

FOREWORD

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Reflecting on the Royal Commission more than twenty years after it finished, I realise that many of my readers will have come to political consciousness and lived in a world in which Aboriginals are always in the news, always a source of national anxiety and a challenge to Australia's international credentials. They may assume that the Royal Commission was established as part of this ongoing concern, to find answers to the deepening Aboriginal malaise that still defies solution today. Let me give some perspective.

For nearly fifty years I lived in the Great Australian Silence,¹ and its corollary, the Great Aboriginal Invisibility. Different events brought them to an end for different people. For me they vanished in 1970 when I met a brilliant group of charismatic young Aboriginals and found a niche working with them to establish the first Aboriginal Legal Service.

For many other Australians the Silence and the Invisibility were shattered in 1972 by the magisterial voice of Gough Whitlam, whose Government ushered in what was conceived as a period of self-determination, exemplified in the thousands of government-funded but Aboriginal-controlled organisations that appeared in following years, and the Woodward Report as a first step in the realisation of land rights.

Before long it became apparent that the Great Australian Silence and the Great Aboriginal Invisibility had been only episodes in a more enduring and frequently recurring phenomenon, which I will call the Great Australian Complacency. Once it became clear that the Fraser Government did not intend to dismantle the Whitlam legacy, Aboriginal issues fell out of focus for many people, including myself. Solutions, it seemed, were in hand, and one could focus on other issues – the environment, multiculturalism, the Murdoch takeover, Indonesia or whatever.

What should have been worrying signs, among them the growing campaign stemming from John Pat's death in custody at Roebourne in 1983, went largely unnoticed. In 1987 a confident nation looked forward to celebrating its bicentenary the following year with head held high.

The Complacency was interrupted by Moral Panic as deaths in custody unexpectedly became news. In the first half of the year 11 Aboriginal deaths in custody, five by hanging, set the stage for a horrifying denouement. In just six weeks between 24 June and 6 August 1987 there were five Aboriginal deaths in custody, all by hanging, and four in police cells. As death after inexplicable death hit the headlines, anxiety and bewilderment grew. Was it credible that so many, mostly young, Aboriginal men would hang themselves, and how could they do so unaided with the meagre resources of a prison cells?

Unwilling to accept a growing Aboriginal belief that police were resuming an old policy of killing Aboriginals, but having no explanation of their own, governments sought to clear the air with the knee-jerk appointment of a Royal Commission to inquire into every Aboriginal death in custody since the 1 January 1980, and into the way they had been investigated at the time.

More than 100 families became convinced that they had lost a member in a death covered by the terms of reference, and their expectations of an exhaustive inquiry into those deaths became a governing factor in subsequent events. It was not possible for governments to call off inquiries when it became clear that it was not difficult for an unaided prisoner to hang himself, and that Aboriginal prisoners were not hanging themselves, or otherwise taking their lives, at a greater rate than non-Aboriginal prisoners.

What cried out for investigation was not the likelihood of foul play, but why so many Aboriginals were falling foul of the justice system and spending time in custody. This was not the purpose for which the Commission had been established, and governments were naturally cautious in expanding what was already proving to be a mammoth task: in effect around 100 royal commissions into separate deaths, each occurring in its own peculiar circumstances. Eventually it was accepted that the newly identified central issue could not be ignored, and a grudging amendment to the National Commissioner's terms of reference made clear by implication that it was part of his task to report on 'underlying issues associated with the deaths'.² It read more like an afterthought – as indeed it was – than a change in the Commission's focus, but it was the hook on which Commissioner Johnston hung most of his massive five-volume report, published 20 years ago this year.

It was only the National Commissioner's terms of reference that received this modest amendment, and he was provided with a research unit to assist him. The rest of us (apart from Patrick Dodson, a non-lawyer who was later appointed with the specific task of investigating underlying issues in Western Australia) remained focused on meticulous inquiry into individual deaths and their subsequent investigation. When in the course of our inquiries we encountered material that might assist Commissioner Johnston in his additional task, as we inevitably did, we recorded it in our reports to him.

Each Commissioner was free to adopt his own style of reporting. My view was that I could best contribute to a national understanding of what was happening if I presented the death I had investigated as the culmination of a life lived in shaping circumstances, rather than an isolated event. By serendipity my first report, about Malcolm Smith, was released on a day when news was slack and was read by *The Age's* Canberra reporter. As a result it attracted considerable media attention and commentary, and even became the subject of a popular song and a documentary film. Later reports, released in Spartan format at strategically selected times by governments with no desire to encourage the airing of critical comment, often disappeared with little trace.

Nevertheless, enough filtered out in the Commission's many individual death reports to create some receptivity for the culmination of its work in Commissioner Johnston's monumental *National Report*. Like everyone who worked close to this gentle, kindly man, with his dry wit and passionate

dedication to justice, I developed not only affection, but also a deep respect for his courage and dedication. The conception and writing of the *National Report* required both.

Some elements of the *National Report* were given. Drawing on the individual death reports, it had to describe the immediate circumstances and causes of the deaths, and the adequacy of their investigation. While in a small number of cases the cause of death has remained controversial for some people, the findings of the Commission and the recommendations flowing from them have been generally accepted. The great issue confronted by Commissioner Johnston and his latter day critics was how far and in what directions it was appropriate for the *National Report* to go in discussing issues 'underlying' the deaths.

Cultural determinists like Gary Johns argue that the *Report* should have recognised that the Aboriginal condition was due to adherence to an outmoded culture and have been concerned to recommend and facilitate the shedding of that culture in favour of 'the' modern culture.³ His criticisms naively treat cultures as if they were items of clothing to be donned and doffed at will, and would make assimilation the overriding aim of policy.

The criminologist Don Weatherburn argues that the issue should have been treated as a criminological one within the relatively narrow bounds of practical criminology, and criticises the *National Report* for being more ambitious.⁴ Along with Noel Pearson, he has wrongly assumed that the *National Report* failed to highlight alcohol and other issues playing major causal roles in relation to Aboriginal imprisonment.⁵

Noel Pearson, who has been by far the most powerful intellectual contributor to the Aboriginal policy debate in recent years, has varied in his policy emphases, but places priority on the issues of alcohol, welfare dependence, education and economic development. Despite his predilection for disparaging the *National Report*, his priorities do not conflict with its priorities.

I have argued elsewhere that Noel Pearson's real complaint is that instead of headlining his issues of priority, the *National Report* headlined the historic destruction of Aboriginal society by European intrusion, and the continuing disempowerment of Aboriginal people that followed.⁶ While he would agree on the importance of this history, Pearson is able to take its recognition for granted in a way the Commission could

not. It was in part the work of the Commission itself, along with the High Court's *Mabo*⁷ decision the following year, and the ongoing messages of the 'new historians' and the reconciliation movement, that there is a general recognition that Aboriginal disadvantage is not the result of Aboriginal inferiority and shortcoming, but of a history of dispossession, institutionalisation, and continuing disempowerment. This has cleared the way for a more open and rational discussion of what may be done to change the Aboriginal condition.

Elliott Johnston's strategy was to use the recognition of historical disadvantage as the launching pad for a national call on all Australians, black and white, to join together for a massive and holistic attack on all aspects of Aboriginal disadvantage. He relied neither on guilt nor denigration, but on the sense of justice and fair play he believed to be present in mainstream Australian society, and on the desire and willingness to take control over their own lives that he believed to be present but stifled in Aboriginal communities.

It was not an empty rhetorical call that the *National Report* made. It was backed by a detailed program to tackle every major aspect of the overall disadvantage found in the Aboriginal society that was producing the candidates for deaths in custody. Whether the problem was related to alcohol and drug abuse, unemployment, education, children and youth, health, housing, community infrastructure, policing, the effect of imprisonment, service delivery, community reconciliation, or the fulfilment of international obligations, the *National Report* sought to provide what was in effect a manual of best practice, based on the advice of recognised experts in the various fields, and the lessons of the Commission's own vast inquiry into particular lives and deaths in custody.

The 339 recommendations of the *National Report* were not an unprioritised wish list. They were framed by a five-volume discussion examining each issue, its importance and its relevance to other issues. Two issues come to stand out as one reads the *Report* as a whole. One is the destructive and undermining effect of alcohol abuse, the subject to which two chapters are devoted and which pervades many other chapters.⁸ The *Report* does not treat Aboriginals as mere victims of alcohol but as people who must take responsibility for their use of it, and major recommendations relate to giving Aboriginal communities effective control over its availability.⁹

The issue that received the greatest emphasis of all was the importance of delivering the assistance that Aboriginal communities need in ways that did not perpetuate or reinforce the dependence and disempowerment that had characterised government policies in the past. Commissioner Johnston saw an ingrained pattern of white domination in policy-making, service delivery and community relations that had survived the years of so-called self-determination. He targeted this disempowerment, advocating an end of domination and the return of control of their lives and communities to Aboriginal hands.¹⁰ This is reflected in recommendation after recommendation.

Twenty years later people ask what has been the effect of the Royal Commission. There no doubt that in relation to its original and central focus, the Commission has resulted, despite the odd egregious exception,¹¹ in much better care of all at-risk prisoners, black and white, and much more thorough and transparent investigation of the deaths that do occur.

In relation to the many specific areas of disadvantage on which the *Report* made recommendations, I have no qualification to speak in detail. However over the years I have heard little informed criticism of the specialised recommendations, and have often had Aboriginals volunteer how useful the recommendations have been to them in seeking support for particular programs.

It is common for Aboriginal and other critics to make a broad-brush complaint that the recommendations of the Commission have not been implemented. Establishing how far this is true would require a detailed study of many areas of policy, and so far as I know this has not been done. If the task were to be undertaken, it would require judgments about what was effective implementation, which would likely be exceedingly controversial.

One early study of Commonwealth implementation that I made for the Aboriginal and Torres Strait Islander Social Justice Commissioner highlighted that what was claimed to be implementation was often expensive bureaucratic activity that produced little or no impact on the ground.¹² It is pleasing to find 14 years later that, while the anarchic, unproductive and self-justifying character of bureaucratic activity on which I stumbled in 1994 still marks Aboriginal policy, it is now the subject of serious academic study.¹³ It is clearly problematic to argue from the limited success of

its bureaucratic implementation that the *National Report* was itself defective.

Certainly some key messages of the *National Report* have been decisively rejected in practice. Its guiding principle, that Aboriginals should at every point be given as much control as possible over their own lives, has been spectacularly abandoned in the Northern Territory Intervention. The idea that imprisonment should be a punishment of last resort has been negated as Aboriginals have been caught up in wave after wave of vengeful and self-defeating law and order policies that have filled prisons with inmates of all kinds. This has been one, although by no means the sole, reason that figures for Aboriginal imprisonment have gone through the roof.

High rates of imprisonment remain today, as the Commission found 20 years ago, not as an isolated feature of Aboriginal society, but as an integral part of communities characterised by many interacting features that are judged distressingly disadvantageous and dysfunctional by mainstream society. A brief return of the Great Australian Complacency after the Royal Commission and the *Mabo* decision was strongly challenged, particularly by Noel Pearson.¹⁴ It again ended in Moral Panic, notably expressed in the way in which the Northern Territory Intervention has been conceived and implemented.

There are many strongly expressed opinions about the depth of the malaise in Aboriginal society and what is required to remedy it, but apart from a few areas where statistics speak louder than words, remarkably little research-based evidence exists to found these opinions. Like other commentators I am left to speculate. I find myself coming back to the conclusion that Commissioner Johnston reached about what he regarded as the most important prerequisite for the success of his program.

He nominated three essential prerequisites for success.¹⁵ The second was assistance from the broader society and the third was the delivery of that assistance in a manner that did not create welfare dependence. However the first and the most crucial was the desire and capacity of Aboriginal people to put an end to their disadvantaged situation and to take control of their own lives. He affirmed a passionate conviction that they would do so, based on the number of initiatives they had taken and were taking at the time. He gave many examples.¹⁶

In other words he proceeded on the assumption that Aboriginals wanted to make, and given the chance would make, substantial efforts to achieve what the mainstream community regards as desirable change or 'progress', that they wanted to embrace modernity, 'to be like us'.

Many of course do, and have gone on to join what we could call a very successful Aboriginal middle class. They are not part of what is conceived as the problem: those who have been left behind in many bounded Aboriginal communities, and in some city and rural town populations.¹⁷ The assumption that these people are willing, indeed anxious, to be 'like us' was not peculiar to Commissioner Johnston, but is shared by his critics and supporters alike. He differed from the rest of us only in feeling the need to give reasons for his assumption; most of us treat the superiority and compelling attractiveness of our way of life as requiring no argument.

However, it is undeniable that, even when opportunities are available, many Aboriginals show little inclination to seek or persist with paid employment, to make the changes to their lifestyles recommended in the interests of achieving a longer and healthy life, to follow medical regimes, to renounce the established rites of passage through conflict with police and imprisonment, to live in nuclear families in unshared houses on unshared incomes, to insist that reluctant children go to school every day, or to forego the pleasures of alcoholic socialising.

Why this is so has been much debated by Australian anthropologists in recent years with no conclusive outcome,¹⁸ and I am not qualified to offer one. I wonder however whether we underestimate and fail to understand how difficult and complex is the transition from an egalitarian hunter-gatherer society, in which one's only capital is social capital in the form of interpersonal relationships, to a modern capitalist society based on individual accumulation. As one observes the continued indifference of many Aboriginal people to what are generally considered benefits of modernity, as well as to its authority, one is reminded of Clastres' view of hunter-gatherer society as a site of resistance to state-formation.¹⁹

Looking down from the heights of modernity, it is easy to fail to realise the warmth and joys and satisfactions of lives that we see only as distressed and dysfunctional, and that surrendering them may be a price that people may not be willing to pay for the problematic advantages of modernity. Perhaps it is not surprising that many Aboriginals do not

respond to the stifling solicitude or ill-concealed contempt of smug advisers and administrators who patently regard their communities, their way of life, their social bonds, their mutual caring and sharing, their emphasis on personal autonomy, their deep ties to country and much that makes them what they are, as at best valueless or unfortunate handicaps, at worst the stigma of inferiority and depravity. The resistance to progress that mainstream society pathologises may to them be a defence of what they experience as 'havens in a heartless world'.²⁰

White Australia has always had difficulty in finding either an ear with which to listen to Aboriginal Australia, or a voice in which to speak to it. One remembers Stanner as a rare example of a person who had an ear to listen and the rarer ability to distil what he heard to a wider white world. It is not easy to listen to Aboriginals, for they have no spokesperson and speak with many voices, and have learnt to be distrustful. It takes time and patience and rapport, things that are hard to muster in bureaucracies, so the listening and interpreting has usually to be done outside government. It is not a fly-in fly-out task on the relatively useless consultation model.

Two of the most successful occasions on which white Australia found a voice to speak to Aboriginal Australia were Paul Keating's Redfern speech and Kevin Rudd's apology. But it is not enough to apologise for past failures. If we want Aboriginals to listen, we must be able to talk about a future, not just an inevitable future on our model, but a future that recognises the value of Aboriginal society for those who live in it, and their view of an acceptable future.

Can Australia offer a future that does not just provide a path for individual Aboriginals to leave their communities and be integrated into mainstream society, but a future for Aboriginal communities in today's world? Jon Altman and his colleagues in the Centre for Aboriginal Economic Policy Research have argued for the viability of hybrid economy, part subsistence and part market-based, to underwrite a future for remote communities.²¹ Noel Pearson has sought to build in Cape York the institutional basis for an Aboriginal society that can control alcohol, promote individual responsibility, achieve high educational outcomes and develop an economic base which allows its members to live in both worlds.²²

Commissioner Johnston would have been happy with either outcome, as long as it was the result of Aboriginal choices. Perhaps both are doomed to failure, as the cultural

determinists and neo-con economists would argue. If that is so, it is hard to see a future other than continuing painful disintegration for many Aboriginal communities. If Commissioner Johnston proves to have been wrong when he rejected any 'doubt that Aboriginal people are capable of, determined to and will in fact exercise self-determination',²³ the *National Report* will in retrospect come to be seen as the great swansong of the self-determination era.

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- * Commissioner (1988–91), Royal Commission into Aboriginal Deaths in Custody; Emeritus Professor and Founding Dean, Faculty of Law, University of New South Wales.
 - 1 This term was coined by W E H Stanner and popularised in his 1968 Boyer Lectures 'After the Dreaming'. Other coinages are my own.
 - 2 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, app A (see amendment to National Commissioner's terms of reference of 6 May 1988).
 - 3 Gary Johns, *Aboriginal Self-Determination: The Whiteman's Dream* (Connor Court, 2011).
 - 4 Don Weatherburn and Jessie Holmes, 'Re-thinking Indigenous Over-representation in Prison' (2010) 45 *Australian Journal of Social Issues* 559.
 - 5 Ibid; Noel Pearson. 'On the Human Right to Misery, Mass Incarceration and Early Death' (Speech delivered at the Dr Charles Perkin Memorial Oration, The University of Sydney, 25 October 2001), reprinted in Noel Pearson, *Up from the Mission: Selected Writings* (Black, 2009) 175; Noel Pearson, 'Lessons from Palm Island', *The Australian*, 7 October 2006; Noel Pearson, 'The Intervention' in Noel Pearson, *Up from the Mission: Selected Writings* (Black, 2009) 301.
 - 6 Hal Wootten, 'Reflections on the 20th Anniversary of the Royal Commission into Aboriginal Deaths in Custody' 7(27) *Indigenous Law Bulletin* 3.
 - 7 *Mabo v Queensland (No 2)* (1992) 1 CLR 175.
 - 8 RCIADIC, above n 2, vol 2, ch 15, vol 4, ch 32.
 - 9 Ibid vol 4, 275–9 [32.2.4]–[32.2.12], vol 5, 130–1 recs 272–81. As to personal responsibility, see vol 2, 322 [15.2.52].
 - 10 Ibid vol 1, 15 [1.7.6].
 - 11 For an extraordinary case of lack of care of a prisoner, see Deaths in Custody Watch Committee WA, *Ward Campaign for Justice* <<http://www.deathsincustody.org.au/ward>>. For a controversial police investigation, see 'CMC Review of the Queensland Police Service's *Palm Island Review*' (Report, Crime and Misconduct

- Commission, Queensland, June 2010)". See also 'Report in Response to the "CMC Review of the Queensland Police Service's *Palm Island Review*"' (Report, Queensland Police Service, 2011).
- 12 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report*, Human Rights and Equal Opportunities Commission (1994) (see 'The Royal Commission into Aboriginal Deaths in Custody: Commonwealth Implementation of Recommendations').
- 13 Tess Lea 'When Looking for Anarchy, Look to the State: Forces of Disorder within the Australian Indigenous Estate' (2012) *Critique of Anthropology* (forthcoming).
- 14 See writings collected in Noel Pearson, *Up from the Mission: Selected Writings* (Black, 2009).
- 15 RCIADIC, above n 2, vol 1, 15–16 [1.7.1]–[1.7.8].
- 16 Ibid vol 1, 16–19 [1.7.9]–[1.7.21].
- 17 Maria Lane distinguished the 'open society population' and the 'embedded welfare population'. See discussion in Noel Pearson, 'Radical Hope: Education and Equality in Australia' (2009) 35 *Quarterly Essay* 1.
- 18 Recent debate has centred on remote bounded communities: see Diane Austin-Broos, *A Different Inequality* (Allen & Unwin, 2011). However, many of the same problems remain in the embedded welfare community in cities and country towns: see Gillian Cowlshaw, *The City's Outback* (UNSW Press, 2009).
- 19 Pierre Clastres, *Society Against the State: Essays in Political Anthropology* (Robert Hurley trans, Zone Books, 1989) [trans of: *La société contre l'État* (first published 1974)].
- 20 This application of Lasch's 1977 phrase to remote Aboriginal communities is from Gillian Cowlshaw, 'Crime and Governance through Culture' (Paper presented at Crime, Justice and Social Democracy, Queensland University of Technology, 27 September 2011).
- 21 Jon Altman, 'What Future for Remote Indigenous Australia? Economic Hybridity and the Neoliberal Turn' in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) 259.
- 22 Pearson, above n 14.
- 23 RCIADIC, above n 2, vol 1, 16 [1.7.11].

COMMENTARY

