

Indigenous injustice: it beggars belief that so much evidence was ignored

By Gillian Triggs

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Barbed wire fences surround the Don Dale youth detention centre in the Northern Territory.

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I was shocked but not surprised by the ABC's Four Corners revelations last Monday night. Incontrovertible CCTV evidence of Aboriginal children subject to demeaning, debilitating and dehumanising behavior has galvanised the Australian community and prompted the creation of a royal commission with an unprecedented breadth of investigation.

I watched Four Corners from the green room at the ABC studios that night along with fellow Q&A panelists. We are not usually short of a word. There was a buzz in the room and much to talk about. Then the disturbing footage of children being

abused appeared on large screens before us. The energy dissipated, silence descended. Some fought back tears. Others had to turn away.

Once again, it has taken the power of the media and iconic pictures to stimulate action by our most powerful leaders. The prime minister rightly acted swiftly to establish a royal commission as an immediate response to some of the most inappropriate treatment imaginable of children and young people in the care of the Northern Territory.

Royal commissions and inquiries are just a start and do not necessarily prompt reform. It beggars belief that the measured and evidence-based reports by so many experts have been ignored by governments.

- 25 years ago another royal commission made over 300 recommendations to combat Aboriginal deaths in custody. Most have not been implemented. Today, Australia warehouses double the number of Indigenous people in detention and about 95% of juvenile detainees in the Northern Territory are Indigenous.
- In August 2015, the report by the Northern Territory's children's commissioner failed to "pique" the interest of politicians to end the abuse at Don Dale.
- This followed the January 2015 report into the NT's youth detention system that considered allegations of mistreatment at Don Dale.
- Also in 2015, the manager of the Northern Australian Aboriginal Justice Agency, Jared Sharp, said young people were being "caged up like animals".
- Pat Anderson's the "Little Children are Sacred" report also drew attention to poor detention conditions for children.
- In May 2016, the commonwealth children's commissioner, Megan Mitchell, visited Don Dale and voiced her concerns about unacceptable conditions,

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The role of the royal commission, led by Margaret White and Mick Gooda, is essentially forensic with the task of determining exactly what happened and what laws have been breached.

The royal commission has both a narrow focus and a wide legal mandate. The inquiry is confined to the Northern Territory child protection and youth detention systems. A focus on the Northern Territory alone makes sense in light of the urgency of responding to the shocking practices at the Don Dale centre. Once this challenge is met, there may well be a recommendation for a more wide-ranging national inquiry.

By contrast with the limited focus of the inquiry, the question of whether these practices breach the law is without precedent in its breadth. The inquiry is charged with determining whether the treatment of children amounted to a breach not only of commonwealth and Territory laws and policies, but also of a “human right or freedom that ... is recognised or declared by an international instrument”.

I have never known any government inquiry to include all international human rights treaties as a benchmark for determining legal responsibilities.

It is a sad legal fact that many of the human rights treaties to which Australia is a party have not been legislated by parliament into our national laws. Notoriously, the Convention on the Rights of the Child (CRC) is not part of Australian law and has not been available as a benchmark for our courts or administrators. The single exception is the mandate of the Australian Human Rights Commission. The commission is charged with ensuring that the CRC, among other human rights treaties, informs the work of the commission in setting universally recognised standards for children.

The convention requires that:

- The detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.
- Children should not suffer torture or cruel, inhuman or degrading treatment or punishment.
- Children in detention should be treated with humanity and respect.
- Children should be protected from all forms of physical or mental violence, injury or abuse while in the care of any other person that has the care of the children.
- Children in detention have the right to prompt access to legal and other appropriate assistance, and the right to challenge the legality of their detention before a court or other independent body.

With political will, especially of a prime minister who has shown leadership in responding to the cruelty at Don Dale, the recommendations of the royal commission can provide the foundations for a further inquiry into the detention of children nationally and into understanding the deeper question as to why indigenous Australians are so caught up in the justice system.

Let us not forget that Australia seeks a seat on the United Nations human rights council at a vote to be held in November 2017. The international community has long voiced its concerns about the treatment of Aboriginal and Torres Strait Islanders. At the Universal Periodic Review of Australia's human rights record in November 2015, 104 states of the human rights council raised several concerns. The primary issue was Australia's treatment of asylum seekers and refugees, especially their mandatory and indefinite detention.

The second issue was the disproportionate incarceration of Indigenous Australians and young people.

A majority of members of the human rights council called on Australia to ratify the optional protocol to the convention against torture (Opcat). This the Australian government has agreed to do on further consultation with the states and territories. The Australian Human Rights Commission has long called for ratification of Opcat because it will enable the creation of a national monitoring system of all forms of detention, not only of juveniles and asylum seekers but also of the disturbing number of detainees with cognitive disabilities.

The convention on the rights of the child says it all: a child should be detained only as a last resort and has the right to grow up "in an atmosphere of happiness, love and understanding".

We have a long way to go in Australia, but the White and Gooda commission has the potential to set us on the right road.