim Report of the Royal Commission, the Commission noted that evidence heard to date 'raises serious concerns about inappropriate and unlawful practices, unacceptable standards of

conduct and inappropriate methods of dealing with detainees within the youth detention centres.⁷ In March 2017, the Victorian Commission for Children and Young People released a report into the use of isolation, separation and lockdowns in Victorian youth justice system.⁸ The report found widespread use of 'restrictive practices that led to the confinement and isolation of young people, despite evidence suggesting that such practices can exacerbate harm and hinder rehabilitation.'⁹ Discouragingly, management plans incorporating isolation and separation were found to be 'generic' and 'failed to articulate any specific actions or interventions necessary to address a young person's problematic behaviour.'¹⁰

Both New South Wales and Western Australia have Offices of the 'Inspector of Custodial Services' ('IOCS'), which inspect and report on conditions in places of detention. Both the New South Wales and Western Australia offices are creatures of statute, tasked with the inspection of prisons, juvenile detention centres and lock-ups at mandated intervals.¹¹ Both offices report to parliament on their inspections¹² and have a significant role in promoting accountability for Department of Corrections and community understanding of the conditions within correctional facilities.¹³ The New South Wales IOCS is currently undertaking a review into behaviour management in the state's youth detention centres with terms of reference that include issues relating to separation, segregation and confinement.¹⁴ In a 2012 report,¹⁵ the Western Australian Office of the IOCS expressed concerns over the use of management or 'regression' regimes that saw juvenile detainees in Banksia Hill Detention Centre ('BHDC') in Western Australia placed in solitary confinement for 22 to 23 hours a day and isolated from the general BHDC population for lengthy periods. The IOCS report noted that of the 241 initiating regressions analysed, over 22 per cent of detainees were held in regression for more than 48 hours, 10 per cent were held for more than 72 hours and 2 per cent spent more than a week subject to a regression management regime.¹⁶ In one instance between late 2011 and early 2012, a juvenile detainee was isolated from the general population of BHDC under various 'regression' and 'individual management regimes' for 95 consecutive days in circumstances described by the President of the Western Australian Children's Court as amounting to 'psychological punishment' and 'psychological subjugation'.¹⁷ These practices remain ongoing in contemporary forms and are particularly concerning to the Aboriginal Legal Service of Western Australia (Ltd), as they exist notwithstanding the formal mechanisms for the confinement of a detainee for a prescribed maximum period under the *Young Offenders Act 1994* (WA).¹⁸

Various international instruments set out to prohibit the forms of solitary confinement and isolation that are widespread inside

Australia's juvenile detention facilities. The Istanbul Statement on the Use and Effects of Solitary Confinement characterises solitary confinement as the physical isolation of individuals confined to their cells for twenty-two to twenty-four hours a day and experience minimal meaningful contact with other people. The UN Special Rapporteur on Torture, Mr Juan E. Mendez commented that where these characteristics are applied to juvenile detainees it amounts to 'cruel, inhuman or degrading treatment or punishment and even torture.'¹⁹ The Committee on the Rights of the Child, in its General Comment No. 10 (2007) emphasised that disciplinary measures such as solitary confinement contravene Article 37 of the Convention on the Rights of the Child,²⁰ and has urged the abolition of solitary confinement against children.²¹ The extent of the reliance on confinement, segregation and isolation in Australia's juvenile detention facilities as a mechanism to manage detainee behaviour as described above suggests the need for greater independent oversight and scrutiny to prevent mistreatment.

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THE RATIFICATION OF THE OPCAT

The ratification of the OPCAT is a significant step to prevent repetition of the events in Don Dale, and the use of solitary confinement in juvenile detention in Australia. In establishing NPMs, as required by the OPCAT,²² Australia will adopt a 'mixed model', with the Commonwealth Ombudsman acting as the national coordinating NPM with the states and territories creating 'subsidiary NPMs' to monitor places of detention within their jurisdictions.²³ In addition to the establishment of NPMs, countries that ratify the OPCAT are required to provide unrestricted access for announced and unannounced visits from the United Nations Subcommittee for the Prevention of Torture (SPT).²⁴ The mandate of the SPT is to visit places of detention, make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment, as well as assisting the State NPMs in carrying out their functions.²⁵ Underpinning the role of the SPT is the notion that State Parties benefit from the comparison of places of detention within that country to other nations, and that the comparison assists with compliance with international standards.²⁶ Catherine Branson, former President of the Australian Human Rights Commission made the following remarks about the attributes necessary to ensure an

NPM can effectively monitor a 'closed environment' such as exists in juvenile detention centres:

Monitoring bodies should be independent. They should make regular visits and should be supported by adequate resources and have adequate functions and powers. They should work cooperatively with detaining authorities and be able to report publicly on their work.²⁷

The New South Wales and Western Australian Office of IOCS (as well as the United Kingdom Inspectorate of Prisons) provide templates for the creation of OPCAT compliant NPMs in other states in Australia. Both of the Australian offices perform hugely important legal and social functions. However, the effectiveness of the bodies ultimately turns on political responses to their recommendations. The effectiveness of these offices is limited by the 'inability to enforce the implementation of its recommendations'.²⁸ A well-known case that could have been prevented if recommendations had been enforced is that of Mr Ward, a First Nations man from the Ngaanyatjarra Lands, who died in 2008 from heatstroke while being transported from Laverton to Kalgoorlie by contractors servicing the Western Australian Department of Corrective Services. In two prior reports, the IOCS had warned that use of the vehicle used to transport Mr Ward would be inhumane for anything other than short trips.²⁹ The State Coroner commented, 'the observations made by the Office of the [IOCS] were accurate and should have been acted upon as a matter of urgency'.³⁰ In the context of juvenile detention, a 2012 report from the IOCS indicated that detainees at BHDC were 'subject to being 'locked down' in their cells or units far more frequently than is the case at adult prisons'. The Department of Corrective Services responded at the time that there was 'no alternative given existing resources'.³¹ In the aftermath of the riot at BHDC on 20 January 2013, IOCS commented that the 'excessive lockdowns of detainees in their cells' was a significant risk factor that remained unaddressed before, and was a causal factor in, the riot.³² As with many issues that affect First Nations people in custody, it took virulent and violent imagery (in this case a riot) to address many of the rights-based concerns affecting detainees at BHDC.

CONCLUSION

The ratification of the OPCAT and creation of NPMs in each Australian state and territory should shine a light on the treatment of young people in detention and counter the forms of political inertia that allowed the mistreatment of juvenile detainees in Don Dale to continue unmitigated. For the states and territories in Australia that do not already have an IOCS, the creation and funding of OPCAT compliant NPMs promises to improve the rights of juvenile detainees through regular inspections and reporting on the conditions in custodial environments. For those jurisdictions, as well as New South Wales and Western Australia, visits from the SPT will give international exposure to concerns around the treatment

of juvenile detainees in Australia and collaboration on how to improve detention standards. Notwithstanding the ratification of the OPCAT, the Australian experience of the legal rights and protections afforded to asylum seekers should suggest that the longevity of Australia's commitment to international human rights standards remains determined by political expediency. In order to ensure that real political change eventuates following the imagery brought about the Royal Commission, Australia will need more from our leaders when responding to the SPT than announcing that Australians are 'sick of being lectured to by the United Nations'.³³ The fate of young people in detention deserves more than being another quibble in the culture wars.

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- 1 The term 'First Nations people' is used throughout the article to describe Aboriginal and Torres Strait Islander people.
- 2 Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander Prisoner Characteristics' (4517.0, Prisoners in Australia, 30 June 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>>.
- 3 Australian Government Australian Institute of Health and Welfare, 'Youth Detention Population in Australia 2016', (Bulletin 138, 13 December 2016), <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129557685>>.
- 4 Joint media release, Minister for Foreign Affairs, the Hon Julie Bishop MP and the Attorney-General, Senator the Hon George Brandis QC, 'Improving oversight and conditions in detention' (9 February 2017) <http://foreignminister.gov.au/releases/Pages/2017/jb_mr_170209.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D>.
- 5 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT'), art 3.
- 6 See for example, Chris Cuneen, 'Abuse in youth detention is not restricted to the Northern Territory', *The Conversation* (online), 28 July 2016, <<http://theconversation.com/abuse-in-youth-detention-is-not-restricted-to-the-northern-territory-63101>>.
- 7 Royal Commission into the Protection and Detention of Children in the Northern Territory, (Interim Report, 31 March 2017) <<https://childdetentionnt.royalcommission.gov.au/about-us/Documents/RCNT-Interim-report.pdf>>.
- 8 Commission for Children and Young People of Victoria, 'The same four walls, inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system', (March 2017) <http://www.parliament.vic.gov.au/file_uploads/CCYP_-_Inquiry_Report_-_The_Same_Four_Walls_L1NNtqzB.pdf>.
- 9 *Ibid*, 13.
- 10 *Ibid*, 15.
- 11 *Inspector of Custodial Services Act 2003* (WA) s 19; *Inspector of Custodial Services Act 2012* (NSW) s 6.
- 12 *Inspector of Custodial Services Act 2012* (NSW) s 6(d); *Inspector of Custodial Services Act 2003* (WA) s 34(1).
- 13 For instance, in Western Australia, media regularly contact the Inspector of Custodial Services, Neil Morgan, to comment on issues within detention centres and prisons.
- 14 New South Wales Inspector of Custodial Services, 'How use of force

- against detainees in Juvenile Justice Centres in NSW is managed' (1 December 2014) <<http://www.custodialinspector.justice.nsw.gov.au/Pages/current-inspections/how-use-force-against-detainees-juvenile-justice-centres-managed.aspx>>.
- 15 OICS, 'Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre', (Report Number 76, January 2012).
- 16 *Ibid*, [5.30].
- 17 *The Department of Corrective Services v RP* [2012] WACC 5.
- 18 Detainees can be confined as punishment for a detention offence pursuant to s 173(2)(e) of the *Young Offenders Act 1994* (WA) while Regulation 74 of the *Young Offenders Regulations 1995* (WA) allows the confinement of a detainee to 'maintain good government, good order or security in a detention centre'.
- 19 *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 66th Session, Provision Agenda Item 69(b), UN Doc A/66/268, (5 August 2011), [81]; Human Rights Law Centre, 'Torture and cruel treatment in Australia: Joint NGO report to the United Nations Committee Against Torture' (Report, October 2014) 25.
- 20 CRC/C/GC/10, [89].
- 21 CRC/C/15/Add.151, para. 41; CRC/C/15/Add.220, [45(d)].
- 22 Professors Richard Harding and Neil Morgan, 'Implementing the Optional Protocol to the Convention against Torture : Options for Australia' (Report to the Australian Human Rights Commission by Centre for Law and Public Policy, The University of Western Australia, 2008).
- 23 *Ibid*, 2; Joint media release, Minister for Foreign Affairs, the Hon Julie Bishop MP and the Attorney-General, Senator the Hon George Brandis QC, 'Improving oversight and conditions in detention' (9 February 2017).

- 24 OPCAT, art 12.
- 25 OPCAT, art 11.
- 26 Bronwyn Naylor, Julie Debeljak and Anita Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments' (2015) 41(1) *Monash University Law Review* 218, 259.
- 27 Catherine Branson, 'Potential for Oversight – The Role and Effectiveness of Monitoring Bodies in Overseeing Human Rights in Closed Environments. A Commonwealth Perspective' in Bronwyn Naylor et al (eds) *Monitoring and Oversight of Human Rights in Closed Environments; Proceedings of a Roundtable, 29 November 2010* (Monash University Law Faculty, 2012) 37, 39.
- 28 Naylor et al, above n 26, 257.
- 29 *Ibid* 257; OICS, 'Report of an Announced Inspection of Adult Prisoner Transport Services' (Report No 3, November 2001); OICS, 'Thematic Review of Custodial Transport Services in Western Australia' (Report No 43, May 2007).
- 30 State Coroner of Western Australia, *Inquest into the Death of Ian Ward* (Ref No 9/09, 12 June 2009) 89.
- 31 OICS, 'Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre' (Report No 76, March 2012), v.
- 32 OICS, 'Directed review into an incident at Banksia Hill Detention Centre on 20 January 2013' (Report No 85, July 2013) 21.
- 33 Lisa Cox, 'Tony Abbott: Australians 'sick of being lectured to' by United Nations, after report finds anti-torture breach', *The Sydney Morning Herald* (Online) March 10 2015, <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-australians-sick-of-being-lectured-to-by-united-nations-after-report-finds-antitorture-breach-20150309-13z3j0.html>>.

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