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# REFLECTIONS ON THE 20<sup>TH</sup> ANNIVERSARY OF THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

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*by Hal Wootten AC QC*  
*A former member of the Royal Commission.*

Reflecting today on the Royal Commission into Aboriginal deaths in Custody, and the criticism it has attracted, I realise that we lawyers who innocently accepted commissions were getting involved in something we had not anticipated – the shaping of the Australian narrative.

Every people has a narrative, a national story that makes sense of its past and present and shows a way forward. For a long time, white Australians told a triumphant story of hardy pioneers taming a harsh continent, a narrative in which the Indigenous people barely figured. Stanner called it the ‘Great Australian Silence’. Aboriginals could be relegated to footnotes—*terra nullius* denied them any serious connection with the land; the dying pillow metaphor cast them as an inferior race, doomed to die out; assimilation offered a cultural cleansing that would make them modern people.

In the post-war era of anti-racism and decolonisation, Australia struggled to find a new inclusive narrative based on racial equality and self-determination, acceptable to Indigenous people, whites and a watching world. A new generation of historians came up with a story of white people taking land with which the very being of Indigenous people was intimately entwined, not only destroying their sources of food and shelter, but critically damaging their social structure and norms, and indeed their whole concept of who and what they were and how they fitted into the universe.

In 1987, as the Bicentennial approached and the telling of the Australian narrative assumed special significance, newspaper headlines presented a new challenge. In just 6 weeks between 24 June and 6 August 1987 there were five Aboriginal deaths in custody, all by hanging, and four in police cells. This followed 11 deaths earlier in the year five by hanging.

Two narratives at opposite ends of the political spectrum were ready to accommodate these events. In one the deaths were a continuation of the genocide police had practised for two hundred years. In the other, they were part of the burden placed upon a benign white Australia

by a good-for-nothing primitive people unable to adjust to the modern world or cope with alcohol. Neither story was suitable for the Bicentenary. Bewildered Governments, Federal, state and territory, hastily united to announce on the 10<sup>th</sup> of August a Royal Commission which would inquire into every Aboriginal death in custody since January 1, 1980.

The date was arbitrarily selected; no one knew how many deaths had occurred, the circumstances in which they had occurred, whether the statistics for non-Indigenous prisoners were different, or whether death by hanging was suspicious. Had Governments known that they were committing to 100 Royal Commissions, that hanging was a very common method by which prisoners everywhere took their lives unassisted, that Indigenous prisoners were not dying at a greater than other prisoners, and that the recent spike in deaths was not peculiar to Indigenous prisoners, they would no doubt have acted differently.

The question implicit in the terms of reference was: has misconduct of custodial officers caused the deaths of Indigenous prisoners, and if so why has this not been detected? The question should have been: why are Aboriginals taken into custody at such stunningly higher rates than non-Aboriginals? By the time this was realised, it was politically impossible to call the death inquiries off. A hundred or so Aboriginal families and communities were convinced or highly suspicious that a loved one had been the victim of foul play or neglect.

Governments’ response was to appoint additional commissioners. Three years later there were five, of whom I was one. The rest of us reported to Elliott Johnston QC, who, as National Commissioner, had the final responsibility of writing a National Report covering deaths, investigations and underlying issues Australia wide. His National Report had its 20<sup>th</sup> anniversary this year.

We came to see our work in three streams:

1. The circumstances of each death, including issues of responsibility.

2. The subsequent investigations of each death by police and coroners.
3. The issues underlying the extraordinary rates of Aboriginal arrest and imprisonment.

On the first issue, Commissioners did not find deliberate violence or brutality, but they did find a general poor standard of care of prisoners that sometimes led to deaths. As a result of the Commission, there has been greatly improved care of all prisoners, or so I thought until I read of the cruel death of a Western Australian prisoner transported hundreds of kilometres across desert in an uninsulated van.<sup>1</sup>

On the second issue, nearly all the police and coronial investigations had been derisory. There was a widespread attitude, perhaps unconscious but embedded, that a death in any form of official custody was by definition above suspicion, to be given only the most perfunctory examination, carried out by your mates. The significance lay less in failure to uncover misconduct than in failure to bring closure to grieving families and communities, and to identify practices that would produce more deaths if not reformed. The Royal Commission led to rigorous protocols, or so I thought, until I read with incredulity of the police investigation of Mulrunji Doomadgee's death.<sup>2</sup>

The Commission's work in the third area, underlying issues, has attracted harsh criticism. We were guilty of public racial vilification of the white community, of intellectual failure, of an entire wasteful exercise, the voices of angry critics accused.<sup>3</sup>

How did we deal with underlying issues? None of us who had sat through inquiry after inquiry following a prisoner from birth to the lonely cell or other custody where death intervened could interpret Indigenous imprisonment statistics merely in terms of individual or group criminality, alcohol addiction, or a pre-modern culture. In most cases we had come to know the history of the prisoner's community and his family, and had followed the course of his life through the records of an unremitting surveillance: the files of protection and welfare authorities, foster homes and institutions, schools, police forces, juvenile justice institutions, prisons, probation services and other agencies. Even before the prisoner's birth, his probable pattern of life was being laid down by the way a history of dispossession, discrimination, disadvantage and despair had damaged his community. The effects of historically established disadvantage, especially alcohol, became central to the narrative we told.

We were converted to this approach not by secondary sources or ideological discourses, but by living literally for years close to these primary sources and to the families and neighbours who remembered and often treasured those who died. It was a humbling, stressful and life-changing experience.

Our conviction that life in communities like those the deceased came from was itself a predictor and producer of high imprisonment rates, and that attempting to reduce disadvantage is a sensible way of addressing such rates, has been supported by recent research.<sup>4</sup>

What were we to do? The Commission had been forced by its original mandate to conduct what were in effect 99 Royal Commissions into individual deaths. They were lengthy and expensive. Following them with a full scale formal Royal Commission into underlying issues could not be contemplated.

A more modest approach was adopted. First, Commissioners noted in their reports matters about underlying issues that came to their attention during death inquiries. Second, there was a discussion paper and a public call for submissions. Third, a raft of measures ensured that Aboriginal voices were heard and given weight in the Report and recommendations.

A National Research Unit analysed the material, studied relevant reports and literature, consulted experts and drafted a discussion of underlying issues. Obviously the National Commissioner could not pronounce authoritative findings on the vast range of issues. His approach had three features. He was determined that Indigenous voices, so often ignored or discounted, should be seriously taken into account. He sought expert opinion on many issues, making his Report something akin to a manual of best practice. Finally he framed his recommendations so as to empower, not disempower Aboriginal people.

The National Report recognised the need to 'accord priority' to the many underlying issues.<sup>5</sup> This meant giving appropriate recognition to the gravity and significance of each issue. In the reports of the Commission, in addition to the historical background, two issues stand out: the disempowerment of Aboriginals, and the devastating effect of alcohol.

The most common message we received from Indigenous people was that they were not taken seriously as individuals or as a people, not listened to, and not recognised. Many

interpreted this as racism, however one explains it, there was an ingrained pattern of white domination in policy making, service delivery and community relations that had survived the years of so-called self-determination. Commissioner Johnston targeted disempowerment, advocating an end of domination and the return of control of their lives and communities to Aboriginal hands.<sup>6</sup>

He nominated three essential prerequisites for progress. 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

**Jalala – Marking Stones 2006**

Jack Dale

*Natural ochres & acrylic on cotton, 1030mm x 1170mm*



conviction that they would do so, based on many examples of initiatives they had taken.<sup>7</sup>

The other thing that stands out in the National Report is the emphasis on alcohol. As Commissioner Johnston wrote, 'the topic of alcohol use ....permeates this report'.<sup>8</sup> Two whole chapters and part of another are devoted to it.<sup>9</sup> Marcia Langton's report, 'Too Much Sorry Business', is reproduced in full. Alcohol's pernicious effect is noted in chapter after chapter.

Commissioner Johnston commissioned a report from Alcohol and Drug Foundation Australia, who appointed an Expert Working Group to produce a report which Commissioner Johnston used extensively. He emphatically rejected cultural relativism or disadvantage as justifications for 'dangerous drinking, alcohol-related violence, sexual abuse, or similar behaviour', insisting that 'Aboriginal people, both as individuals and in groups and organisations, have a deep responsibility to accept that they are accountable for their own actions and to work to overcome abuses.'<sup>10</sup>

It is astonishing to find Noel Pearson saying that the Commission's discussion of grog as a primary problem did not play a central role in its final report and recommendations and was just one of the underlying factors.<sup>11</sup> His complaints that the Commission was unable to understand that the lack of social norms is not only a consequence of Aboriginal disadvantage but a cause and that it failed to confront the truth that 'alcohol directly causes, exacerbates or prevents the resolution of the other underlying issues'<sup>12</sup>, cannot survive a fair reading of the Report. Commissioner Johnston wrote of the destructive downward spiral so often seen: the synergistic relationship between the disempowerment of Aboriginal people in general and self-destructive drinking behaviour.<sup>13</sup> After noting that alcohol and other drugs can be direct causes of death, he said they also:

contribute less directly to deaths in custody through their impact on family and community relationships, employment, housing, educational achievements, etc. These factors interact to produce the serious situation of Aboriginal people and alcohol observed today in many parts of Australia.<sup>14</sup>

He listed, among the devastating effects of alcohol misuse, domestic violence and sexual abuse; strong negative role models of drinking and parenting behaviour for children; alcohol-related damage to property and services; damage to social and cultural life; a range of adverse economic consequences, including the diversion of family financial resources with indirect effects such as malnutrition,

inadequate heating and shelter, and bad hygiene; and general disruption of families and communities.<sup>15</sup>

It is quite unfair to imply that the Report offers decriminalisation and diversion of drunks from the criminal process as solutions to the problem of alcohol.<sup>16</sup> These measures were proposed as more humane and safer ways of dealing with drunks than throwing them into cells to sleep it off, which the death inquiries had shown to be so fraught with risk and without deterrent effect.<sup>17</sup>

One would never guess from reading Pearson, that at the top of Commissioner Johnston's responses to the problem of alcohol was reducing its availability.<sup>18</sup> Consistently with his overall emphasis on empowering Aboriginal people, he made a series of recommendations<sup>19</sup> to give Aboriginal people and communities power and influence over its availability. They included empowering communities across Australia to prohibit or regulate the availability of alcohol, accompanied by a strengthening of measures to eliminate sly grogging, and a range of measures to give Aboriginal people power to influence the grant or continuance of liquor licences and the enforcement of their conditions. In the Northern Territory he also recommended reducing the number of liquor outlets in places like Alice Springs and appointing at least one Aboriginal person to its Liquor Commission. Had his recommendations been followed through, there may have been no need for the Intervention whose disempowering modality he would have deplored.

How can one explain Pearson's hostility to the National Report? It cannot just be that Commissioner Johnston followed advice from the recognised professional experts in Australia, not that of the Swedish psychiatrist, Nils Berjerot, whom Pearson embraces with some zealotry.

I believe the clue is in Noel's complaint that the Commission, 'identified grog as an issue, but it didn't ... bring the grog out like the nose on your face'.<sup>20</sup> Pearson believes that grog, not historical disadvantage, should have been the headline of the Report. He doesn't disagree about the role of historical disadvantage; he just wants it to be taken for granted, while alcohol abuse is made the lead story. I understand why he takes this position today, but he lacks a sense of history in condemning the choice not to do so 20 years ago.

Making alcohol addiction the primary message of the Report in 1991 would have fed a national narrative of an enlightened nation burdened by an Indigenous people unable to cope with alcohol because they are trapped in a

worthless culture that they refuse to abandon. Even today Gary Johns castigates the Commission for not adopting that view. He recently attacked the Commission in terms that revealed a resentment of its choice of narrative, as well as utter ignorance of what the Commission's task was, and what it in fact did.<sup>21</sup> Pearson accurately summed him up some years ago when, under the title, 'Don't listen to those who despise us', he deplored Johns' 'irrational contempt' and his 'notion that our culture is unable to change and must therefore be left to die'.<sup>22</sup>

Today Pearson is free to discount Johns and his ilk because others before him firmly established a narrative that places Aboriginal disadvantage in a historical context of dispossession and discrimination, culminating forty years ago in the delivery of the lethal cocktail of three ingredients: the disappearance of the rural and unskilled jobs that had kept Aboriginals in the real economy, the availability of unconditional welfare, and easy access to alcohol. The seeds of that narrative had been planted long before the Royal Commission; one only has to think of Rowley and Stanner and but it was far from established 20 years ago. It gained traction by its endorsement in consecutive years by the Royal Commission and the High Court in *Mabo*.

Commissioner Johnston deliberately chose a tone and language to unite the whole community in a commitment to recognise and tackle the historical disadvantages of Indigenous people. He was careful, for example, not to demonise and alienate the police and prison officers who would inevitably continue to handle Aboriginals; rather he sought to use the criticisms he had to make as a platform for offering them a constructive role in the future. He pulled no punches on the devastating effects of alcohol, and emphasised the responsibility of those who drank, but he was careful not to stigmatise or humiliate them, or to encourage tendencies to denigrate or imply racial inferiority. His success in entrenching a constructive narrative was attested by the almost unanimous support received by his National Report on both sides of every Australian Parliament.

The Commission was not the end of history. Narrative building continued. A few years later a young Aboriginal man turned his back on the lucrative, prestigious and potentially powerful career available to him because he saw his people were in deep trouble. He applied his powerful intellect to ask why their condition was getting worse not better.

He saw that the desire and capacity 'to put an end to their disadvantaged situation and to take control of their own

lives'<sup>23</sup> which Commissioner Johnston had so passionately attributed to them, was being undermined. Able to take for granted the now firmly established narrative of historical disadvantage, Pearson incorporated in it the need for Aboriginal people to take responsibility for themselves, free themselves from the clutches of alcohol and welfare dependency, find themselves a place in the real economy and insist that their children acquire an education.

I honour Pearson's achievement, his intellectual power and his courage. I wish we could have it with a little less hubris, a little more sense of historical contingency, in a language that would unite, not divide or alienate, Aboriginal people amongst themselves, and the broader community that is ready to support them.

One last matter, I get somewhat impatient with those who sanctimoniously point out that Indigenous incarceration rates have risen not fallen since the Royal Commission, as though it is the Commission's fault and they are absolved of responsibility. They speak as if the Commission had given them ointment to rub on a wound and it hadn't healed. There are no magic ointments or silver bullets for complex social problems, and the Commission never claimed to have one. It examined the deaths and the lives of 99 people who had died in custody. It told the stories of these 99 people and the history from which they and their communities had emerged so that it could be seen that these were not worthless people but fellow human beings who had been disadvantaged and suffered. It said that if people continued to live in deprived, disadvantaged and dysfunctional communities, imprisonment rates would continue to be high. It identified problems in these communities as seen by experts who had studied them, by the people who lived in them and by Commissioners who had spent three or four years of intense stress and effort listening to them. It identified what experts and the people themselves saw as the best way to tackle the problems. It said the most serious problem was alcohol and the most fruitful way of tackling it was by reducing its availability. Finally it said, you will never get anywhere unless you respect Aboriginal people, recognise their difference, and let them take control of their lives.

Our commissions expired, we went home and left it to you, those who hold power in Australian society. You, not the Commissioners, have been responsible for the last twenty years. What have you done in those twenty years? Have you done anything to reduce the availability of alcohol, or have you turned your head while profiteers go on exploiting Indigenous misery? Have you seriously tried to find constructive alternatives to the revolving gate

of prison, or have you acquiesced in the expensive and inefficient punitive policies that always bear most harshly on the disadvantaged? Have you kept abreast of changing problems in the communities and new expertise in tackling them? Have you engaged with Pearson's vision?

The National Report was not a revelation from on high, not a font of perennial wisdom, not the end of history, but a passing moment in it. It was a response to the problems of the time, by people of the time, using the tools of the time. Take what you can from it and move on. It is now your thinking, your imagination, your dedication and your professional commitment that is needed.

*Hal Wootten AC QC is a former member of the Royal Commission. This paper was delivered at the Queensland University of Technology School of Justice 20th Anniversary Breakfast to an audience of senior legal and justice professionals.*

- 1 See 'Ward Campaign for Justice' <<http://www.deathsincustody.org.au/ward>>.
- 2 See Crime and Misconduct Commission, Queensland, 2010. 'CMC Review of the Queensland Police Service's Palm Island Review'. See also Queensland Police Service, 2011. "Report in response to CMC Review of the Queensland Police Service's Palm Island Review".
- 3 See for example criticism by Johns and Pearson cited below.
- 4 Don Weatherburn, 'Predictors of Indigenous Arrest: An Exploratory Study', (2008) 41 *Australian and New Zealand Journal of Criminology*, 307-322.
- 5 Royal Commission into Aboriginal Deaths in Custody, *National Report*, 1991. Vol 1, 'The Framework of this Report'.
- 6 Above n 5, Vol 1, 1.7.6.
- 7 Ibid Vol 1, 1.7.9-21.
- 8 Ibid Chapter 32, Introduction.
- 9 Ibid Chapters 15, 32 and part of 21.
- 10 Ibid Vol 2, 15.2.52.
- 11 Noel Pearson, 'Lessons From Palm Island', *The Australian* (7 November 2006), Noel Pearson 'Up from the Mission', (Black Books Melbourne) 305.
- 12 Noel Pearson, 'On the Human Rights to Misery, mass Incarceration and Early Death', Charles Perkins Memorial Lecture, reprinted in Noel Pearson 'Up from the Mission' 179.
- 13 Above n 5, Vol 2, 15.1.1.
- 14 Ibid Chapter 32.1.2.
- 15 Ibid Vol 2, 15.2.37-46.
- 16 Noel Pearson, 'Lessons from Palm Island', *The Australian* (7 November 2006).
- 17 Above n 5, Vol 1, Chapter 3.28.
- 18 Ibid Chapter 32.2.4-12.
- 19 Ibid Vol 5, Recommendations 272-281.
- 20 Noel Pearson in ABC TV interview (19 June 2007) <<http://www.abcnet.au/pm/content/2007/s1956074.htm>>.
- 21 Gary Jones, 'Note equal when it comes to being offensive', *The Australian* (14 April 2011).
- 22 Noel Pearson, 'Don't listen to those who despise us', *The Age* (26 June 2006).
- 23 Above n 5, Vol 1, Chapter 1.7.6-1.7.11.

**Wandjina – Male 2006**  
Jack Dale

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