

# “THEY WERE TREATING ME LIKE A DOG”: THE COLONIAL CONTINUUM OF STATE HARMS AGAINST INDIGENOUS CHILDREN IN DETENTION IN THE NORTHERN TERRITORY, AUSTRALIA

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**Abstract:** The analytic lens of state crime can inform our understanding of the mistreatment of Indigenous children and young people in settler-colonial state institutions. Based on a critical analysis of the proceedings and findings of the Royal Commission into the Protection and Detention of Children in the Northern Territory (2016–2017), this article identifies state crimes of torture and abuse inflicted on Indigenous children in carceral and non-carceral institutions. These crimes breach international human rights laws but are more than a set of individual harms. They are also part of a pattern of ongoing structural violence that reasserts the settler-colonial state’s sovereign position. This article identifies that the Royal Commission itself is complicit in reproducing state sovereignty. It argues that redressing state crimes against Indigenous children requires challenging the structural injustice of the settler-colonial state.

**Keywords:** Indigenous incarceration; youth detention; state crime; structural injustice; Royal Commissions; state sovereignty; Indigenous sovereignty

## Introduction

On 25 July 2016, Australian national television aired footage of torture inflicted by guards on Indigenous children in Northern Territory (NT) youth detention. This Australian Broadcasting Corporation (2016) programme was entitled “Australia’s Shame” and exposed horrific images of guards bashing, gassing, restraining and hooding Indigenous children. Immediately following the programme, the Australian Government announced a Royal Commission into the Protection and Detention of Children in the NT (the Royal Commission). The Terms of Reference directed the inquiry to identify: the failings of the NT’s youth detention and child protection systems; the treatment of detained children; whether

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such treatment breached Commonwealth or NT laws, rules, policies, procedures, duties or any international instrument; whether appropriate oversight procedures and safeguards were in place; and what measures would prevent inappropriate treatment of children in detention (Royal Commission 2016).

Indicative of its place within the settler-colonial state, the Royal Commission was directed towards how the state could *improve* the state's carceral and punitive systems, rather than calling into question the role of the state in relation to Indigenous communities. The Terms of Reference did not identify as a concern the horrific overrepresentation of Indigenous children in detention. Currently 100 per cent of the NT youth detention population is Indigenous (McDonald 2018). This is well above the level of 45 per cent of Indigenous children aged 10–17 years in the general NT population (Australian Institute of Health and Welfare 2017: 2). The overrepresentation signals a racialized penal practice in the NT, which also emerges within youth detention centres and should have been a stipulated line of inquiry for the Royal Commission. The racial power dynamic of the violence in youth detention, which takes place between abusive *non-Indigenous state officers* and victimized *Indigenous* children, required discrete attention, as did the broader racially discriminatory policies in the NT. By neglecting the context of race relations, the Royal Commission was not able to see past the institutional injustices to reveal the deeper structural injustice in its findings.

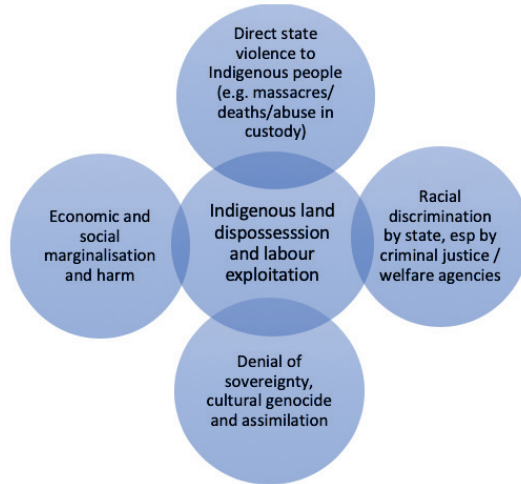
### Settler-Colonial State Crime as Structural Violence

The scaffolding for state crime within this article is settler-colonial theory and its notion of structural violence. Settler colonies<sup>1</sup> in this context include Australia, Canada, the United States and New Zealand. They are different from other colonies because, as Tuck and Gorlewski (2016) explain,

Settler colonialism requires the destruction of Indigenous communities to clear the way for settlement. Through genocide, assimilation, appropriation, and state violence, Indigenous presence is erased. (210)

In this application of settler-colonial theory, state crime is understood as the settler-colonial state's direct and indirect violence inflicted on Indigenous children in detention as well as broader indirect violence on Indigenous communities. The notion of indirect violence stems from Galtung's writings on structural and cultural violence as the social harm arising from legalized social and institutional deprivation or cultural exclusion (see Galtung 1969: 171, 1990: 291). McGill (2017) extends this formulation of structural violence to encapsulate both the "social marginalization, political exclusion and economic exploitation" and

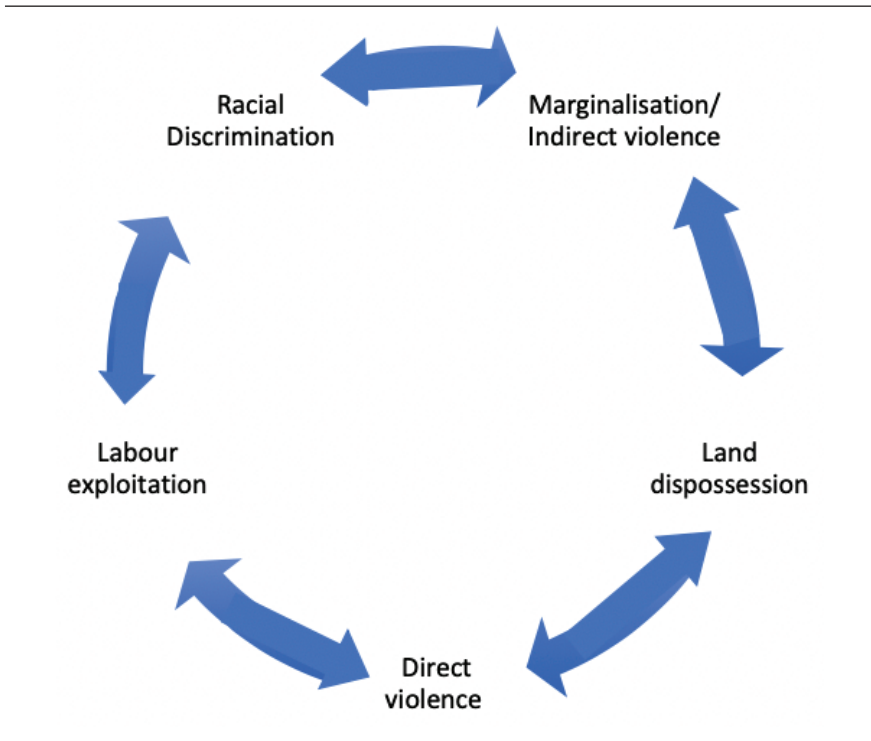
Figure 1 Imbrication of settler-colonial strategies and impetuses.



“specific harms” against these same individuals (80). Settler-colonial theory regards the structural violence against Indigenous communities and direct personal violence perpetrated by state officials or settlers against Indigenous people (including massacres) as part of the same continuum (see Wolfe 1994: 101–102, 106; see also Grewcock, this volume). At its core is Indigenous land dispossession, which is necessary for colonial expansion (see Figure 1).

Structural relations explicate settler violence rather than isolating the violence to individual or institutional faults. Balint, Evans and McMillan (2014) assert that individual wrongs are only a chapter in a series of settler-colonial harms against Indigenous people – which they regard as “crimes against humanity” – embedded in the relationship between the colonizing and colonized populations (199, 202).<sup>2</sup> A line may be drawn between, first, the Australian frontier period (which began in south-eastern Australia in the late eighteenth century and expanded into central and northern Australia in the late nineteenth and early twentieth century) where state crimes of genocide were the key technique of Indigenous dispossession (see Short 2016; Gibson 2014) and, second, the later period of colonial rule where state law enforcement was exercised through discriminatory protection laws, welfare practices and policing to regulate the state’s relationship with Indigenous people. However, this line is blurred in many Indigenous peoples’ contemporary lived experiences, with state officials continuing to inflict personal violence on Indigenous people with impunity, as evident in NT youth detention. Figure 2 reveals how the ongoing processes of land dispossession, direct violence and indirect violence are self-perpetuating. This article contends that the Royal Commission

Figure 2 Continuums of settler-colonial violence against indigenous peoples.



only comes to terms with the direct, personal violence against Indigenous children, and even then, only in limited measure. By failing to comprehend the indirect, structural violence, it is unable to address the underlying forces of abuse in detention.

### Structural Violence Girding NT Youth Detention

The NT government's mistreatment, abuse and torture of Indigenous children in NT youth detention pervades evidence in the Royal Commission proceedings and its findings. The acts of violence violate international laws on the humane treatment of detainees, including the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT; Article 4) and *Convention on the Rights of the Child* (CRC; Article 37(a)) that prohibit torture and cruel and degrading treatment or punishment and the CRC (Articles 30, 37(c)) and *International Covenant on Civil and Political Rights* (ICCPR; Articles 10, 27) that require detainees be "treated with humanity and with respect for the

inherent dignity of the human person” and be able to enjoy their own culture and language (see Lawrence 2016: 836; Henderson and Shackleton 2016). The guards’ violence, racist slurs and prohibitions on Indigenous children speaking their language (see Tasker 2017: 1113; Coon 2017: 2726), and the removal of Indigenous children from Country, restricted access to family visits and calls, and prohibitions on attending sorry business and ceremonies, additionally contravened the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP; see Fejo-King 2017: 4665).

The direct violence of the state upon Indigenous people and children is embedded in deeper oppression and discrimination by the state. While such acts may constitute immediate and discrete violations of international human rights laws, they are also undergirded by wrongful applications of international laws, such as the Doctrine of Discovery and concepts such as *terra nullius* (Miller, LeSage and López Escarcena 2010; United Nations Permanent Forum on Indigenous Issues 2010). Antony Anghie (2004) points to the inter-relationship between “sovereignty, colonialism and international law”, which depends on the extinguishment of Indigenous rights to territory, sovereignty and culture (2, 110). From this perspective, structural violence cannot be simply cured through the rubric of universal human rights standards but requires a deeper challenge to settler-state sovereignty (see Watson 2015).

The ongoing harm from state sovereignty reflects the endurance of *primitive accumulation* (see also Grewcock, this volume). Yellowknives Dene scholar Glen Coulthard (2014: 7) describes the Marxist concept of primitive accumulation as creating individual ownership of resources for the purpose of individual, private profit, as well as replacing non-classed societies (where resources are shared) with classed societies (where resources are privatized). The ongoing formation of capitalist social relations in Indigenous communities involves “violent state dispossession of place-based, non-state modes of self-sufficient Indigenous economic, political, and social activity” (Coulthard 2014: 7, 12). In his book, *Red Skin, White Masks*, Coulthard (2014: 10–11) discusses how Indigenous people became caught in the “process of commodity production” and “proletarianisation” (where workers are separated from the means of production) through “a particular form of *domination*”:

It is a relationship where power – in this case, interrelated discursive and nondiscursive facets of economic, gendered, racial and state power – has been structured into a relatively secure or sedimented set of *hierarchical* social relations that continue to facilitate the dispossession of Indigenous peoples of their lands and self-determining authority.... [It is] structurally committed to

maintain . . . ongoing state access to the land and resources that contradictorily provide the material and spiritual sustenance of Indigenous societies on the one hand, and the foundation of colonial state-formation, settlement, and capitalist development on the other. (6–7, italics within)

While maintaining Marx's notion of primitive accumulation as a backbone of settler-colonial theory, Coulthard (2014: 10) states that its emphasis should shift from "the capital relation to the colonial relation". Legal geographer David Harvey (2004: 74–76) coined this "accumulation by dispossession", where capital's search for surplus adapts to the historico-geographical conditions. Capitalism's resilience in settler colonies, according to Coulthard (2014: 14), is evident "in the ongoing dispossession of Indigenous peoples", whereby "exploitation and domination" are uniquely "configured along racial, gender, and state lines". Current colonial structures and relationships are administered through a colonial governmentality that variously draws on force as well as "modes of colonial thought, desire, and behaviour" (Coulthard 2014: 14–16).

In relation to Australian colonization, Wolfe (1994: 93) states that its primary structural characteristic is land acquisition and displacement of Indigenous people. The "deep structures of the Australian colonial project" are enmeshed in an economics of territorialism (Wolfe 1994: 93). Coulthard (2014) broadly refers to this as "structured dispossession" (7). Primitive accumulation, for Wolfe (2006: 395), turned Australian Indigenous modes of survival and production into dwindling economic resources. A feature of this accumulation process, which only appeared at the margins of Wolfe's (1994) and Coulthard's (2014: 12) definitions, was the exploitation of Indigenous labour. In northern Australia, in the nineteenth and twentieth centuries, highly skilled and unpaid Aboriginal workers were vital to the development of the massive colonial-pastoral industry (Anthony 2007, 2003). This exploitation and dispossession required direct and indirect violence, including repression of Indigenous ways of knowing, being and doing (Wolfe 1994: 111).

A structural understanding highlights that acts of state violence on Indigenous people are not ad hoc or discrete. Rather, they are systemic and systematic state crimes that are a product of the imposed sovereignty of the settler state on Indigenous people. In the NT, abuse in youth detention is rooted in a state policy that overtly discriminates against Indigenous people (known as the "Northern Territory Intervention") and is part of ongoing primitive accumulation, discussed below. The deeper oppression in the state's treatment of Indigenous people across the NT reveals that, in the same way "invasion is a structure not an event" (Wolfe 1999: 2), state harm is systemic rather than exceptional.

This article explores the brutalities against Indigenous children in youth detention over the past decade as part of the settler state's structural violence. It

examines the transcript of proceedings and findings of the Royal Commission to contend that the Royal Commission implicates the state on a narrow basis rather than linking the state’s culpability to its broader injustices against Indigenous people. This ignores the causal factors of harm and fails to address the non-repetition of these state crimes. It regards the individual acts as abhorrent rather than normalized behaviours for state officers. It presumes that human rights violations in youth detention, which are discussed in the next section, offend an otherwise peaceful society, rather than are “intimately linked to the underlying structural violence” (Mcgill 2017: 82). The broader oppressive relationship between the settler state and NT Indigenous communities arises from the state’s enduring and expanding control of Indigenous land, communities and cultures.

The third section draws attention to the ongoing land dispossession in the NT and its facilitating policy regime – the Northern Territory Intervention – a discriminatory, top-down policy imposed on Indigenous communities across the NT. This policy undermines Indigenous peoples’ rights to self-determination, as provided for under the *United Nations Declaration on the Rights of Indigenous Peoples*. Expert witnesses to the Royal Commission, mostly Indigenous people working in Indigenous organizations, made the connection between the torture in youth detention and the settler state’s control of Indigenous people more broadly. They regarded torture in detention as the pointy end of the state’s sovereignty over Indigenous communities.

The final section reimagines state crime in relation to Indigenous people as possessing a structural, and not merely situational, dimension. It suggests that the Royal Commission’s concern with a confined set of institutional wrongs overlooks the ideologies and structures that make state crimes not only possible but also normal and necessary for the colonial project. While forms of structural violence are shape-shifting, they are nonetheless true to their original colonial intent of primitive accumulation and dispossession. Attribution of state crimes therefore needs to implicate and challenge the illegality of state sovereignty<sup>3</sup> in relation to Indigenous nations, and the restrictions it places on Indigenous sovereignty, collective ownership of land, culture and well-being. This article asserts that the Royal Commission’s findings reinforce rather than challenge the role of the state in Indigenous children’s lives.

### **Torture and Segregation of Indigenous Children in Detention: The Tip of the State Crime Iceberg**

The Royal Commission heard evidence of torture and violations of human rights throughout its proceedings, which is well-documented in its *Final Report* (2017a). The defining image of the torture is Indigenous teenager Dylan Voller sitting, half-naked, on a restraint chair, with his wrists, ankles and hips shackled and his head

covered in a hood tied to the chair (Kerr 2016: 482–483). Voller was kept on the mechanical restraint chair for two hours. Dylan Voller (2016a: 6) would later tell the Royal Commission that the guards “were treating me like a dog”.<sup>4</sup>

Media commentators and international law experts made parallels between NT detention and Abu Ghraib or Guantánamo Bay, where hooded detainees were similarly tortured (see Tobin 2016; Davidson, Karp and Hunt 2016). The proceedings of the Royal Commission have highlighted that the wrongs were inflicted by detention directors, managers and officers, cataloguing a rich archive of the practices and mentalities of state crime. It revealed that the acts were not simply random or individually attributable, but examples of systemic practices of state crime (see Jamieson and McEvoy 2005: 505). Cunneen, Goldson and Russell (2016: 173) argue that the abuses of children in NT detention are not “isolated incidents, but are emblematic of systemic, widespread violations of the human rights of children in contact with the juvenile justice system”.

The transcripts of proceedings reveal that practices of torture were sanctioned at the highest levels. The Corrections Minister and Attorney General, John Elferink, publicly defended acts of torture, such as tear gassing, on the basis that the child victims were the “worst of the worst” and deserving of the brutal treatment (Goldflam 2016: 855). The Corrections Commissioner who authorized the most extreme violence, including through the consignment of the riot squad, explained it on the basis that young people in detention were hoodlums, while the people making the decisions were on “executive salaries” (Middlebrook 2017: 3008). Their intention was to control children and to send a message that authority was vested in the guards and the NT government. Safeguards and independent oversight of youth detention were denied to children, including by restricting access to the Children’s Commissioner, the Ombudsman and information held by corrective services, including “registers of use of force, critical incidents, use of isolation” (Mitchell 2016: 29).

The institutionalized mentalities and abusive practices by guards and senior officers in youth detention evidence state crime. They constitute breaches of international human rights conventions on the lawful treatment of youth detainees and Indigenous peoples, which are discussed below in further detail. Essentially, the Indigenous children inside were made to feel sub-human, like “dogs” (Voller 2016a: 6; AN 2017: 7; AB 2017: 25).

## **Restraints and Hooding**

The Royal Commission received extensive evidence on the use of hooding and shackling, including on the mechanical restraint chair, to control children in NT youth detention. Children were shackled by their wrists and ankles while in their



cells, throughout transportation and during medical examinations (Mitchell 2016: 54). The use of hooding and the restraint chair was eventually permitted under NT legislation, through the NT parliament amending the *Youth Justice Act* that gave “significant powers to custodial staff” to administer them, although its use predated the legislative sanction (Goldflam 2016: 841, 846–848).<sup>5</sup> The Commissioner approved the constraints notwithstanding advice by senior staff that they were illegal under international and domestic laws adopted by the Australian Juvenile Justice Administrators (Middlebrook 2017: 3027; Cohen 2017: 2780). Witnesses before the Royal Commission (Goldflam 2016: 863; Anderson 2016: 138), the United Nations High Commissioner for Human Rights (2016) and the United Nations Special Rapporteur on Torture (see Wahlquist 2016) identified the use of force, restraint chairs and hoods as illegal acts of torture under CAT. Dylan Voller (2016b: 712), who was hooded on the restraint chair on a number of occasions, told the Royal Commission that it was among the “scariest” experiences of his life and that he felt he could not breathe and was vomiting in his mouth.

## Gassing

Footage of Indigenous children being sprayed with the toxic chemical agent CS Gas also featured on the *Four Corners* programme and was examined by the Royal Commission. This gas is a prohibited agent under the *International Convention on Chemical Weapons* (see Office of the Children’s Commissioner Northern Territory 2015: 4). The Royal Commission heard that six Indigenous boys were gassed ten times in the segregation unit in 2014. Detention staff expressed in the lead-up that they wanted to “pulverise” the children (see Kelleher 2017: 1565; Zamolo 2017: 1430). The gassing was administered by an armed riot squad and authorized by the Corrections Commissioner (AD 2016b: 618; Middlebrook 2017: 3008). It constrained the children’s breathing, blinded some of them, and made them feel as though they were going to die (AD 2016a: 6; AB 2017: 23; Voller 2016a: 42).

## Segregation

The children who were gassed, like many other detainees, had been contained in segregation cells for 23 hours per day for indefinite periods (AD 2016b: 4). Rolling segregation placements is contrary to NT’s *Youth Justice Act* (Nobbs-Carcuro 2017: 3944; Elferink 2017a: 3126), Rule 9.5 of the *Australian Juvenile Justice Administrators Rules* (Cohen 2017: 2858–2859), and solitary confinement of young people, per se, that is contrary to the *United Nations Rules of the Protection of Juveniles Deprived of their Liberty* (1990; Havana Rules) Rule 67. The isolation

unit at Don Dale detention centre (in tropical Darwin), often referred to as the behavioural management unit (BMU), was rancid and filthy, dark, hot and lacking airflow and running water (AB 2017: 20; AG 2016: 6; AU 2017: 6; Hunyor 2017: 1487). These units created the illusion of total control: guards fed children through a chute and refused children food as punishment, ignored children's cries for help and restricted access to the outside and to any light or hygiene, which was contrary to Rule 67 of the Havana Rules (Cohen 2017: 2858–2859; Grant, Lulham and Naylor 2017: 126). Many of the segregated children had cognitive issues. Confinement for these children, according to Shalev (2014), “is the equivalent of putting an asthmatic in a place with little air to breathe” (quoted in O'Brien 2017b). When the guards' control was tested, such as through attempted escapes, guards would resort to extreme measures to reinstate the power dynamic. This is what precipitated the gassing of the children.

### **Physical and Sexual Violence in Detention**

Another feature of the evidence of young people and CCTV footage was guards' unprovoked assaults inflicted on children. It included hitting, kicking, smashing heads on concrete floors and walls, and grabbing children by the neck and choking them (BH 2017: 4–5; BA 2017: 6, 8; Voller 2016a: 18; Turner 2017: 923; Royal Commission 2017c: 211). Swearing, racist language and lewd or derogatory comments could accompany the violence. There was also evidence of “inappropriate sexualised attention” towards female detainees and indecent assaults such as forcible strip searches, including by male guards on girls (Royal Commission 2017c: 449). The evidence documented that children were stripped with the assistance of restraints and scissors to cut through clothes. Children were given wedgies, which involved grabbing them by their underwear. There were other acts of indecency on the part of the guards. One girl told the Commission that guards would “shine the torch up and down my body” and “say creepy things to me like ‘nice bra’” (AG 2016: 5).

### **Placement of Children with Adults and the Opposite Sex**

Finally, the Royal Commission heard that children were placed in adult prisons and with the opposite gender, including in isolation units (Middlebrook 2017: 3025; Hamburger 2016: 322). These measures violate the CRC (Articles 37(c)), the *Beijing Rules* (13.4 and 26.3) and the *Havana Rules* (Rule 29) and the ICCPR (Article 10[2](b)), all of which stipulate that children are to be separated from adult prisoners. Decisions to transfer children to adult prisons were justified by guards in terms of increasing security and control (McCarthy 2017: 1361; Sizeland

2017: 1974). However, the Australian Children's Commissioner Mitchell (2016: 39) stated that placing children with adult prisoners puts them at an "additional risk" above and beyond the usual risks of being placed in a "detention setting". The Don Dale youth detention facility already was a notorious former adult prison and was described by the Corrections Commissioner when it was closed down for adults as "only fit for a bulldozer" (Hamburger 2016: 423–424). It was converted to a youth detention centre with minimal refurbishment and thus remained a series of concrete cages. Consequently, children were detained in cells that were oppressive and punitive. Similarly, in Alice Springs, where children and young people were ultimately housed in the adult prison precinct, the detention facilities were described by social worker Antoinette Carroll (2017: 1173) as breaching "every human rights standard".

Thus far, this article has catalogued the wrongs of the state against Indigenous children in detention. They are brutal wrongs that constitute crimes. But they are not exceptional. For Indigenous people, they are part of a pattern of how the state treats them as lesser human beings. This is additionally evidenced in the personal accounts to the Royal Commission of forced and violent Indigenous child removals that the state continues to carry out through its "child protection" system (see Royal Commission 2017d). It is also forthcoming in the connections that Indigenous witnesses made between the oppressive policy of the Northern Territory Intervention that affects all Indigenous communities in the NT and the abuse of Indigenous children in detention. The next section interrogates this connection and ties it back to ideas of settler-colonial theory and primitive accumulation.

### **State Crimes in Detention as a Symptom of Structural Violence**

The Royal Commission's attention to the wrongs of individuals and specific institutions has the effect of isolating the harm from broader racial ideologies and structures. Resonating with the observations of McGill (2017), direct and structural violence for oppressed peoples are part of the same continuum. Justice requires that both ends of this spectrum are addressed and redressed. Although the Royal Commission was made aware of the broader structural inequities confronting Indigenous people in the NT, including the racist policy of the Northern Territory Intervention, it did not raise these problems in its findings or recommendations. Indigenous witnesses regarded systemic racism in the NT as the front and centre of the problems in detention, which is detailed in this section. For these witnesses, brutal practices in detention were a symptom of the state's ongoing discriminatory and disempowering policies towards Indigenous people. The Royal Commission did not connect abusive practices in youth detention to the state's enduring colonial

processes and land dispossession. By contrast, the earlier *Final Report* of the Royal Commission into Aboriginal Deaths in Custody (1991) linked custodial malpractice and over-incarceration of Aboriginal people to colonization and impoverishment of Aboriginal Australians because it pursued an inquiry into the racial dynamics of law enforcement. Instead, the NT Royal Commission produced recommendations that hinge on change within state institutions, thus maintaining the structures and broader state relations that underlie the violence in detention.

Indigenous witnesses in the proceedings told the Commission that the abuse of Indigenous children in institutions cannot be understood apart from the state's treatment of Indigenous people and communities in the NT. They said that the racist violence in detention is part of a bigger picture of the subordination of Indigenous people. There is reference to the takeover of their land, the removal of their children, assimilationist and protectionist laws, and most recently the discriminatory Commonwealth legislation, *Northern Territory National Emergency Response Act 2007* (Cth; NTER) and its successor *Stronger Futures in the Northern Territory Act 2012* (Cth) and related measures, collectively known as the "Northern Territory Intervention". The Northern Territory Intervention was focused on increasing state controls over the management of Indigenous communities and their land holdings under the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth; ALRA) and was introduced soon after amendments to the ALRA that opened up access to Aboriginal land for mining (see Commonwealth Parliament of Australia 2006: 3). This pursuit of primitive accumulation through commodifying land for mining was evident in 2007, the year the NTER was enacted, with the number of mining exploratory licences increasing by over a third and the number of grants of mining tenements (including leases) almost doubling. In his book, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide*, Short (2016: 132) describes the Northern Territory Intervention and related amendments to mining legislation as expediting "exploration and mining on Aboriginal land". These reforms were reinforced through changes to land tenure and the permit system under the Northern Territory Intervention legislation (Howard-Wagner 2008: 52) that sought to open up access to Aboriginal land to "promote economic activity" (Howard-Wagner 2007: 247, quoting the parliamentary Explanatory Memorandum to the legislative bill). Collectively, they sought to correct "the government's decades-old failure to secure appropriate tenure on Aboriginal land" (Howey 2014/2015: 5). The object, however, was not mere economic viability; it was transforming the mode of land holding from communal to individual ownership and thus extending settler colonialism (see Veracini 2015: 88; Howard-Wagner 2012: 231).

The pursuit of primitive accumulation through changing socioeconomic relations in remote NT Indigenous communities was part of a multi-axes modality of power, as posited by Coulthard (2014: 14) in his observation of the contemporary

work of settler colonialism, that was intent on both economic exploitation and domination *along with* other forms of racialized control. The state's language of the Northern Territory Intervention was that Indigenous communities and families were "dysfunctional" and required "normalisation" (quoted in Howey 2014/2015: 4). A moral panic about the abuse of Indigenous children in remote communities was not matched by reforms relating to the well-being of children. Of greater concern to the Commonwealth was the need to assimilate these communities into a colonial capitalist economy where Indigenous people would take up "real" jobs (Scullion 2007: 17). The Northern Territory Intervention forced Indigenous people and their land holdings into the dominion of the settler state and ruling class. It required an overtly discriminatory policy that suspended Indigenous peoples' rights under the *Racial Discrimination Act 1975* (Cth) and contravened the *Convention on the Elimination of All Forms of Racial Discrimination*. In addition to the forcible leasing of Aboriginal land, the legislation restricted Indigenous peoples' social security (by placing their welfare money on cards that could only be used for gazetted items), possession of alcohol, use of the Internet, and bail and criminal sentencing submissions. It also increased police powers in Indigenous communities, enabling the entry and search of houses without a warrant (Anthony 2013: 51).

The Royal Commission heard that the Northern Territory Intervention placed profound pressure on Indigenous people to leave their "rich culture, land, language and traditions behind" (Bamblett 2016: 199). They were pressured into towns and larger settlements due to the government defunding of homelands and smaller communities (Howard-Wagner and Kelly 2011: 103). The Intervention also caused Indigenous young people to be placed within the carceral remit of the criminal justice and child protection systems, where they have been pushed into white homes, residential facilities and youth prisons. The Intervention has not simply represented the insipid state control of Indigenous affairs through benign bureaucrats, it has been imposed through the heavy hand of law enforcement. Its initial gesture was to send the Army into Central Australian communities to demonstrate the state's total control. This terrifying act set the tone for the tough approach of police, particularly in relation to low-level offending, and transpired in the formation of an "enhanced juvenile squad" to target "ratbag families" (Elferink 2017a: 3148). The NT's detention population soared under the Northern Territory Intervention, increasing by 50 per cent between 2007 and 2012 (Goldflam 2016: 818–819). The Intervention also exacerbated child removals from families. Indigenous people spoke about how this felt like a direct continuation of the Stolen Generations policy, where Indigenous children were removed from families under various guises of protectionism and assimilation. A Warlpiri Elder told the Royal Commission (2017b: 91) that their kids were going through the same thing as the

Stolen Generations, where they “grew up not knowing who they are, not knowing family and where they come from”. One Aboriginal parent said,

One time they dragged [my son] out from under a sofa bed. There were six police officers. He was calling out “Mum, I love you. Help me” I said “There’s nothing I can do, son.” Then he was yelling “You don’t love me. You hate me” I sat crying, shaking and wanting to throw up. *That’s when I had a recognition, sitting in the driveway that day, of what happened with our grandparents and the Stolen Generation.* (Royal Commission 2017b: 91)

This disempowerment has created an environment that allows human rights abuses of young Indigenous peoples’ in NT detention to flourish. Alyawarr woman and Chair of the Lowitja Health Centre, Pat Anderson (2016), gave evidence that there is “no doubt in my mind” that the “disempowerment” and “appalling” treatment of Aboriginal people living under the Intervention culminated in the torture of Aboriginal children at Don Dale (149). For Anderson (2016: 161), the racial violence in detention mirrored the oppressive racism of the Northern Territory Intervention. It has legitimated an attitude that Aboriginal people can only be dealt with as a problem and fails to accept that “we” as Aboriginal people are “human beings and this is our place and this is our country” (Anderson 2016: 161). The systematic torture in state institutions, according to Anderson’s (2016: 149, 164) evidence, is “an extension” of the “general moral decay” in the attitudes towards Indigenous people under the Intervention. It fuelled the public demonization of Indigenous children in detention and the portrayal of Indigenous families as deviant and dysfunctional by politicians (Goldflam 2016: 855). The Royal Commission provided an opportunity for politicians to reiterate these criticisms and thus defend government decisions to harm Indigenous children (Elferink 2017a: 3148). Chief Minister Giles (2017: 3280) defended his earlier position when he stated that if he were the Corrections Minister, he would “build a big concrete hole” for all the criminals, so they can never come out again. His righteousness and disregard for human rights was evident in his subsequent statement: “I might break every United Nations Convention on the rights of the prisoner, but get in the hole” (Giles 2017: 3280). Corrections Commissioner Middlebrook (2017: 3356) similarly accused Indigenous youth detainees of being “hoodlums” and making it difficult for staff to observe human rights. The NT Children’s Commissioner Bath stated that Middlebrook was concerned with punitive responses to children’s behaviour and not “whether they were ethical, culturally appropriate, harmful to the young people or complied with internal policy, training, accepted best practice in Corrections or human rights obligations” (quoted by O’Brien 2017a: 3370).

The testimony of Anderson, Bamblett and other Indigenous witnesses evinces that the problem in youth detention is not discrete but a product of deeper structural violence. This flows not only from policy that discriminates but also from underlying colonial imperatives towards primitive accumulation, which is evident in land reform processes and discourses on integration of the Indigenous community into the mainstream economy. These policies create a repressive relationship between the settler state and Indigenous societies, which typecasts Indigenous people as only valuable within the capitalist relationship and otherwise primitive (Wolfe 2006). "Primitiveness" legitimates state responses that are harmful and exclusionary. The attribution of state crime needs to account for the imperatives and ideologies of the settler state towards Indigenous peoples in imputing its malpractice as more than an institutional anomaly.

### **Royal Commission's Final Report: Can't See the Wood for the Trees**

The Royal Commission refrained from making any findings on the Northern Territory Intervention and the settler state's subordination and denigration of Indigenous communities, despite the relevant evidence before it. The Royal Commission's *Final Report* (2017a) was directed to improving institutional conditions rather than decentring and decolonizing power. This reinforces what Burton and Carlen (1979: 51), Scraton (2004: 49) and others have referred to as Royal Commissions' role in restoring state authority. Blue (2017) identifies "microsolidarities" of power between those conducting inquiries and state agents responsible for the harms that preclude imputations of state responsibility. In the NT Royal Commission, microsolidarities emerge in the empathy conveyed by Commissioner White to the guards whom she regarded as having understandable "difficulties" in managing Indigenous children (White 2017a: 2950, 2017b: 3465).

The findings in relation to youth detention in the Royal Commission's (2017e) *Final Report* concentrated on the limitations within detention centres. They cautiously pointed to breaches of human rights under international laws on the rights of detainees and the child. Some of the findings include the following:

- NT youth detention *facilities* did not comply with international instruments and Australian guidelines and presented a safety risk for children and staff alike (Royal Commission 2017c: 101).
- Detention centre *operations and procedures* were out of date, precluded the passage of information to detainees, and gave rise to decision-makers receiving incorrect information (Royal Commission 2017c: 121–145).

- Detainees were subject to humiliation and degrading treatment, verbal abuse and deprivation of food, water and hygiene that amount to a contravention of rights under the CRC and the Havana Rules (Royal Commission 2017c: 159, 164–166).
- Force was inflicted on detainees in a manner inconsistent with training, including restraining children while unconscious, throwing children forcefully on the ground, unclothed searches of all children following family visits, which were or “may have been” contrary to the Havana Rules (Royal Commission 2017c: 204, 215, 235, 239, 247).
- The isolation of children was used excessively and punitively and for the purpose of “operational convenience”; its use was “potentially inconsistent” with the CRC, ICCPR, Havana Rules, *UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)*; Royal Commission 2017c: 329–331).

The myopic focus of the findings in relation to detention, which is mirrored in the findings on child protection, regards the problems as a product of institutional practices, rather than the state’s racialized ideologies and policies. Sociologist and historian Bauman (1997) reminds us that the practices of the state are enmeshed in broader ideologies that forsake certain groups of people. In the settler-colonial dynamics of the NT, the brutality inflicted on Indigenous children by non-Indigenous guards and managers reflects the relationship between the state and Indigenous nations. The Royal Commission, however, makes narrow findings on institutions devoid of this context.

One glaring omission is the lack of findings on the racial dimensions of the violence, including breaches of CERD and UNDRIP. Even evidence of overt racism – such as the “racist remarks” in detention and disallowing children speaking in their Indigenous languages (Royal Commission 2017c: 159, 401) – did not produce findings that corrections had acted contrary to CERD and UNDRIP. By contrast, the Royal Commission (2017c: 439, 450) made findings of sexism in detention. Such findings related to the lack of access that girls in detention had to separate and sanitary hygiene facilities, recreational facilities and education. While these findings are crucial, the Royal Commission does not follow the same logic by highlighting the discrimination in detention that Indigenous children face because of their culture. Perhaps it did not appear racially discriminatory to the Royal Commission because Indigenous children are the entire detention population and are mistreated and deprived of their rights in equal measure, or that it is discriminatory for Indigenous children to be singled out for detention in the first place.

The report does not impute the state for the wrongs in detention, by pointing to the criminal liability of the state, nor does it recommend charges for individual officers. Indeed, following the Royal Commission, the NT Police announced that



there will be no criminal prosecutions against guards (Breen 2018). Nonetheless, the Royal Commission does single out individuals for “exceptional” deviations from the norm, such as where Conan Zamolo, a guard at Don Dale, filmed detainees in the bathroom and showers (Royal Commission 2017c: 173); centre manager Derek Tasker who repeatedly strangled detainees but was nonetheless exculpated by the Supreme Court (Royal Commission 2017c: 204) and guard Trevor Hansen who placed force on children’s genital areas to restrain them (Royal Commission 2017c: 228). Senior managers were not made responsible for the culture of violence that they permitted and even fostered in detention, nor corrections at large. Crofts (2018) has noted in relation to other Royal Commissions that there is a tendency to highlight individual “monsters”, which rescues the institution from blame.

The Royal Commission’s 227 recommendations are heavily concerned with improving facilities, procedures and compliance, with a strong emphasis on safeguards and reigning in punitive excesses rather than challenging the management of Indigenous children through state systems of punishment and confinement. The recommendations do not mention transferring the care of Indigenous children away from the state and back into the hands of Aboriginal communities. Overall, only 3 per cent of the recommendations refer to the need for Aboriginal community-controlled programmes or organizations to play a greater place-based role in the well-being of Aboriginal children.

A cornerstone recommendation is implementing a new model of “secure accommodation” that would replace current youth detention centres (Recommendation 28.1). In the meantime, the current centre should be improved in “consultation” with detainees and using their labour (Recommendation 28.2). The focus of recommendations to reduce the detention of children (particularly remandees who comprise over 70 per cent of the incarceration population) was watering down exceptions to bail (Recommendation 25.19) and increasing the age of criminal responsibility from 10 years to 12 years (Recommendation 27.1).

The recommendations on accommodating Indigenous children’s cultural identity aim to provide more cultural activities in detention and cultural training of staff (Royal Commission 2017c: 462–466), rather than addressing the racism and White cultural norms in detention. Recommendation 18.1 promotes the recruitment of Indigenous staff in detention, more Elders visits and culturally competent education in detention schools. The intention of the recommendations is to “Indigenize” the state institutions rather than decolonize the institutions by shifting control to Indigenous communities and nations. The Royal Commission was not constrained from addressing de-institutionalization. Not only did it receive evidence that spoke to the importance of Indigenous nations’ self-determination in the upbringing of Indigenous children and supporting them to act safely and respectfully (Dowardi 2017: 4543; Robertson 2017: 3808–3809), but also there is

precedent from the 1989–1991 Royal Commission into Aboriginal Deaths in Custody, that self-determination and socioeconomic reform can be brought into a holistic set of recommendations around structural change.

The Royal Commission’s perception of wrongs in detention was isolated from the racial dynamics within detention and broader society. This precluded it from coming to terms with the abuses of Indigenous children in detention as a manifestation of settler-colonial relations. Its observance of contemporary structural inequities, under the heading “Challenges for Aboriginal People”, is only cursory and by way of background (Royal Commission 2017b: 169–177). The Northern Territory Intervention, for instance, does not appear in the findings or recommendations. By failing to see the wood for the trees, the Commission is limited in its vision for justice. The risk of such approaches is identified by Balint, Evans and McMillan (2014) who warn that doing no more than remedying “immediate wrongs” legitimates the deeper injustice of settler-state sovereignty over Indigenous nations (203). They explain that it sends the incorrect message that something is being done, while leaving intact the state’s unlawful acquisition of Indigenous land, imposition of the state’s jurisdiction and discriminatory policies.

### **Structural Justice as More than Institutional Reform**

An alternative vision for justice was outlined by Indigenous witnesses before the Royal Commission. It involves a structural shift in the power relationship that would release Indigenous families and children from state controls and instead empower local Aboriginal communities to look after the care and well-being of their own children. The evidence of Professor Larissa Behrendt (2017b: 3995), a Eualeyai-Kamilaroi woman, pointed to role of Indigenous self-determination, whereby Indigenous people play “the central role in the decisions around their own future and their own affairs” (including the design and development of programmes in their communities and policies relating to their children). She referred to the *United Nations Declaration on the Rights of Indigenous Peoples* in pursuit of this right. Yolngu people spoke about their successful community-designed and community-controlled family programmes that could support their children’s upbringing if they were adequately resourced (Wala Wala 2017: 4544). Law and justice programmes that harnessed the cultural strengths in Warlpiri communities were presented as another alternative to state institutionalization (Jangala 2017: 4548; Dixon 2017: 4549). Muriel Bamblett (2016), Chair of the Victorian Aboriginal Child Care Agency (VACCA), gave evidence on the effective role that Indigenous organizations play in challenging orthodox state practices. Anderson (2016) asserted that “Aboriginal people are perfectly qualified and perfectly able to take control, and manage their own affairs” without the state’s paternalism (155).

Collectively, they recognized the role of Indigenous-owned initiatives in furthering social, cultural and emotional well-being of their children and, inversely, the injury of government interventions. Anderson (2016: 157, 161) and Bamblett (2016: 199, 218, 231) refer to the inter-generational Indigenous trauma arising from the exclusion of Indigenous people from both their own ways of life and from civil life and economic participation, which has its genesis in past and present child removal policies and practices that produce generations of Indigenous people who "don't know anything about their culture and their people".

The viewpoints that Indigenous people and representatives of Indigenous organizations expressed to the Royal Commission recognized that community-driven approaches are fundamental to ending the harms in detention. Social worker at the Central Australian Aboriginal Legal Aid Service, Antoinette Carroll (2017), conveyed the need for "community driven or community led" approaches that are grounded in "a community development model, a community engagement model" (1180). This requires a "restorative and human rights framework" that "genuinely engage[s Indigenous] community in these solutions", otherwise we "are going to really struggle" to overcome the problems in detention. Carroll (2017) pointed to the problems of governments' lack of "grassroots consultation with communities . . . to see what solutions communities can bring" (1180). Pat Anderson (2016) added to this when she pointed to the "betrayal" of Indigenous communities in the discriminatory measures under the Northern Territory Intervention and how this correlated with the emergence of a thug culture in youth detention (149).

Framing these perspectives within a settler-colonial analysis reveals that it is not simply that state interventions in Indigenous peoples' lives *cause* harm but that it is those interventions in themselves that are harmful. Confining Indigenous people in criminalizing institutions, by removing them from Country, family and culture, constitutes institutional violence (Blagg 2008). Part and parcel is the structural drive of "primitive accumulation" that is inherently violent in its takeover of Indigenous land and displacement of Indigenous modes of survival (Coulthard in Epstein 2015). To promote structural justice, therefore, requires retreating from the interventions that further primitive accumulation and vesting authority in Indigenous nationhood and modes of belonging to Country.

In her evidence, Bamblett (2016: 205–206, 229) refers to the importance of treaties in renegotiating the relationship between the state and Indigenous nations and strengthening Indigenous connections to land and return to Country. Institutional and individual failures, rather than institutional failures, were the narrow grounds for which the Royal Commission imputed the violence against Indigenous children. It did not heed Indigenous proposals for a paradigm shift in its recommendations. Instead, it focused on the institutional "disregard for evidence of what works, and insistence on a punitive approach" (Royal Commission 2017b: 11). In a critique of

the judicial rejection of Indigenous sovereignty, Desmond Manderson (2001) asserts that such claims are “impossible to domesticate” because they challenge the legitimacy of colonized legal knowledge and state policies (31).

Accepting that structural injustice pervades Indigenous lives beyond detention centres, Balint, Evans and McMillan (2014) assert that redress requires “structural reform” to redress “long-term, structural injustice” (203). “Transitional justice”, based on legalistic inquiries into individual harms, is not enough. What is required is “transformative justice” that “pays more attention to the historical and socio-economic underpinnings” of the harm and critically interrogates “prevailing social structures and power relations on which it is founded” (McGill 2017: 79). The inter-generational nature of harms against Indigenous people means that the structural inquiry and change must be “expansive rather than narrow” (Balint, Evans and McMillan 2014: 206, 213). A structural justice model implicates rather than reaffirms the role of the state in its relationship with Indigenous people and enlivens “Indigenous jurisprudences” rather than entrenching state discourses that enable the harms (Balint, Evans and McMillan 2014: 213; see also Balint et al., this volume).

The Royal Commission resiled from challenging the state’s role in Indigenous communities. It sought to improve the state institutions that had caused the harm rather than question the normative role of these institutions in Indigenous lives, which Indigenous witnesses implored the Royal Commission to do. But more insidiously, it pointed the finger at Indigenous communities. Pursuant to evidence presented by the former Attorney General and Corrections Minister, who was responsible for the harmed Indigenous children in detention, that the sexual harm of children arose from Indigenous cultural practices, the Royal Commission adopted this stance. The former Minister Elferink (2017b) stated that Indigenous cultural practices should be outlawed on the grounds that “human rights should have ascendancy over cultural rights” (5178). Indigenous people’s evidence contradicted the claim that cultural practices harm their children. In fact, they pointed to the value of culture, including participation in ceremonies, for the well-being of their young people (Fejo-King 2017: 4665; Jangala 2017: 4551; Dowardi 2017: 4577; Riley 2017: 4077–4078). The Royal Commission’s Recommendation 3.2, nonetheless, called for a review of ceremonial practices on the basis that it affects male children’s health. In this and other respects, the Royal Commission privileged the knowledge of the state and neglected Indigenous views. In doing so, it re-enacted settler-state sovereignty and was complicit in the continuation of structural injustices.

## Conclusion

This article has argued that the violence perpetrated by guards on Indigenous children in NT detention can be classified as state crimes. But such crimes go beyond

individual breaches of international human rights laws and domestic laws. They need to be understood within the sovereign’s structural arrangements that marginalize and dehumanize Indigenous people and enable racial violence. Settler-colonial structures penetrate beyond the walls of prisons, child protection institutions and foster homes, impacting all facets of Indigenous livelihoods, especially connection to Country and self-governance of societies and lives. This article relied on settler-colonial theory that posits colonialism is a living and breathing set of relations, which manifests in the ongoing assertion of state sovereignty and denial of Indigenous sovereignty. State crimes against Indigenous people cannot be examined outside these structural relations and merely as a response to an immediate set of circumstances.

For its part, Indigenous nations in the NT continue to be burdened by the discriminatory encroachment of state sovereignty. This is structural violence that is not merely indirect – enacted through unequal and exploitative power relations that continue to deprive Indigenous people of their land and sovereignty – but also direct, harming the body of individuals. Settler-colonial violence manifests in dispossession of Indigenous people through the process of primitive accumulation that sees capitalist appropriation, commodification and non-Indigenous settlement of Indigenous land *as well as* actual violence as an expression of settler-state authority over Indigenous peoples. Torture of Indigenous children in detention is one incident of these structural relations. By locating state wrongs as limited to institutional wrongs disavows the state’s responsibility for the broader structural injustice.

The Royal Commission missed an opportunity to make findings on the wrongfulness of the state beyond specific actions in detention and child protection. Even in that instance, it did not identify the harm as racially discriminatory and directed towards *Indigenous* children. It did not implicate the Commonwealth or NT government for their wider treatment of Indigenous peoples. In this vein, the recommendations refrained from endorsing Indigenous demands for change that would shift power away from the hands of the state, cease discriminatory interventions and enable Indigenous communities to enhance their connections to their Country. The *Final Report* of the Royal Commission (2017a) reflects a denial of structural injustice and an overemphasis on individual and institutional injustice.

Carceral segregation and punishment of Indigenous people have permeated settler-colonial acts of sovereignty. Arrernte woman Celeste Liddle states that the state has moved from “policing us in missions to policing us within [prison] facilities to control our movements” (Behrendt 2017a). The almost exclusive placement of Indigenous children in NT detention and the brutalities in NT detention are part of this continuum of structural injustice. It can only begin to be redressed when there is recognition of settler-colonial harms as *systemic state crimes* (Balint, Evans and McMillan 2014: 215–216). The designation of state crimes against Indigenous peoples to immediate wrongs does not promote justice for Indigenous peoples.

Criminologists and criminal law scholars must also take on this responsibility to go beyond notions of state crime on Indigenous people as immediate wrongs inflicted by state actors, by also considering the state's role in structural violence against Indigenous people. By drawing on the rubric of "settler colonialism", criminologists are not only awakened to structural injustices but can understand their impetuses. The state becomes exposed for excluding, subordinating and disempowering Indigenous nations and peoples and assuming control of their land as well as the immediate harms flowing from settler-colonial structural relations. Without such understandings, the capacity to hear Indigenous stories of injustice and the prospects for justice is limited. This is evidenced by the Royal Commission, whose proceedings and *Final Report* demonstrate that Indigenous voices were not wholly heard – both in their holistic identification of the problem and suggestions for systemic reform and transformation of structural relationships. These voices sought to challenge the colonial continuum in the governance of Indigenous lives. Locking up children, removing children from family and segregating them in institutions has been a consistent practice since the inception of colonization and a critical aspect of the takeover of Indigenous land. Concepts of state crime need to reflect the structural harmfulness of state sovereignty that exists both deep within, and beyond, prison walls. The issue is not merely apparent in custodial violence but also Indigenous people's exclusion from society and sovereignty. As Pat Anderson (2016) told the Royal Commission: "we are excluded and that is the point" (162).

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## Notes

1. I use this term because of its lineage but regard it as problematic due to, first, the legal connotations of the word "settlement" that presupposes that the non-Indigenous people were first arrivals, thus in international law legitimatizing the processes of settlement as lawful; second, it implies a peacefulness in the process; and third, it presumes a homogeneity across settler standing apart from the homogenous process in relation to non-settler colonies. I prefer the term "occupier colonies" because it speaks to the violence and illegitimate process, or simply "colonies".
2. It has its legacy in the Aboriginal Protection Acts, segregation of Indigenous people on missions and reserves and in forms of pastoral exploitation in which Indigenous people's wages were withheld (Balint, Evans and McMillan 2014: 207).
3. In Australia, for instance, Aboriginal and Torres Strait Islander sovereignty and territory were never ceded, treaties were never entered into and Indigenous laws and sovereignty were never renounced.

4. See Voller (2016a: 6).
5. Before the passage of this legislation, the use of the restraint chair was enabled through the “wide discretion” afforded to the Commissioner to determine what restraints could be imposed (Goldflam 2016: 841; Middlebrook 2017: 3025).

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