

THE TREATMENT OF AUSTRALIAN CHILDREN IN DETENTION: A HUMAN RIGHTS LAW ANALYSIS OF MEDIA COVERAGE IN THE WAKE OF ABUSES AT THE DON DALE DETENTION CENTRE

KATE FITZ-GIBBON*

In July 2016 harrowing images of a child being forcibly restrained in Don Dale Youth Detention Centre in Australia's Northern Territory shone a national spotlight on the conditions experienced by some young persons in custody. The subsequent Royal Commission provides an important opportunity for an independent body with expansive powers to examine the human rights violations that some youth experience in detention. This article examines Australian media coverage of the Don Dale incidents to question whether an international human rights law perspective was embraced and the degree to which such a perspective offers a useful vantage point for understanding and responding to the abuses at Don Dale. The article concludes that the international human rights framework provides a valuable perspective for communicating the gravity of the treatment of young people in detention and from which the Federal Government can draw to ensure an effective response to the violations committed.

I INTRODUCTION

In July 2016 harrowing images of a child being forcibly restrained in Don Dale Youth Detention Centre ('Don Dale') in Australia's Northern Territory ('NT') shone a national spotlight on the conditions experienced by some young persons in custody. The images animated debate about the conditions of youth detention broadly and the treatment of Indigenous youth in detention more specifically. In response to a *Four Corners* report on Don Dale,¹ the Australian Prime Minister, Malcolm Turnbull, announced a Royal Commission into the

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1 Australian Broadcasting Corporation, 'Australia's Shame', *Four Corners*, 26 July 2016 (Caro Meldrum-Hanna) <<http://www.abc.net.au/4corners/stories/2016/07/25/4504895.htm>>.

Protection and Detention of Children in the NT ('the Royal Commission').² The Royal Commission's Terms of Reference, among other things, call for an examination of whether the treatment of detainees breaches laws or the detainees' human rights.³ Aligning with the rights-focus adopted by the Royal Commission in the wake of the Don Dale incident, debate has emerged in Australian media coverage as to the extent to which the treatment of children in detention in the NT (and elsewhere in Australia) represents a human rights violation. The implications of applying a human rights lens to this issue are particularly significant in the current political climate, where Australian jurisdictions have arguably demonstrated a declining commitment to the rights of children in the administration of juvenile justice.

The Royal Commission provides an important opportunity in Australia for an independent body with expansive powers to examine the human rights violations that some youth experience in detention. The implications of this are important both in terms of challenging current practice and encouraging a change of practice in the NT specifically, but also across Australia more broadly and potentially in other countries where research suggests similar practices persist.⁴ The Royal Commission is also important in terms of its contribution to a growing body of research that points to the overrepresentation and ill-treatment of Indigenous persons, minority ethnic youth and youth immigrant populations in detention.⁵ In Australia the unjust treatment of Indigenous persons, including children in custody has a long history. A study conducted by the Australian Institute of Health and Welfare found that 'Indigenous young people aged 10–17 were 31 times as likely as non-Indigenous young people to be in detention on an average night in the June quarter 2012'.⁶ In the NT specifically, the home of the controversial and heavily criticised Don Dale, 97 per cent of persons detained

2 Malcolm Turnbull and George Brandis, 'Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory' (Joint Media Release, 28 July 2016).

3 Attorney-General, *Letters Patent*, No 51, 1 August 2016, 1.

4 Chris Cunneen, 'Abuse in Youth Detention is Not Restricted to the Northern Territory', *The Conversation* (online), 28 July 2016 <<https://theconversation.com/abuse-in-youth-detention-is-not-restricted-to-the-northern-territory-63101>>; Julian Cleary, *The Last Six Months are Proof Enough: It's Not Just Don Dale* (2 November 2016) Amnesty International <<https://www.amnesty.org.au/the-last-six-months-are-proof-enough-its-not-just-don-dale/>>.

5 See, eg, Barry Goldson, 'Child Incarceration: Institutional Abuse, the Violent State and the Politics of Impunity', in Phil Scraton and Jude McCulloch (eds), *The Violence of Incarceration* (Routledge, 2009) 86; Barry Goldson and John Muncie, 'Towards a Global "Child Friendly" Juvenile Justice?' (2012) 40 *International Journal of Law, Crime and Justice* 47, 54; John Muncie, 'International Juvenile (In)Justice: Penal Severity and Rights Compliance' (2013) 2 *International Journal for Crime, Justice and Social Democracy* 43; Jerome G Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (Cambridge University Press, 1996); Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (Spiegel & Grau, 2014).

6 Australian Institute of Health and Welfare, 'Juvenile Detention Population in Australia: 2012' (Report, Juvenile Justice Series No 11, 2012) 10. On the overrepresentation of Indigenous youth in the Australian prison system, see also Chris Cunneen and Rob White, 'Australia: Control, Containment or Empowerment?' in John Muncie and Barry Goldson (eds), *Comparative Youth Justice: Critical Issues* (Sage Publications, 2006) 96.

in youth corrections are Indigenous,⁷ a figure which has remained relatively consistent for over three years.⁸ While the overrepresentation of Indigenous young people is most starkly felt in the NT, it is also evident in other Australian states and territories. For example, as of 2015, in Victoria the rate is 11 times higher for Indigenous persons, in New South Wales Indigenous youth were 15 times more likely to be under youth justice supervision, and in Queensland it is 16 times higher.⁹

Against this backdrop, this article combines doctrinal analysis with an analysis of media coverage to critically analyse the extent to which human rights claims made in the media have a basis in international human rights law. In doing so, the article examines Australian media coverage of the Don Dale incidents to question whether an international human rights law perspective was embraced and the degree to which such a perspective offers a useful vantage point for understanding and responding to the abuses at Don Dale specifically and the treatment of Australian children in detention more broadly. In order to do so, the article is structured in eight parts. Part II sets out the qualitative media and documentary analysis upon which this article draws. Part III provides the context for this article's focus by setting out the role that the media played in exposing the treatment of young people at Don Dale and the subsequent establishment of a Royal Commission by the Australian Federal Government. Part IV undertakes a critical analysis of the media's account of the alleged violation of human rights under international law and whether Australia is meeting its human rights obligations. In Part V the analysis considers the extent to which media coverage portrayed the treatment of juveniles in detention as amounting to torture or cruel, inhuman or degrading punishment and whether the tests established at international law support such a portrayal. In the final parts of the article the analysis focuses on the response of the Australian Federal Government in establishing a Royal Commission and critically analyses whether this is an effective response to the problem (Part VI) and whether it fulfils the positive obligations upon the Australian Federal Government to protect the human rights of children held in detention (Part VII). The article concludes that the international human rights framework, in and of itself, provides a valuable perspective through which the media can communicate the gravity of the treatment of young people in detention and from which the Federal Government can draw in order to ensure an effective response to the violations committed.

7 Benedict Coyne and Kerry Weste, 'ALHR's Open Letter to the Prime Minister Calling for a Broader Inquiry into Youth Justice System' (Open Letter, Australian Lawyers for Human Rights, 27 July 2016) <<https://alhr.org.au/alhrs-open-letter-prime-minister-calling-broader-inquiry-youth-justice-system-immediate-steps-protect-child-detainees/>>.

8 Michael Vita, 'Review of the Northern Territory Detention System Report' (Report, January 2015) 10.

9 Australian Institute of Health and Welfare, 'Juvenile Justice National Minimum Data Set' (2015).

II RESEARCH DESIGN

This article is informed by a qualitative documentary and media analysis, which includes the identification and thematic analysis of official documents, media articles and government press releases emerging in the wake of the Don Dale events as well as an analysis of the relevant scholarly and grey literature. This broad-ranging documentary analysis seeks to capture official and unofficial responses, as well as public discourses, emerging prior to and in the immediate wake of the Don Dale incident. In doing so it builds on a bank of previous research that has examined the role of the media in promoting a human rights dialogue,¹⁰ and the power of imagery in generating public interest in human rights issues.¹¹

For the media analysis, all media articles published in Australia between 1 January 2012 and 31 October 2016 were identified using the NewsBank Media Database. The search term ‘Don Dale detention centre’ was combined in different combinations with ‘human rights’, ‘juvenile offenders’, ‘juvenile justice’ and ‘Royal Commission’ to identify all relevant media coverage. The period chosen allowed for the inclusion of all articles published in the immediate period leading up to and following the *Four Corners* documentary and the establishment of the Royal Commission as well as the inclusion of any media in the four years prior to that documentary during which several of the incidents took place and other inquiries were held. Through this process ‘traditional’ mainstream media coverage was targeted, as opposed to undertaking an analysis of social media outlets, albeit it is acknowledged that this too would be an interesting point of analysis,¹² particularly given the salience of the Don Dale images in online media.

Table 1 (see below) lists the number of articles identified as relevant for each year using this search process.

10 See, eg, Lieve Gies, *Mediating Human Rights: Media, Culture and Human Rights Law* (Routledge, 2015); Sharon Sliwinski, *Human Rights In Camera* (University of Chicago Press, 2011).

11 See, eg, Cynthia Banham’s research on Abu Ghraib and the power of images: Cynthia Banham, *Liberal Democracies and the Torture of Their Citizens* (Hart Publishing, 2017) 53.

12 For research on the role of social media in generating political change during the Arab Spring uprisings, see Sarah Joseph, ‘Social Media, Political Change, and Human Rights’ (2012) 35 *Boston College International and Comparative Law Review* 145.

Table 1: Relevant media coverage 1 January 2012 – 31 October 2016

Year of publication	Number of relevant articles ¹³	News outlets (place of publication)
2012	2 articles	<i>Northern Territory News</i> ¹⁴ (Darwin)
2013	3 articles	<i>Herald Sun</i> (Melbourne), <i>Northern Territory News</i> (Darwin)
2014	13 articles	<i>Northern Daily Leader</i> (Tamworth), <i>Northern Territory News</i> (Darwin)
2015	40 articles	<i>Centralian Advocate</i> (Darwin), <i>Darwin and Palmerston Sun</i> (Australia), <i>International Business Times: Australian edition</i> (Australia), <i>Northern Territory News</i> (Darwin), <i>The Australian</i> (Australia), <i>The Examiner</i> (Launceston)
2016	223 articles	<i>ABC News</i> (Australia), <i>Bendigo Advertiser</i> (Victoria), <i>Daily Advertiser</i> (Wagga Wagga), <i>Daily Mercury</i> (Mackay), <i>Daily Telegraph</i> (Sydney), <i>Dalby Herald</i> (Queensland), <i>Geelong Advertiser</i> (Victoria), <i>Gold Coast Bulletin</i> (Queensland), <i>Herald Sun</i> (Melbourne), <i>Illawarra Mercury</i> (New South Wales), <i>International Business Times: Australian edition</i> (Australia), <i>Mercury</i> (Hobart), <i>Newcastle Herald</i> (New South Wales), <i>Northern Miner</i> (Townsville), <i>Northern Territory News</i> (Darwin), <i>Rural Weekly</i> (Rockhampton), <i>SBS News</i> (Australia), <i>Sunday Mail</i> (Adelaide), <i>The Advertiser</i> (Adelaide), <i>The Advocate</i> (Burnie), <i>The Age</i> (Melbourne), <i>The Australian</i> (Australia), <i>The Cairns Post</i> (Queensland), <i>The Canberra Times</i> (Australian Capital Territory), <i>The Conversation</i> (Melbourne), <i>The Courier Mail</i> (Brisbane), <i>The Daily Examiner</i> (Grafton), <i>The Northern Star</i> (Lismore), <i>The Sun Herald</i> (Sydney), <i>The Sydney Morning Herald</i> (Sydney), <i>Townsville Bulletin</i> (Queensland), <i>Warwick Daily News</i> (Queensland)

The media analysis sought to identify and examine differences in responses to and coverage of the events at Don Dale, including an analysis of who were the authoritative voices in the aftermath of Don Dale, the extent to which the children in detention were constructed as ‘rights bearers’, the construction of the incident as a ‘legitimate’ or ‘illegitimate’ response to children held in detention and the degree to which a human rights lens was applied to the issue. In doing so, as the above table demonstrates, this article examines media from across Australia revealing that in the wake of the *Four Corners* documentary the treatment of juveniles in the Don Dale Detention Centre became a national issue. Coverage of the incident occurred across metropolitan, rural and regional news outlets. Excerpts from the media articles analysed are cited throughout this article

13 The total number of articles tallied here does not account for instances where the same article was published across multiple news outlets. The analysis took into consideration only one copy of each article.

14 All articles categorised as ‘Northern Territory News’ also included articles identified on NewsBank from the *Sunday Territorian* and *Northern Territory Business Review*.

to illustrate how the incident was constructed by the media. This analysis also sheds light on the extent to which media coverage supported a human rights perspective being brought to bear on understanding what had occurred at Don Dale and how it should be responded to by state and non-state parties.

In addition to the media analysis, this article also reviews and examines relevant international human rights law in order to consider the extent to which the incidents at Don Dale detention centre violate Australia's obligations under international law. This analysis is specifically focused upon the state's obligations under the *International Covenant on Civil and Political Rights* ('ICCPR'),¹⁵ *International Covenant on Economic Social and Cultural Rights* ('ICESCR'),¹⁶ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment* ('Convention against Torture'),¹⁷ and most specifically, the *Convention on the Rights of the Child* ('CRC').¹⁸ These international treaties are drawn upon in terms of the content of the treaties but also the tests used in international human rights law to determine violations and the mechanisms for effective accountability and monitoring compliance. This doctrinal analysis is combined with the media analysis to critically analyse the extent to which human rights claims made in the media have a basis in international human rights law.

III DON DALE DETENTION CENTRE AND THE NORTHERN TERRITORY ROYAL COMMISSION

On 25 July 2016 the Australian Broadcasting Corporation's ('ABC') *Four Corners*, a national investigative documentary-based program,¹⁹ broadcast footage of children being abused while held in detention at Don Dale.²⁰ The episode, entitled 'Australia's Shame', shone a national spotlight on the use of spit hoods and shackles on juveniles, alleged abuse within cells with footage shown of children being thrown to the ground and the use of solitary confinement

15 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The ICCPR was ratified by Australia on 13 August 1980.

16 *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1996, 993 UNTS 3 (entered into force 3 January 1976). The ICESCR was ratified by Australia on 10 December 1975.

17 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). The *Convention against Torture* was signed by Australia on 10 December 1985 and ratified on 8 August 1989.

18 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

19 *Four Corners* is arguably the leading news documentary program in Australia. In 2015–16, the period during which the documentary on the treatment of young people at Don Dale Detention Centre aired, the program achieved an average audience of 1 million per episode: see Australian Broadcasting Corporation, 'Annual Report 2016' (Annual Report, 6 October 2016) 65 <<http://about.abc.net.au/wp-content/uploads/2016/11/ABCAnnualReport2016.pdf>>.

20 Australian Broadcasting Corporation, above n 1.

for juveniles.²¹ The documentary focused in particular on the treatment of one juvenile, Dylan Voller,²² and his alleged ‘sustained mistreatment’ over a five-year period,²³ including an incident where he was placed in a spit hood and strapped to a mechanical restraint chair for nearly two hours.²⁴

The incidents shown on the *Four Corners* program occurred between 2010 and 2015. In the days following the footage, the broadcasted treatment of juveniles in detention was described as ‘unthinkably evil’,²⁵ ‘unspeakable cruelty’,²⁶ ‘likely unlawful’,²⁷ and ‘truly shocking and distressing’.²⁸ Less than 12 hours after the footage aired, in what has been described as an ‘instantaneous’ reaction to the *Four Corners* documentary,²⁹ Australian Prime Minister, Malcolm Turnbull, announced a Royal Commission would be set up. The Terms of Reference for the Royal Commission require it to examine the treatment of children in all detention centres in the NT and the child protection system in the NT.³⁰ This dual focus recognises the vulnerability of children in the child protection system as well as the frequent overlap of children who interact with both child protection and youth detention.³¹ The focus of this article is the first of the Royal Commission’s two areas of examination.

Despite the Federal Government’s quick response to the issue, and while the ABC footage was undoubtedly shocking to many in the Australian community, it has since emerged that it involved several incidents and practices previously

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- 21 Ibid. It should be noted that in the days following the footage, the *Four Corners* documentary was criticised for omitting facts. See, eg, Piers Akerman, ‘PM Pulls the Hood over His Own Head’, *The Sunday Telegraph* (Sydney), 14 August 2016, 34; Andrew Bolt, ‘Shameless Four Corners Bias Will Bring Down a Government’, *The Courier Mail* (Brisbane), 18 August 2016, 20; Jeff Kennett, ‘ABC’s Bias Is Offensive and Unacceptable’, *Herald Sun* (online), 17 August 2016 <<http://www.heraldsun.com.au/news/opinion/abc-bias-over-nt-juvenile-detention-issue-offensive-unacceptable-jeff-kennett/news-story/cc33f3a64676aac373ca7a6387d4aaae>>; Jeff Kennett, ‘New Thinking is Vital to Helping our First People’, *Herald Sun* (Melbourne), 24 August 2016, 25.
- 22 Following the documentary’s broadcast Voller was granted early release. In the short period since he has emerged as a somewhat ‘spokesperson’ for imprisoned Indigenous young people. He has provided evidence to the Royal Commission. See Luke Pearson, ‘Dylan Voller’s Path to Healing: Turning Years in Detention into a Voice for Kids Inside’, *ABC News* (online), 21 August 2017 <<http://www.abc.net.au/news/2017-08-21/dylan-voller-turns-years-in-detention-into-voice-for-kids-inside/8816052>>.
- 23 Amos Aikman, ‘Torture and Teargas Alleged in NT Juvenile Detention System’, *The Australian* (online), 26 July 2016 <<http://www.theaustralian.com.au/news/nation/torture-and-teargas-alleged-in-nt-juvenile-detention-system/news-story/93fe37713052d8e90707f67d3defab2b>>.
- 24 Hayley Sorensen, ‘Don Dale Chairs “Unlawful”: Children’s Commissioner’s Report Tabled in Parliament’, *Northern Territory News* (Darwin), 27 October 2016, 10.
- 25 Mark Kenny, ‘PM Widens Abuse Inquiry – Detention Centre Shame’, *The Sydney Morning Herald* (Sydney), 27 July 2016, 1.
- 26 Mark Kenny, ‘Swift Response Is Just a Start – Analysis: Exposure Prompts Federal Intervention’, *The Sydney Morning Herald* (Sydney), 27 July 2016, 4.
- 27 Hayley Sorensen, ‘Use of Restraint Chair “Unlawful”’, *Centralian Advocate* (Darwin), 1 November 2016, 8.
- 28 Coyne and Weste, above n 7.
- 29 Kenny, ‘Swift Response Is Just a Start’, above n 26.
- 30 Royal Commission into the Protection and Detention of Children in the Northern Territory, ‘Royal Commission Fact Sheet’ (Fact Sheet No 1) <<https://childdetentionnt.royalcommission.gov.au/about-us/Pages/fact-sheets.aspx>>.
- 31 Clare Tilbury, ‘The Over-representation of Indigenous Children in the Australian Child Welfare System’ (2009) 18 *International Journal of Social Welfare* 57.

known to members of the NT Government and corrections officials. Incidents highlighted by the ABC had previously been referenced in at least three inquiries and reports which had been made available to high level officials. Among those who were either aware of prior incidents or arguably should have been was Indigenous Affairs Minister, Nigel Scullion, who conceded that he had not previously intervened to examine or address the treatment of juveniles in detention as the issue had not 'piqued' his interest.³² It is undoubtedly an indictment on those in positions of power in corrections and politics that it took national media coverage of the abuses to prompt a response at the federal and state government level.

A key report which preceded the *Four Corners* documentary, the Vita Review, was commissioned by the NT Government in October 2014 in response to 'a series of serious incidents' which resulted in the closure of the NT Don Dale facility in September 2014.³³ The Vita Review concluded that multiple factors – including a lack of training, uncoordinated case management processes, outdated and inadequate operating procedures, inconsistent management of high risk detainees and inappropriate facilities – had 'contributed to create an environment of instability within the youth detention system'.³⁴ Within this environment the Vita Review noted several 'isolated cases' of abuse,³⁵ including excessive periods of isolation,³⁶ inappropriate force,³⁷ and the use of tear gas (also referred to as 'chemical agents').³⁸ To address such practices the Review made 16 recommendations.³⁹ Notably the public release of the Vita Review occurred over 18 months before the ABC documentary on Don Dale.

Several of the recommendations of the Vita Review and other inquiries had been acted upon by the time the incidents were brought to national attention via the *Four Corners* documentary. Indeed, several administrative changes and reforms had been introduced to address known deficiencies in the treatment of juveniles in detention in the NT. These included the investigation of at least six prison officers by the NT Children's Commission (none of which were subsequently referred for police investigation),⁴⁰ and the closure of the old Don Dale centre.⁴¹

In addition to the establishment of a Royal Commission there have also been a number of investigations completed in the short period since the *Four Corners* documentary was aired, including one by the Office of the Children's

32 Kenny, 'PM Widens Abuse Inquiry', above n 25.

33 Vita, above n 8, 8.

34 Ibid 12.

35 Ibid 32.

36 Ibid 28, 51.

37 Ibid 28.

38 Ibid 52.

39 Ibid 18–19.

40 Aikman, above n 23.

41 Kennett, 'New Thinking', above n 21.

Commissioner which later published an Own Initiative Investigation Report.⁴² That investigation ‘identified systemic and departmental failings in dealing with those young persons placed “at risk”’, concluding that:

The current approach is reactive, confronting and at times frantic. It is not cognisant of the complex, extremely vulnerable nature of those young persons and fails to apply a therapeutic or preventative approach in dealing with those young persons.⁴³

The report specifically examined the use of the ‘Hoffman tool’,⁴⁴ restraints, at-risk isolation practices and the use of spit hoods. The findings of that report are explored throughout this article in the context of Australia’s obligations at international human rights law.

The media analysis in the table above supports the assertion that abuses in youth detention facilities were previously known and exposed. In 2012 and from 2014–2015,⁴⁵ the articles discuss the mistreatment of young people in detention in the NT. The one article that did so in 2012, entitled ‘Call to Help Kids in Jail’, recounted a mother’s concerns about her 16-year-old child’s treatment in custody where she alleged he was placed on suicide watch and was required to sleep naked without any blankets.⁴⁶ Of greatest relevance to this article, and to the argument that the abusive treatment of young people in detention in the NT was widely known prior to the ABC documentary, is relevant media reporting made during 2014 and 2015. In 2014 there were multiple articles discussing the use of ‘tear gas’ on young people in detention,⁴⁷ an article detailing an ongoing independent investigation by the Children’s Commissioner,⁴⁸ and one article questioning the adequacy of the Don Dale facility.⁴⁹ While each of these articles were short and only appeared in *Northern Territory News* (no other state or territory media outlets ran relevant articles at that time) they do establish the longevity of the issue under examination. Interestingly, in one article, the journalist quotes responses from both the NT Children’s Commissioner, Howard Bath, who was ‘deeply concerned’ by the use of tear gas on youth detainees and

42 Office of the Children’s Commissioner NT, ‘Own Initiative Investigation Report: Services Provided by the Northern Territory Department of Correctional Services to Don Dale Youth Detention Centre Alice Springs Youth Detention Centre’ (Final Investigation Report, August 2016).

43 Ibid 8.

44 The Hoffman tool is used to remove clothing (by cutting) from a young person. The tool is also designed ‘to enable quick and effective’ release in the case of a hanging attempt: see *ibid* 19.

45 In 2013, the three relevant articles all reported on a ‘stand off’ between young people in detention and guards, whereby a group of young persons climbed onto the roof of Don Dale. There was no mistreatment of young people alleged in these articles; the reporting was largely written from the vantage of the prison officers and called for the need for security updates to youth detention centres in the NT. See ‘Ceiling Standoff Prompts Upgrade’, *Northern Territory News* (Darwin), 10 September 2013, 11.

46 Nigel Adam, ‘Call to Help Kids in Jail: Prisoner’s Mum Wants System to Change’, *Northern Territory News* (Darwin), 29 September 2012, 4.

47 Zach Hope, ‘Tear Gas Fired to Quell Teens in Don Dale Riot’, *Northern Territory News* (Darwin), 23 August 2014, 2; Zach Hope, ‘Minister Defends Choice of Tear Gas in Teen Riot’, *Sunday Territorian* (Darwin), 24 August 2014, 9.

48 ‘NT Review Won’t Stop Inquiry into Youth Detention’, *Northern Territory News* (Darwin), 4 October 2014, 3.

49 ‘Purpose Built Facility Sought for Juveniles’, *Northern Territory News* (Darwin), 9 August 2014, 3.

the then NT Corrections Minister, John Elferink, who ‘defended the actions of staff’.⁵⁰

This prior documentation by the media of abuses during 2012 and 2014 is further supported through the analysis of 2015 media articles, whereby at least 24 articles reported on the abuse of children in detention in the NT. This included articles reporting on the use of solitary confinement in youth detention,⁵¹ several articles which make claims about the abuse of children in detention,⁵² as well as other articles exposing the ‘horrific’ conditions in youth detention facilities.⁵³ More specifically, during this period there was one article calling for a United Nations (‘UN’) investigation of the mistreatment of young people at Don Dale,⁵⁴ two articles which described the treatment of youth detainees as a ‘human rights abuse’,⁵⁵ and one article highlighting key findings of the Vita Review.⁵⁶

This analysis highlights that the media, particularly local media in Darwin, have played a key role in bringing the ill-treatment of young people in detention in NT to the fore. However, the effectiveness of such reporting as a form of public record is questionable given the relative inaction at the official level until the ABC documentary aired in July 2016. While there were independent reviews undertaken prior to this date, it was not until the *Four Corners* documentary that national attention was drawn to the issue and the Federal Government responded. This points to the value of visual images in propelling change in the application of human rights. Like the images from Guantanamo Bay and Abu Ghraib,⁵⁷ those from Don Dale – and in particular the still image of Dylan Voller wearing a spit hood while held in a restraint chair – were utilised to bring to light a human rights issue: the treatment of children in youth detention in the NT. Supporting Sliwinski’s argument in her work on the importance of aesthetics and the ‘spectator of human rights’, the use of the image of Voller illustrates the power of visual evidence in generating community concern around alleged human rights violations.⁵⁸

50 Hope, ‘Minister Defends Choice’, above n 47, 9.

51 Christopher Walsh, ‘Minister Ducks for Cover in Jails Crisis’, *Northern Territory News* (Darwin), 13 November 2015, 4; Zach Hope, ‘Solitary Reason Behind this Riot’, *Northern Territory News* (Darwin), 18 September 2015, 9.

52 Fred McCue, ‘Centre Adopts the Hard Cell’, *Northern Territory News* (Darwin), 1 October 2015, 9; Christopher Walsh and Shae McDonald, ‘Youths Alleging Horrific Abuse at Don Dale’, *Northern Territory News* (Darwin), 23 September 2015, 5.

53 Jessica Brown, ‘Detention Centres Slammed’, *Centralian Advocate* (Darwin), 9 June 2015, 9; Shae McDonald, ‘Lawyer Says Razor Wire Won’t Help Kids Rebuild’, *Northern Territory News* (Darwin), 13 January 2015, 8; Shae McDonald, ‘Jail Boy’s Suicide Threat’, *Northern Territory News* (Darwin), 13 June 2015, 9.

54 Jill Pousen, ‘Much Needs Correcting in Corrections’, *Northern Territory News* (Darwin), 13 November 2015, 4.

55 ‘Call for Elf to Go over “Anarchy”’, *Northern Territory News* (Darwin), 3 October 2015, 11; ‘Push For Action on Don Dale Allegations’, *Northern Territory News* (Darwin), 8 October 2015, 9.

56 Fred McCue, ‘Crisis in Youth Detention’, *Centralian Advocate* (Darwin), 20 February 2015, 7.

57 See, eg, Ekaterina Balabanova, *The Media and Human Rights: The Cosmopolitan Promise* (Routledge, 2014); Noel Whitty, ‘Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa’ (2010) 10 *Human Rights Law Review* 689.

58 Sliwinski, above n 10. See also Banham, above n 11.

IV WHAT RIGHTS WERE VIOLATED AT INTERNATIONAL HUMAN RIGHTS LAW?

In the wake of the Don Dale incident, debate emerged in the media and elsewhere as to the extent to which the treatment of children in detention in the NT (and elsewhere in Australia) represents a human rights violation. Examining the range of relevant instruments at international human rights law and Australia's varied commitment to them, this section identifies what rights were most commonly cited in media coverage of the incidents at Don Dale and, using doctrinal analysis, considers what rights were arguably violated at international human rights law in the NT's treatment of young people in detention.

An analysis of media coverage in the period immediately following the *Four Corners* program reveals the extent to which a rights-based discourse was brought to bear in media coverage, in the official responses to the Don Dale issue, in the establishment of a Royal Commission and in wide-ranging reaction to the treatment of young people in detention more broadly. The Royal Commission represents an important inquiry given the recognised lack of a human rights discourse in mainstream Australian media and a general failure by those in power to engage with the language of rights.⁵⁹ In spite of this arguably anti-rights culture, several articles published in 2016 referred to a 'breach' of human rights, including that 'fundamental human rights have been breached, and breached in ways that civilised Australians like to imagine can only happen elsewhere'.⁶⁰ One article quoted the Australian Children's Commissioner Megan Mitchell as saying: 'It was also clear the use of force was routinely used as part of the everyday business of the facility, not just when there was an incident. I think all of those things are breaches of children's rights'.⁶¹

The connection to human rights in media coverage of the Don Dale incident is interesting given that Australian governments – at both the state and federal level – have in recent years discouraged rights-focused debates.⁶² As such, the coverage of the Don Dale incident provides an Australian example to support work by Lieve Gies, who has argued that the media has long been a valuable platform for human rights campaigners and organisations to communicate concerns surrounding local, national and international events, and that the tabloid media in itself is not 'entirely hostile to human rights'.⁶³ From a scholarly perspective it is also worth noting that the formation and application of juvenile justice laws are usually viewed from a law and order and socio-political

59 John Tobin, 'Finding Rights in the "Wrongs" of our Law: Bringing International Law Home' (2005) 30 *Alternative Law Journal* 164.

60 Kenny, 'Swift Response Is Just a Start', above n 26.

61 Australian Children's Commissioner Megan Mitchell quoted in Damien Murphy, 'Isolation, Force Routinely Used, Commission Told – Don Dale – Teens "Felt Like Caged Animals"', *The Sydney Morning Herald* (Sydney), 12 October 2016, 6.

62 Australian law professor Sarah Joseph notes that 'the discourse of human rights in Australia seems weaker than in other liberal democracies': Michael Short, 'The Zone: Understanding Human Rights', *The Sydney Morning Herald* (online), 23 November 2014 <<http://www.smh.com.au/national/the-zone-understanding-human-rights-20141121-11r81s.html>>.

63 Gies, above n 10, 18.

perspective as opposed to one based on international human rights law.⁶⁴ While the media reported broadly on human rights ‘breaches’ and raised the notion of ‘children’s rights’ in their coverage of the Don Dale incidents, there was limited detail provided in terms of the specific standards or obligations at international law that had been breached. While this is to some extent to be expected given the media targeting of a general lay audience, it underlines the need here to examine which international human rights instruments were of relevance and whether the incidents could be interpreted as constituting a breach of legal obligations.

At the international level, scholars have argued that ‘it is invariably assumed (and in some cases expressly asserted) that the human rights at the core of a rights based approach are those rights contained in *international human rights treaties*’.⁶⁵ Adopting this view, it is pertinent here to look to the treaties that Australia has signed and ratified and that either apply to children by virtue of them being a human being or apply more directly due to the inclusion of provisions explicitly relating to children.⁶⁶ These include the *ICCPR*, *ICESCR*, *Convention against Torture*, and the *CRC*. These international instruments are important in terms of placing obligations upon the Australian Government, as a signatory state, to ensure that children deprived of their liberty are treated with humanity and that no child held in detention is subjected to torture, cruel, inhuman or degrading treatment or punishment. As argued by Tobin, children are ‘*prima facie* the beneficiaries of the human rights articulated under *all* the international human rights treaties by virtue of their status as human beings’.⁶⁷ Tobin’s acknowledgement here of the relevance of treaties is important given that to date none of these aforementioned treaties has been incorporated into Australian domestic law.

In addition to these treaties, Australia also has obligations under the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (‘*Beijing Rules*’),⁶⁸ the *UN Rules for the Protection of Juveniles Deprived of their Liberty* (‘*Havana Rules*’),⁶⁹ the *UN Standard Minimum Rules for the Treatment of Prisoners* (‘*Nelson Mandela Rules*’)⁷⁰ and the *UN Guidelines for the Prevention of Juvenile Delinquency* (‘*Riyadh Guidelines*’).⁷¹ The latter of these is particularly relevant here in that it establishes that ‘no child or young person should be subjected to harsh or degrading correction or punishment measures at

64 This latter argument is made by Muncie in relation to ‘global narratives’ of juvenile justice laws and policies: see Muncie, above n 5, 47.

65 John Tobin, ‘Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations’ in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Routledge, 2016) 67 (emphasis in original).

66 Ibid 68.

67 Ibid 67 (emphasis in original).

68 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, 96th plen mtg, Supp No 43, UN Doc A/RES/40/33 (29 November 1985).

69 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990).

70 *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN GAOR, 70th sess, Agenda Item 106, UN Doc A/RES/70/175 (17 December 2015).

71 *United Nations Guidelines for the Prevention of Juvenile Delinquency*, GA Res 45/112, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/RES/45/112 (14 December 1990).

home, in schools or in any other institutions'.⁷² Building on this, Muncie asserts that collectively, international human rights law provides 'the basis for a "globalised" human rights-compliant and "child friendly" juvenile justice' system.⁷³ This is important as it restates the importance of a range of treaties inclusive of, and beyond, the *CRC* which is at times referred to in isolation in considerations of the rights of children in detention. This is not to say that the *CRC* is not of great relevance here, but merely to highlight the broader relevance of other international human rights instruments.⁷⁴

The *CRC*, described by Kilkelly as 'the most comprehensive, legally binding document on the treatment of children',⁷⁵ includes 54 articles which provide for the economic, social, civil, cultural and political rights of persons under 18 years of age.⁷⁶ The Convention includes multiple articles that are of direct relevance to this article's examination of the extent to which the treatment of young people in detention at Don Dale violated international human rights law. In particular, the use of mechanical restraint chairs, solitary confinement, shackling and stripping naked of young people in detention conflicts with Australia's obligations under article 3 (the best interests of the child shall be a primary consideration), article 16 (prohibiting arbitrary or unlawful interference with his or her privacy), article 37(a) (prohibiting torture or other cruel, inhuman or degrading treatment or punishment), article 37(c) (ensuring children deprived of liberty are treated with humanity and respect) and article 40 (ensuring every child is treated in a manner consistent with the promotion of the child's sense of dignity and worth). While drafted in broad terms, these articles provide 'an effective benchmark'⁷⁷ for determining the extent to which a member state, in this case Australia, has adhered to its obligations at international law. When examined with specific reference, for example, to the treatment of Dylan Voller and other young people held in solitary confinement, the practices at Don Dale appear significantly out of step with the principles established in the *CRC* and other relevant international instruments.

In the aftermath of the Don Dale incident article 37 of the *CRC* has been most frequently referred to in media responses. That article provides that 'every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age'.⁷⁸ In considering the extent to which the treatment of young people at Don Dale violates this article, one spokesperson for UNICEF stated 'Australia has plainly failed in its promise' to uphold article 37.⁷⁹

72 Ibid para 54.

73 Muncie, above n 5, 47.

74 On this point, see also Ursula Kilkelly, 'Youth Justice and Children's Rights: Measuring Compliance with International Standards' (2008) 8 *Youth Justice* 187.

75 Ibid 188.

76 Goldson and Muncie, above n 5, 48.

77 Kilkelly, 'Youth Justice and Children's Rights', above n 74, 191.

78 *CRC* art 37(c).

79 Jacob Hunt, *Five Ways Australian Governments Can Stop the Abuse of Children in Detention* (26 July 2016) UNICEF Australia <<https://www.unicef.org.au/blog/news-and-insights/july-2016/five-ways-to-stop-abuse-children-detention>>.

This is not a difficult argument to mount whether the treatment of young people is considered either as individual incidents or as systemic practice – any one of the practices of solitary confinement, stripping a child, placing a spit hood on them or placing them in a mechanical restraint chair could be considered in breach of article 37's provision relating to the need to *respect* the dignity of the rights bearer in a manner consistent with their age. The extent of the violation under article 37 becomes even more apparent when these incidents are considered together, in that multiple practices were used upon the one child, for example Dylan Voller.

In addition, the UN Committee on the Rights of the Child's 2007 *General Comment 10* ('the *Comment*') sets out how the rights enshrined in article 37 (among others) should be fully realised and implemented in juvenile justice settings. Specifically, the *Comment* establishes that 'restraints or force can only be used when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted'.⁸⁰ Even where these two tests are met, the *Comment* also sets out that the use of restraints or force should be 'under close and direct control of a medical and/or psychological professional' and that staff within such facilities must be appropriately trained.⁸¹ The close reading of the *Comment* here is important as it fleshes out the standards by which an alleged violation of article 37 can be assessed. In the context of the treatment of young people at Don Dale and other NT facilities it establishes at international law the four different criteria upon which the Royal Commission should draw in determining whether the treatment of those in youth detention breached the individual's human rights.

It is also arguable that article 19 is critical to understanding the extent to which the treatment of young people in detention in the NT breaches international human rights law. Article 19 of the *CRC* provides:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protection measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child.⁸²

This article places a positive obligation on the government, in this case the NT State Government, to take *all appropriate* measures to protect children within its care. In light of the previous investigations and inquiries into abusive practices at Don Dale, the failure of the government to effectively remedy this issue with legislative, administrative, social or educational measures arguably represents another point at which a violation of international human rights law has occurred.

80 UN Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 89.

81 *Ibid.*

82 *CRC* arts 19(1)–(2).

Beyond articles 19 and 37, numerous articles contained within the *CRC* also emphasise the importance of reintegration and rehabilitation in the administration of juvenile justice.⁸³ Rehabilitation and ensuring a young person's preparation for reintegration into society is listed as one of three 'fundamental roles' of youth detention centres in the NT,⁸⁴ and was flagged as a key feature of a 'holistic approach' to youth detention in the 2015 Vita Report: 'Everything that happens in a juvenile detention facility should in some way, either directly or indirectly, be aimed at that young person's eventual successful release and reintegration back into the community.'⁸⁵

In stark contrast to this, however, the treatment of juveniles in detention at Don Dale appears to have been based on a culture of punishment and punitive approaches to law enforcement. The importance of eradicating treatment that directly contradicts a child's need for rehabilitation is emphasised in comments made by Children's Commissioner, Colleen Gwynne:

When we have young people in detention and we further abuse them and use violence and punitive measures to deal with them, it is absolutely going to translate into them learning those behaviours and repeating those behaviours out in the community.⁸⁶

Although the Don Dale example is an extreme one, it is not uncommon. Legal scholars have noted the tension often present in the administration of juvenile justice between systems designed to punish and the international rights obligations designed to ensure rehabilitation and that the welfare of the child is prioritised and promoted as a primary objective.⁸⁷

Beyond the specific categorisation of the Don Dale treatment of young people as a human rights issue, the broader issue of the over imprisonment of Indigenous persons in Australia has long been identified as a key human rights issue.⁸⁸ The UN, through the treaty body reporting system and the Universal Periodic Review process, has repeatedly criticised Australia for its over representation of Indigenous persons at all stages of the criminal justice process.⁸⁹ Specific to children, in 2005 the Committee on the Rights of the Child recommended that Australia 'urgently remedy the overrepresentation of Indigenous children in the criminal justice system' and relevant to this article's specific focus, 'improve conditions of detention of children and bring them into

83 Kil Kelly, 'Youth Justice and Children's Rights', above n 74, 188.

84 Office of the Children's Commissioner Northern Territory, above n 42, 4.

85 Vita, above n 8, 12.

86 Sorensen, 'Use of Restraint Chair "Unlawful"', above n 27, 8.

87 Muncie, above n 5, 44.

88 See, eg, Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008); Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen and Unwin, 2001); Chris Cunneen, 'Criminology, Human Rights and Indigenous Peoples' in Stephen Parmentier and Elmar Weitekamp (eds), *Crime and Human Rights: Sociology of Crime, Law and Deviance* (Elsevier, 2007) vol 9, 243.

89 See, eg, UN Committee Against Torture, *Concluding Observations of the Committee Against Torture*, 53rd sess (23 December 2014); UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 17th sess, UN Doc A/HRC/17/10 (24 March 2011); UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 31st sess, UN Doc A/HRC/31/14 (13 January 2016).

line with international standards'.⁹⁰ Over ten years later, the current crisis at Don Dale (and reportedly in other detention centres) combined with the continued quantifiable over-representation of Indigenous children at all levels of the Australian justice system suggests that, as yet, neither recommendation has been meaningfully acted upon or achieved.

V DOES THE TREATMENT OF JUVENILES IN DETENTION AMOUNT TO TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT?

It could have been a terrifying image from the infamous Abu Ghraib prison during the Iraq war, when such abuses were uncovered and those responsible sent to prison. The cruel and unusual punishment suffered by the 13-year-old boy and other child prisoners was excused by prison authorities as being in response to a riot.⁹¹

As the above quotation, taken from an editorial published soon after the *Four Corners* documentary, illustrates questions as to whether the treatment of Indigenous youth in detention amounts to torture gathered momentum in media coverage of the issue. Various media outlets described the incidents featured in the documentary as 'torture-like treatment',⁹² while some journalists and spokespersons likened the images of juvenile abuse as akin to those which emerged in April 2004 of the abuse of inmates at the Abu Ghraib prison in Iraq and in the Guantanamo Bay detention camp in Cuba, describing the treatment of juveniles as 'Abu Ghraib-style torture',⁹³ 'shocking Guantanamo Bay-like conditions',⁹⁴ and 'physical and mental torture'.⁹⁵ NT barrister John Lawrence observed, 'they're being shackled to chairs a la Guantanamo Bay. This is actually happening in Australia in 2016'.⁹⁶ The Australian Children's Commissioner, Megan Mitchell, also made this connection, stating that the conditions of youth detention at Don Dale specifically were not in line with Australian obligations under the *Convention against Torture*.⁹⁷ Mirroring this view former NT Children's Commissioner, Dr Howard Bath, was quoted in the media as stating, 'you could define what I've seen happening in the youth justice facilities as torture'.⁹⁸ Likening the treatment of young people in detention to torture within public discourse establishes a powerful narrative which serves to highlight the gravity of the abuses experienced. In determining the extent to which this

90 UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations Australia*, UN GAOR, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2015) para 74.

91 Editorial, 'Child Abuses Shame Us All', *Herald Sun* (online), 26 July 2016, 24 <<http://www.heraldsun.com.au/news/opinion/child-abuses-shame-us-all/news-story/139092be481a820bbd935fc6d35d85f2>>.

92 Aikman, above n 23.

93 Kenny, 'Swift Response Is Just a Start', above n 26.

94 Renee Viellaris, 'Close Watch on Jailed Juveniles', *The Courier Mail* (Brisbane), 27 July 2016, 2.

95 'Child Abuses Shame Us All', above n 91, 24.

96 'How Australia Reacted', *Northern Territory News* (Darwin), 27 July 2016, 6.

97 'Commissioner Blasts Conditions at Don Dale', *Northern Territory News* (Darwin), 27 July 2016, 8–9.

98 'How Australia Reacted', above n 96.

narrative finds merit in international human rights law, the following analysis looks to the relevant tests and standards to which Australia is obliged.

While there is no single definition under international human rights law for torture, there is a degree of agreement as to the four important elements of torture: the nature of the act, the intention of the perpetrator, the purpose of the act and the involvement of a public official.⁹⁹ Article 1 of the *Convention against Torture* defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁰⁰

Adopting this definition, Nagan and Atkins explain that ‘the torture of a victim with official sanction sends a social message of intimidation and a message about the scope, character, and strategies of official social control’.¹⁰¹ When applied to the *CRC*, however, the definition changes slightly in that under the Convention the purpose or involvement of a public official is not required. Like torture, under the Convention, the definition of cruel, inhuman or degrading treatment or punishment also does not require the suffering imposed to have been intended.¹⁰²

Using this definition, if the conclusion drawn by the Royal Commission is that the rights of the children detained at Don Dale were violated, then the question emerges as to whether such violation can be justified using an international human rights law approach. Utilising key tests relied upon in justifying special measures at international human rights law, this analysis examines the extent to which the media constructed the justification and legitimacy of the actions at Don Dale and in doing so considers whether the rights violation can be justified when assessed against the standards of legitimacy, proportionality, reasonableness, objective evidence and a commitment towards the minimal impairment of rights. In doing so, the following analysis focuses specifically on the media portrayal of the young persons’ treatment as amounting to cruel, inhuman or degrading treatment or punishment, recognising that the prohibition against torture is absolute. In relation to assessing the former, the requirement of a legitimate aim and a proportionate and reasonable response that minimally impairs the rights of the person affected is well established in international human rights law. This notion

99 Office of the United Nations High Commissioner for Human Rights, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies* (2011) <http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf>.

100 *Convention against Torture*.

101 Winston Nagan and Lucie Atkins, ‘The International Law of Torture: From Universal Proscription to Effective Application and Enforcement’ (2001) 14 *Harvard Human Rights Journal* 87.

102 Tobin, ‘Finding Rights in the “Wrongs”’, above n 59, 167.

of proportionality is also upheld in the *Beijing Rules*, which provide that ‘the juvenile justice system ... shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence’.¹⁰³

In the wake of the Don Dale footage several commentators and stakeholders weighed in on whether the treatment of the juveniles featured in the ABC documentary was justified. For some commentators, it was:

The ABC failed to tell viewers that the young man being strapped down, Dylan Voller, was not being tortured but restrained after threatening to hurt himself. The ABC failed to say the hood was actually a mesh to stop him spitting on guards, as he’d done hundreds of times. And the ABC failed to give a true picture of Voller’s history, glossing over the threat he posed, claiming: ‘Voller has been in and out of juvenile detention since he was 11 years old for car theft, robberies and, more recently, assault’. False. The ABC failed to tell viewers that Voller’s first convictions for assault dated back seven years, and that of his more than 50 convictions, 23 were for assault or other attempts to hurt people, often police and warders.¹⁰⁴

Here the legitimacy of the prison officials’ actions is considered justified and reasonable with reference given to the right bearer’s behaviour (that is, the behaviour of Dylan Voller). Another commentator took a similar view, stating:

The so-called Abu Ghraib hood was being worn by recidivist inmate Dylan Voller because of his unpleasant habit of spitting at law officers. There’s little doubt that the other tough measures – hosing down and tear gas, as disagreeable as they may seem to middle-class ABC viewers – were also used for good reason most of the time.¹⁰⁵

The words used to describe the rights bearer, Dylan Voller, here as a ‘recidivist inmate’ are used to justify what the commentator describes as ‘disagreeable’ but good, reasoned behaviour. Similar justifications have been raised in court in the first cases to be heard involving youth detainees from Don Dale who are suing the NT Government over their alleged mistreatment in custody. In one case, where a teenage detainee was stripped naked, handcuffed and placed in a spit hood by six youth justice officers, the officers involved have argued in court that ‘the treatment was necessary to protect the boy’ who had threatened to kill himself.¹⁰⁶

However, even if this argument is accepted and therefore Voller’s provoking actions justified intervention from officers, then the test of minimal impairment arises, which requires that the act chosen by the officer impairs the achievement of the child’s right to the absolute minimum standard. This test may be considered passed if evaluated from the vantage point of the former Premier of Victoria, Jeff Kennett, who commented:

The second piece of footage was a spit hood being applied to an individual in a restraint chair. I am told this was because there had been threats of self-harm. It occurred in 2015 in the Complex Behaviour Unit, but there is no sign of

103 *Beijing Rules*, UN Doc A/RES/40/33, r 5.1.

104 Bolt, above n 21.

105 Akerman, above n 21.

106 ‘Spit Hood “To Punish Teenager”’, *Daily Telegraph* (Sydney), 5 October 2016, 17.

aggression from the officers – on the contrary, they appear calm, as does the individual in the chair.¹⁰⁷

However, this contradicts the findings of the Office of the Children's Commissioner which found that incidents reported to the Commission involving the use of a restraint chair were 'likely unlawful' and were not permitted under the *Youth Justice Act 2005* (NT).¹⁰⁸ Further, and in light of the tests of justification and minimal impairment, the Commission concluded that 'the use and duration of the Emergency Restraint Chair was not justified nor was it kept to a minimum'.¹⁰⁹

In determining the extent of a violation, international human rights law also privileges the inclusion of objective evidence. International research has consistently documented the harms and negative impairments of restraints, shackling and spit hoods on juvenile detainees. For example, the use of restraints on children in detention has long animated debate among international law, human rights, youth justice and legal scholars. Such research has been focused on the use of restraints (also referred to as 'shackles') during criminal court appearances,¹¹⁰ and in the context of detention.¹¹¹ Given the scope and time with which the work of the Royal Commission is to be undertaken it would be expected that such objective evidence will (and indeed, should) contribute to the Commission's assessment of the treatment of children in youth detention in the NT.

In previous reviews of Australia, the Committee Against Torture has found that the mandatory immigration detention of children, violence against women and the involuntary sterilisation of persons with a disability all fall within the remit of behaviours considered cruel, inhuman or degrading treatment or punishment.¹¹² This is not the first time that a connection has been made between breaches of the *Convention against Torture* and Australia's youth detention policies. In March 2015 a report produced by the UN Special Rapporteur on Torture, Juan Mendez, found that:

Australia's youth detention policies are out of date. We're allowing a number of physically and psychologically harmful practices to continue, and permitting punitive policies and practices, which do not prioritise young people's rehabilitation or reintegration.¹¹³

107 Kennett, 'ABC's Bias Is Offensive', above n 21.

108 Office of the Children's Commissioner NT, above n 42, 23.

109 Ibid 25.

110 See, eg, Brian D Gallagher and John C Lore, 'Shackling Children in Juvenile Court: The Growing Debate, Recent Trends and the Way to Protect Everyone's Interest' (2008) 12 *UC Davis Journal of Juvenile Law & Policy* 453.

111 See, eg, John Tobin, 'Time to Remove the Shackles: The Legality of Restraints on Children Deprived of their Liberty under International Law' (2001) 9 *International Journal of Children's Rights* 213.

112 Henry Wells and Tim Craven, 'Tortured Truth: Australia's Non-compliance with the Convention' (News Update, Human Rights Law Centre, 17 April 2015) <<https://www.hrlc.org.au/news/tortured-truth-australias-non-compliance-with-the-convention>>; see also Tobin, 'Finding Rights in the "Wrongs"', above n 59, 167.

113 Human Rights Law Centre, *UN Report a Reminder That Australia's Youth Justice Practices Are Failing to Meet International Standards* (17 April 2015) <<https://www.hrlc.org.au/news/ausyouthjusticepracticesarefailing>>. See also UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other*

Mendez's findings here are important as they point to the problematic nature of the policies which permit and support such practices and highlight that the abuse of youth in detention may not in all cases be the result of rogue individual officers or a belligerent culture. In some instances, as Mendez's report suggests, the use of 'harmful practices' is supported by punitive policies. This arguably transfers responsibility from the individual officers involved to the policy makers who ought to ensure that obligations held in international law are supported in domestic policies and procedures. In this context it is worth noting that, in late October 2016, the NT Government passed legislation which expressly bans the use of mechanical restraint chairs on young persons in detention.¹¹⁴ While a temporary ban had been put in place from July 2016, the new legislation ensures that this will be enshrined in NT law.¹¹⁵ The *Youth Justice Legislation Amendment Act 2016* (NT) also prohibits the use of handcuffs and waist restraining belts on children, except where permission is granted by the Commissioner of Correctional Services and restraints are approved as a matter of 'last resort'.¹¹⁶ The introduction of this reform is a step in the right direction in terms of eradicating some of the punitive policies which have supported the ill-treatment of young people in detention in the NT, but wider reform is needed to prohibit the use of other 'harmful practices' in juvenile detention, including the use of solitary confinement, tear gas, and spit hoods.

Regardless of these recent legislative reforms, as well as any protections that are put in place as a result of the Royal Commission, the current national attention on the treatment of children in detention illuminates the urgent need for Australia to ratify the *United Nations Optional Protocol to the Convention against Torture* ('*OPCAT*'). The UN has explained that the objective of the *OPCAT* is to 'establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment'.¹¹⁷ In the days following the release of the Don Dale footage, the spokesperson for the UN High Commissioner for Human Rights, Rupert Colville, urged Australia to ratify the *OPCAT*, stating:

This important instrument focuses on the prevention of torture. Under the Protocol, Australia would establish a National Preventive Mechanism which conducts regular visits to all places of detention in the country ... Events at Don

Cruel, Inhuman or Degrading Treatment or Punishment, 28th sess, UN Doc A/HRC/28/68 (5 March 2015).

114 *Youth Justice Legislation Amendment Act 2016* (NT). See also Dale Wakefield, 'Northern Territory Government Keeps Election Promise to Ban Restraint Chair' (Media Release, 25 October 2016) <<http://newsroom.nt.gov.au/mediaRelease/21438>>.

115 Andrea Johnson, 'Restraint Chairs Banned as Part of Youth Justice System Overhaul', *Centralian Advocate* (Darwin), 28 October 2016, 3.

116 *Ibid.*

117 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 57th sess, UN Doc A/RES/57/199 (9 January 2003, adopted 22 June 2006) art 1.

Dale clearly show the immediate need to establish such a system of regular visits to ensure that what happened at Don Dale never happens again in Australia.¹¹⁸

Similar calls were made by the Australian Lawyers for Human Rights,¹¹⁹ and a representative of UNICEF.¹²⁰

In a welcomed move, in February 2017 Australian Attorney-General George Brandis announced that Australia would ratify *OPCAT* before the year's end.¹²¹ While media following the Brandis announcement tied the ratification of *OPCAT* closely with the need to improve accountability of Australian immigration detention centres, this would also benefit young persons in detention in terms of establishing clearer mechanisms for accountability and external oversight. Specifically, by ratifying the *OPCAT*, the Australian Government would take an important step towards creating clearer mechanisms for transparency and accountability through the establishment of a National Preventative Mechanism. The need for exactly this – above and beyond any outcomes of the Royal Commission – was underscored by Amnesty International Australia:

Let's be clear – this is child abuse and this is torture ... A Royal Commission is an important step but it fails to provide urgent, independent oversight to stop torture and human rights abuses in all youth detention centres. In the past five years there's been serious allegations about the treatment of children in detention centres in every state and territory. With little independent oversight kids all across Australia are vulnerable to brutality and mistreatment.¹²²

The implementation of an effective national mechanism for ensuring accountability in youth detention centres would be an important step forward. Alston and Tobin describe accountability as the '*lynchpin* of the international human rights regime',¹²³ a descriptor which holds particular importance in the context of closed institutions, such as detention centres, which do not readily lend themselves to transparency of decision making, process or outcomes. In this respect, the establishment and operation of a National Preventative Mechanism would 'give substance and meaning' at a domestic level to the rights afforded to children held in detention under international human rights law.¹²⁴ At the time of writing, the Australian Government has not delivered upon ratifying the *OPCAT* and as yet there is no clear indication as to when this will occur and/or how the

118 United Nations, *UN Rights Office Shocked by Inhumane Treatment of Children in Australian Detention Centre* (29 July 2016) United Nations News Centre <<http://www.un.org/apps/news/story.asp?NewsID=54589#.WfPF4miCxPY>>.

119 Coyne and Weste, above n 7, 4.

120 Hunt, above n 79.

121 Alexandra Beech, 'OPCAT: Australia Makes Long-Awaited Pledge to Ratify International Torture Treaty', *ABC News* (online), 9 February 2017 <<http://www.abc.net.au/news/2017-02-09/australia-pledges-to-ratify-opcat-torture-treaty/8255782>>.

122 Amnesty International Australia, *Stop the Torture of Kids in Youth Detention* (18 August 2016) <<https://web.archive.org/web/20170116024637/https://www.amnesty.org.au/act-now/stop-torture-kids-youth-detention/>>.

123 Philip Alston and John Tobin, 'Laying the Foundation for Children's Rights: An Independent Study of Some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child' (Study, UNICEF, 2005) xi (emphasis added).

124 *Ibid* 33.

standards contained within will be implemented.¹²⁵ This article's analysis provides just one example of why there is a definite need for the government to take positive steps to deliver upon this commitment and ensure oversight and improvement of the conditions of Australian detention facilities.

VI RESPONDING TO DON DALE: WHAT HOPE FOR A ROYAL COMMISSION?

You don't need a Royal Commission to tell you there are fundamental failings in the juvenile detention system here in the Northern Territory. ... For a commission to have any gravitas it has to [be] headed by someone with the experience and authority to be able to tease out to the core all the facts.¹²⁶

We spend a lot of time talking about Aboriginal problems but very little has been done. I hope, commissioners, that this isn't the fate of this report ... You're morally bound to do something not just talk about it. That's all this country ever does is talk about blackfellas. Please, I beg you, do not just put it in the filing cabinet ... we're not going to be here in another 25, 50 years.¹²⁷

The above quotations from the President of the Law Society of the NT, Tass Liveris, and Aboriginal advocate and author, Pat Anderson, reflect the concern felt from the outset as to the merits and effectiveness of the Royal Commission into the Protection and Detention of Children in the NT. Among the questions raised by the media, one journalist asked, 'will the result [of the Commission] make any real difference to outcomes for young offenders?'¹²⁸ In examining this question of the Royal Commission's legitimacy, as raised in media coverage of the incidents at Don Dale, this part offers a critical analysis of the merits of the response from an international human rights perspective. It is important to note that in considering the merits of the Royal Commission this article is not suggesting that no response would have been preferable, but rather the analysis recognises the difficulties of enforcing the human rights regime broadly and children's rights more specifically, whereby breaches of the *CRC* and other treaties by signatory states attract no formal sanction.¹²⁹ Difficulties of enforcement are particularly apparent in the Australian context given that the international treaty system is not incorporated in domestic legislation nor enforceable in the Australian justice system.¹³⁰ In approaching the legitimacy and

125 In May 2017 the Australian Human Rights Commission released a Consultation Paper, which sought submissions on how *OPCAT* should be implemented in Australia: see Australian Human Rights Commission, 'OPCAT in Australia: Consultation Paper' (Consultation Paper, May 2017).

126 Ashley Manicaros, 'Give Commission Broad Terms', *Northern Territory News* (Darwin), 27 July 2016, 11.

127 Damien Murphy, "'I Beg You, Do Not Just Put It in the Filing Cabinet'", Witness Pleads at NT Royal Commission', *Sydney Morning Herald* (online), 12 October 2016 <<http://www.smh.com.au/national/i-beg-you-do-not-just-put-it-in-the-filing-cabinet-witness-pleads-at-nt-royal-commission-20161012-gs0jxb.html>>.

128 Sorensen, 'Use of Restraint Chair "Unlawful"', above n 27.

129 See, eg, Alston and Tobin, above n 123; Goldson and Muncie, above n 5, 51; Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in Light of the UN Convention on the Rights of the Child' (2001) 23 *Human Rights Quarterly* 308.

130 Tobin, 'Finding Rights in the "Wrongs"', above n 59.

merits of a Royal Commission from this perspective the analysis draws from international human rights law to critically consider what can be gained from a Royal (read Truth) Commission versus individual prosecutions.

At the media level the legitimacy of the announced NT Royal Commission was called into question from the outset when, less than two weeks after its establishment, the resignation of appointed Commissioner former NT Chief Justice, Brian Martin, cast a cloud of doubt over the legitimacy of the response and the leadership assigned to it. Martin resigned amid concerns that his appointment as Commissioner did not have the ‘full confidence’ of the Indigenous community.¹³¹ The Commission’s loss of credibility at the outset is worrying given research that has found that, for a Royal Commission to be effective it must exist within ‘a supportive and trusting environment’.¹³² To some degree the credibility of the Royal Commission has since been restored following the subsequent appointment of the Hon Margaret White AO and Mr Michael Gooda as Royal Commissioners – appointments which also addressed growing disquiet as to the lack of Indigenous representation in the Commission’s appointed leadership.

Beyond those involved, one of the key criticisms that has been levelled by the media over the establishment of a Royal Commission in response to the Don Dale incidents has concerned the apparent lack of progress and outcomes achieved in over 25 years since the Royal Commission into Aboriginal Deaths in Custody¹³³ as well as numerous other Royal Commissions in Australia and elsewhere, including in the United Kingdom and Canada.¹³⁴ In addition to their findings, these previous inquiries have given rise to a significant body of literature critiquing the merits of Royal Commission processes, findings and implementation.¹³⁵ Of greatest relevance here is the Australian Royal Commission into Aboriginal Deaths in Custody (‘RCADC’), which was undertaken from 1987 to 1991 and has been described as ‘the most thorough legal inquiry ever conducted into the lives of Indigenous Australians’.¹³⁶ Over a four year period, the RCADC cost over \$50 million and examined 99 deaths which occurred in custody between January 1980 and May 1989.¹³⁷ Reporting in April 1991, the RCADC made 339 recommendations aimed at reducing the over-

131 Akerman, above n 21.

132 Elena Marchetti, ‘Critical Reflections upon Australia’s Royal Commission into Aboriginal Deaths in Custody’ (2005) 5 *Macquarie Law Journal* 103, 124.

133 To access the five-volume reports of the Royal Commission into Aboriginal Deaths in Custody, see *Royal Commission into Aboriginal Deaths in Custody* (29 April 1998) AustLII Indigenous Law Resources <<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>.

134 Marchetti, above n 132.

135 See, eg, Martin Bulmer (ed), *Social Research and Royal Commissions* (Routledge, 2015); Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001); George Gilligan and John Pratt (eds), *Crime, Truth and Justice: Official Inquiry, Discourse, Knowledge* (Routledge, 2013); Gregory J Inwood and Carolyn M Johns (eds), *Commissions of Inquiry and Policy Change: A Comparative Analysis* (University of Toronto Press, 2014); Patrick Weller (ed), *Royal Commissions and the Making of Public Policy* (Macmillan Education, 1994).

136 Marchetti, above n 132.

137 Australian Law Reform Commission, ‘Cost, Formality of Royal Commission Queried in ALRC Review’ (Media Release, 6 April 2009); *ibid* 106.

incarceration of Indigenous persons in Australia – many of which have still not been implemented.¹³⁸ As Ruth Barson, Director of Legal Advocacy at the Human Rights Law Centre, has observed:

Twenty-five years ago the Royal Commission into Aboriginal Deaths in Custody provided a road map for reducing imprisonment rates. But successive governments around Australia have chosen to ignore these recommendations. One was to use cautions and diversion wherever possible. Another was to avoid locking people up for unpaid fines. Another was to properly fund and consult with Aboriginal organisations.¹³⁹

The ABC footage similarly prompted Royal Commissioner Mr Michael Gooda to reflect publicly on the lack of progress that has been made in the 25 years since that Commission.¹⁴⁰ While Senior Counsel Assisting, Peter Callaghan, made the challenging point that:

There was a national inquiry, there have been two royal commissions, four commissions or boards of inquiry, a parliamentary report, four Northern Territory government reviews and 23 independent reviews that have all published findings and recommendations that command our attention. ... This commission is being held under the long shadow cast by the Royal Commission into Aboriginal Deaths in Custody ... The very fact that there have been so many reports prepared already raises, we suggest, another issue altogether. It invites a question: do we need to confront some kind of inquiry mentality where investigation is allowed as a substitute for action?¹⁴¹

Consequently, there has been a high level of acknowledgement of the need for the present NT Royal Commission to result in real outcomes and impact in practice. The extent to which this practical goal of the Royal Commission will be achieved will only become apparent in time as the Commission is bought to a close, submits its report, and its findings and recommendations are acted upon.

In the meantime, reflections on the failings of previous Royal Commissions are helpful in informing better processes and strategies at the outset of the present Royal Commission. Marchetti argues that the problem with processes such as Royal Commissions is that they ‘exclude non-orthodox perspectives’, including those of marginalised groups and diverse communities.¹⁴² For this reason, Marchetti concludes that such ‘quasi-legal inquiries’ as she describes them, are ill-suited to examine issues facing minority communities.¹⁴³ This is a particularly important argument when considered in light of international human rights law which requires participation in rights-based remedies. To this end, for the Royal Commission into NT youth detention to be effective, the participation

138 Marchetti, above n 132; see also Thalia Anthony, ‘Deaths in Custody: 25 Years after the Royal Commission, We’ve Gone Backwards’, *The Conversation* (online), 13 April 2016 <<https://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109>>.

139 Ruth Barson, ‘The Shocking Footage that Australia Needs to See’, *The Age* (Melbourne), 27 September 2016, 18.

140 See Rachel Browne, ‘Cautious Welcome for Royal Commission into Northern Territory Prison System’, *The Sydney Morning Herald* (online), 26 July 2016 <<http://www.smh.com.au/national/cautious-welcome-for-royal-commission-into-northern-territory-prison-system-20160726-gqe3v3.html>>.

141 Murphy, ‘Isolation, Force Routinely Used’, above n 61.

142 Marchetti, above n 132, 111–12.

143 Ibid 111.

of two minority groups – children and Indigenous people – is critical. The importance of children's involvement is established in the *CRC* where multiple articles 'stress the importance' of the participation of the child in decision-making processes.¹⁴⁴ This includes article 12, which requires that the child's voice is heard, respected and taken into account in all proceedings that affect the child, and article 13 relating to freedom of expression. Providing meaningful opportunities for a child's participation has been described by Alston and Tobin as 'one of the great unsolved dilemmas' for those seeking to protect and implement the rights of the *CRC*.¹⁴⁵ To offer an effective investigation and remedy at international human rights law the Royal Commission – either through a public hearing, individual complaints or other mechanism – will need to incorporate the voices and experiences of the rights bearers directly implicated in the alleged abuses in NT detention centres. The importance of including children's voices, as rights bearers, has been previously recognised by the Chair of the Royal Commission into Institutional Responses into Child Sexual Abuse, Justice Peter McClellan, who stated 'taking children seriously and allowing them to participate in decisions that affect them is an important element of what makes an institution child-safe'.¹⁴⁶ The emphasis on safety here is important, both in terms of ensuring youth detention facilities uphold the rights and safety of children detained but also in terms of ensuring that the process for participation in itself fosters a safe environment which is not (re)victimising.¹⁴⁷

Beyond the specifics of participation and the achievement of practical outcomes, there is a broader question to consider: whether a Royal Commission is, in and of itself, the most effective response at hand, and to what degree lessons from international human rights law on the merits of truth commissions versus individual prosecutions can be used to inform effective remedies for human rights violations occurring in the Australian domestic context. Elsewhere, truth commissions have been set up in response to massive human rights violations and crimes against humanity.¹⁴⁸ The South African Truth and Reconciliation Commission was established in 1995¹⁴⁹ and more recently the Truth and Reconciliation Commission of Canada was established in 2008.¹⁵⁰ While it is not within the scope of this article to examine recent developments in international human rights law concerning the right to truth,¹⁵¹ there are lessons from truth commissions that are relevant here – including the need to ensure both

144 Muncie, above n 5, 44.

145 Alston and Tobin, above n 123, 48.

146 'Time to Include Children in Conversation', *Newcastle Herald* (online), 15 August 2016 <<http://www.theherald.com.au/story/4094863/time-to-include-children-in-conversation/>>.

147 See Alston and Tobin, above n 123, 48–9.

148 Philip Alston and Ryan Goodman, *International Human Rights – The Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford University Press, 2013) 1406.

149 Albie Sachs, 'South Africa's Truth and Reconciliation Commission' (2002) 34 *Connecticut Law Review* 1037.

150 Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (Final Report, 2015).

151 See Alston and Goodman, above n 148, 1408.

political will and the necessary resources are committed to supporting the provision of truth.¹⁵²

Alongside these structural imperatives, examinations of truth commissions also emphasise the importance of reconciliation.¹⁵³ As Williams suggests, reconciliation ‘includes elements of both increased trust across lines of difference and reformation of the institutions that have allowed an injustice to occur in the first place’.¹⁵⁴ Both are desirable outcomes in the context of remedying abuses occurring in NT youth detention facilities, where it is vital to ensure a reform of the culture and practices that allowed such behaviour to occur in the first place. Further, given the long-documented tensions between those working within the criminal justice system and the Indigenous community, there is an additional need for reconciliation in this context. To this end, the broader political context in the NT cannot be overlooked, in particular, the impact of the 2007 NT Intervention on policing practices, imprisonment rates and distrust of the criminal justice system amongst the Indigenous community.¹⁵⁵

A truth commission often occurs where permission has been granted by witnesses to forgo prosecution and where amnesty has been granted.¹⁵⁶ This marks an important difference from a domestic Royal Commission whereby prosecutions can occur beforehand, as in the case of Don Dale (albeit that such prosecutions did not lead to conviction) or afterwards (as in the case of the ongoing Royal Commission into Institutional Responses into Child Sexual Abuse). In this sense the selection of a Royal Commission as a mechanism to investigate a potential human rights violation does not require a selection between justice and truth. This distinction is important in the context of responding to the abuses at Don Dale, given emerging public calls for individual prosecutions. For example, in the wake of the announcement that a Royal Commission would be established, one media outlet made the case for ‘faster criminal investigation into the abuses already uncovered than can be dealt with by an unwieldy and inevitably lengthy royal commission’.¹⁵⁷ Highlighting the gravity of the breach of responsibility and the need for accountability, former President of the Australian Human Rights Commission, Gillian Triggs, stated: ‘If you or I were to treat our children this way we would be prosecuted criminally. These children are in a relationship with the state or the territory that is essentially a parental relationship’.¹⁵⁸

152 Henry J Steiner, ‘Introduction’ in *Truth Commissions: A Comparative Assessment: An Interdisciplinary Discussion Held at Harvard Law School in May 1996* (Harvard Law School Human Rights Program and World Peace Foundation, 1997) 7.

153 See, eg, Jill E Williams, ‘Legitimacy and Effectiveness of a Grassroots Truth and Reconciliation Commission’ (2009) 72 *Law and Contemporary Problems* 143.

154 *Ibid* 149.

155 Diana Perche, ‘Ten Years On, It’s Time We Learned the Lessons From the Failed Northern Territory Intervention’, *The Conversation* (online), 26 June 2017 <<https://theconversation.com/ten-years-on-its-time-we-learned-the-lessons-from-the-failed-northern-territory-intervention-79198>>.

156 Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *European Journal of International Law* 481.

157 Kenny, ‘Swift Response Is Just a Start’, above n 26.

158 ‘How Australia Reacted’, above n 96.

To date, at least six young people held in NT youth detention centres have launched civil action against the NT Government.¹⁵⁹ This gives rise to questions surrounding the difficulty of allocating responsibility and at what level such allocations should occur. If it is the case that the abusive practices committed at Don Dale were reflective of a broader punitive culture towards young people in detention, then the question arises as to whether individual prosecution is an effective remedy or whether a truth-style commission, in the form of a Royal Commission, offers a more appropriate mechanism for investigation of whole of system practices.

Beyond the (disputed) merits of the process and the outcome per se, an important question of scope in the Terms of Reference arises. There is undoubtedly a need to ensure that other well-documented human rights violations in the administration of juvenile justice in NT are brought to light and remedied as part of the current Royal Commission. Most pertinently, the Royal Commission should seek to address and make recommendations to abolish the NT's long history of heavily criticised mandatory sentencing laws for juvenile offenders.¹⁶⁰ Connecting the NT's controversial history of imposing mandated sentences on Indigenous youth with the current focus on Don Dale, in 2000 a 15-year-old Indigenous boy committed suicide at Don Dale after he was sentenced to 28 days' detention for stealing less than \$100 worth of school supplies.¹⁶¹ This tragic case demonstrates that the issues of youth treatment in detention, Indigenous over representation in detention, and mandatory sentencing laws are inherently connected and must be addressed by a holistic review of current practice and future needs for reform, rather than via a piecemeal review.

VII THE RESPONSIBILITY TO PROTECT: EXAMINING THE POSITIVE OBLIGATION ON THE AUSTRALIAN FEDERAL GOVERNMENT

The Royal Commission is only charged with looking at the experience in the NT in spite of emerging evidence of similar practices and violations in other youth detention facilities across Australia. In the weeks following the Don Dale incident anecdotal evidence of similar youth detention practices emerged in

159 Craig Dunlop, 'Don Dale Kids Claim Tear Gassing Broke the Law', *Northern Territory News* (Darwin), 21 September 2016, 1.

160 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997); Helen Bayes, 'Punishment Is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory' (1999) 22 *University of New South Wales Law Journal* 286; Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing' (Discussion Paper, May 2014); Louis Schetzer, 'A Year of Bad Policy: Mandatory Sentencing in the Northern Territory' (1998) 23 *Alternative Law Journal* 117; Hilde Tubex, 'Mandatory Sentencing Leads to Unjust, Unfair Outcomes – It Doesn't Make Us Safe', *The Conversation* (online), 5 January 2016 <<https://theconversation.com/mandatory-sentencing-leads-to-unjust-unfair-outcomes-it-doesnt-make-us-safe-52086>>.

161 Matt Cunningham, 'Axe Hovering Over Laws: Fyles Confirms Govt Review of Mandatory Sentencing', *Northern Territory News* (Darwin), 28 October 2016, 9.

several other Australian state and territory jurisdictions.¹⁶² For example, less than two months after the *Four Corners* documentary, allegations emerged of similar abuse of young people held at Townsville's Cleveland Youth Detention Centre and another youth centre in Brisbane.¹⁶³ A report produced by Amnesty International based on Right to Information reports documented multiple incidents of abuse, including one where a youth, at high risk of suicide, had his arms and legs handcuffed and his clothing removed, including the removal of his underwear with a knife.¹⁶⁴ The youth was then left for over an hour, naked in his cell. In that case the youth had allegedly refused to shower prompting the officers' actions.¹⁶⁵ In an editorial in *The Courier Mail*, the child was described as being treated 'like an animal, in scenes depressingly reminiscent' of Don Dale.¹⁶⁶ Other media reported incidents included eight Indigenous children being held in solitary confinement for 22 hours a day for 10 days, the use of a dog when a child was threatening self-harm and the use of partial strip searches.¹⁶⁷ Commenting on the report, Amnesty International's Roxanne Moore said that the incidents demonstrate 'both the failure of care for vulnerable children and the lack of accountability in the detention system'.¹⁶⁸ Shortly after the release of the Amnesty International report Queensland Attorney-General, Yvette D'Ath, ordered an independent review into 'very serious' allegations of abuse in Queensland youth detention centres.¹⁶⁹

In the days following the Prime Minister's announcement of the Royal Commission, and again following the release of Amnesty International's Report into Queensland youth detention centres, there were several public calls in the media made by key officials to expand the scope of the Terms of Reference to permit a national examination of the issue of juvenile detention.¹⁷⁰ Federal Treasurer Scott Morrison stated 'you've got to deal with what is clearly a broader systemic issue'.¹⁷¹ Resisting such pressures, however, Prime Minister Malcolm Turnbull stated that the Commission needed to be 'focussed' on 'the particular problem that had been exposed' if results were to be achieved.¹⁷² Further, he stated:

162 See Cunneen, 'Abuse in Youth Detention Not Restricted', above n 4; Cleary, above n 4.

163 Sarah Elks, 'Answers Sought on Juvenile Abuse', *The Weekend Australian* (Australia), 20 August 2016, 4; Stephen Fitzpatrick, 'Child Detention Abuse Shocks', *The Australian* (Australia), 19 August 2016, 5; Lucy Smith, 'Attorney-General Orders Review into Detention Centre: Youth "Abuse" Uncovered', *Daily Mercury* (Mackay), 20 August 2016, 5; Anthony Templeton, 'D'Ath Denies Youth Abuse', *The Courier Mail* (Brisbane), 19 August 2016, 13.

164 Smith, above n 163.

165 Templeton, above n 163.

166 Editorial, 'Welfare of Juveniles in Jail Matters More than Government's Image', *The Courier Mail* (Brisbane), 31 August 2016, 46.

167 Elks, above n 163; Fitzpatrick, above n 163.

168 Smith, above n 163.

169 Elks, above n 163.

170 See, eg, Smith, above n 163; Mark Dunn, 'Calls to Close Don Dale Ignored', *Herald Sun* (Melbourne), 27 July 2016, 6.

171 Kenny, 'PM Widens Abuse Inquiry', above n 25.

172 Ibid.

This needs a thorough inquiry. We need to move quickly, get to the bottom of it, and expose what occurred and expose the culture that allowed it to occur and allowed it to remain unrevealed for so long.¹⁷³

Challenging this view, by the time of the ABC documentary the issue under focus – the abuse of young people in detention and the culture which supported it – had already been exposed through multiple investigations and in widespread media attention. To this end, it was not, as the Prime Minister suggested, ‘unrevealed for so long’, bringing into question the justification used to limit the jurisdictional scope of the Royal Commission.

Importantly, this justification ignores the fact that the Australian Federal Government has a positive obligation at international human rights law to ensure that the violations exposed at Don Dale are not occurring nationally. Without a national inquiry or independent investigation in all Australian youth detention facilities, the government is unable to fulfil its responsibility at international law, which includes taking positive measures to ensure that children are not, in any circumstances, subjected to cruel and inhuman treatment, including torture. Under its obligations to protect, respect and fulfil human rights, and in line with the requirements of signatory states to the Optional Protocol, there is a need for Australia to introduce better mechanisms for the achievement of accountability and transparency within youth detention centres across Australia. The Royal Commission, bound by its jurisdictionally restricted terms of reference, alone will not achieve this.

VIII CONCLUSION

I was shocked and disgusted. A community is judged by the way it treats its children.¹⁷⁴

Australia is better than this and our children deserve much better.¹⁷⁵

In the wake of the ABC *Four Corners* documentary national attention was drawn to the dangers of youth detention centres and the vulnerability to abuse of those incarcerated. Despite this, in less than four months following the announcement of the NT Royal Commission, proposals emerged in Victoria to build a ‘mini supermax’ detention facility for serious young offenders,¹⁷⁶ and to transfer ‘rioting’ young people into adult prison facilities.¹⁷⁷ The former proposal

173 Rob Harris, ‘Prime Fury at Abuse’, *Herald Sun* (Melbourne), 27 July 2016, 6.

174 Adam Giles, ‘Statement: Juvenile Detention’ (Media Release, 26 July 2016) <<http://newsroom.nt.gov.au/mediaRelease/21147>>.

175 Coyne and Weste, above n 7.

176 Alex White and Mark Buttler, ‘Mini Supermax: Bid for New Prison for Victoria’s Worst Young Criminals’, *Herald Sun* (online), 26 September 2016 <<http://www.heraldsun.com.au/news/victoria/mini-supermax-bid-for-new-prison-for-victorias-worst-young-criminals/news-story/805b242152dd70cc42e3fd3fad783ebd>>.

177 Cameron Houston, Richard Willingham and Chris Vedelago, ‘Forty Teenage Juvenile Prisoners to be Sent to Adult Jail’, *The Courier* (online), 15 November 2016 <<http://www.thecourier.com.au/story/4295641/forty-teenage-juvenile-prisoners-to-be-sent-to-adult-jail/>>.

was described as ‘Victoria’s very own “Don Dale”’,¹⁷⁸ and while it is yet to be implemented the very existence of such a proposal is a concerning indicator of the continued adoption of punitive strategies for responding to children in conflict with the law. It has also been followed by the emergence of several anecdotal incidents of Indigenous children in Victoria being ‘mistreated’ by police prior to their transfer to a youth detention centre. Victorian Aboriginal Children’s Commissioner, Andrew Jackomos, has claimed that these emerging cases are merely ‘the tip of the iceberg’,¹⁷⁹ adding Victoria to the ever-growing list of Australian states and territories accused of abusing young persons in detention.

Beyond considering the violations at Don Dale in the context of human rights law, this article highlights the important role the media can play in casting a light on the often impenetrable spaces of youth detention centres and offering insight via a human rights perspective to the problem. In the context of Don Dale, the significant level of reporting and attention given to the issue by media outlets across Australia ensured a degree of local accountability and provided an important avenue for non-state actors and relevant stakeholders to advocate for reform.

While acknowledgement and documentation of human rights violations represent important steps, a Royal Commission will not in and of itself be a sufficient response by the Australian Government to the abuse of young people in detention in the NT. The Australian Government should not wait for the findings and recommendations of the Royal Commission to put other necessary right protections in place, namely signing and ratifying the Optional Protocol, as well as introducing reform and a change in practice and culture – all of which are urgently needed. To this effect, this article argues that, while there is merit in the process of a Royal Commission, equally important is the need for Australia to fulfil its positive obligations to respect and protect the rights of *all* Australian children held in detention by uncovering and remedying problematic youth detention practices nationally. Significant evidence has emerged that the practices at Don Dale, which shocked the Australian community and mobilised the Federal Government into announcing a state-focused Royal Commission, were not unique nor confined to one detention centre, state or territory. To this end, while there are well-founded concerns as to the enforceability of the international human rights regime, it remains a useful tool in that it provides a ‘benchmark for a common global language’ on the rights of children in detention.¹⁸⁰ A language which when applied to the current context reveals the gravity of the breaches which were perpetrated upon Australian children in youth detention.

178 Rob Hulls, ‘Supermax Idea a Path to a Dark, Expensive Place’, *Herald Sun* (Melbourne), 28 September 2016, 23.

179 Farrah Tomazin, ‘Police Youth Abuse Claims’, *The Age* (Melbourne), 23 October 2016, 1.

180 Goldson and Muncie, above n 5, 61.