

Insight into suffering: The roles of testimony in exposing child abuse in immigration detention

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Abstract

Central to the objective of most human rights inquiries is the uncovering of incidents of widespread harm, which may then be interpreted according to human rights principles and disseminated to the public in the form of written reports. In this context, testimonies that are firsthand accounts of the traumatic event not only possess significant evidentiary value, but also an advocative and affective capacity. By examining the testimonial narratives of individuals in immigration detention, as documented in the Australian Human Rights Commission's report, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*, this paper argues that testimony in the context of human rights is used as a source of evidence, a tool for advocacy, and an affective device. Through these three roles, testimony legitimises the findings of human rights reports by not only granting them the value of truth, but also by capturing the attention of the public and evoking empathy through expressions of suffering.

Introduction

As a survivor of the Holocaust, Elie Wiesel assigned great significance to the power of personal narratives that emerged from the devastation.

If the Greeks invented tragedy, the Romans the epistle, and the Renaissance the sonnet, our generation invented a new literature, that of testimony. We have all been witnesses and we all feel we have to bear testimony for the future.¹

Rather than an 'art of leisure', testimony is an 'art of urgency'²—it exhorts the reader to become conscious of the failures of the past; to experience at once the suffering of the witness and the vast silence of those who did not survive.³ For this reason, testimony is frequently used in human rights practices as a form of evidence, advocacy, and an affective device.

This paper will examine the contributions and limits of testimony to human rights practices by considering testimony through these three forms, and argue that testimony is a highly important and effective instrument through which empathy, awareness, and action may be inspired within the audience. This argument will be grounded in the testimonial narratives within the National Inquiry ('the Inquiry') conducted by the Australian Human Rights Commission ('the Commission') in 2014, and the report that followed, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* ('the Report').⁴ Indeed, this paper will aim to demonstrate that these testimonies played an influential role in exposing the abominable conditions of detention facilities and their deleterious effects on the children detained within, in turn sparking public outrage and eventually resulting in the removal

¹ Elie Wiesel, 'The Holocaust as Literary Inspiration' in Elie Wiesel (ed), *Dimensions of the Holocaust: Lectures at Northwestern University* (Northwestern University Press, 1977) 1, 9.

² Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (Taylor & Francis, 1992) 114.

³ Didier Fassin, 'The Humanitarian Politics of Testimony: Subjectification through Trauma in the Israeli-Palestinian Conflict' (2008) 23(3) *Cultural Anthropology* 531, 536 <doi.org/10.1111/j.1548-1360.2008.00017.x>.

⁴ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* (Australian Human Rights Commission, 2014) ('National Inquiry Report').

of all children from Nauru in February 2019. The first section of this paper will give an overview of Australia's asylum seeker policy, and the methodology of the Inquiry. The second section will explore the use of testimony in human rights practices, and the final section will consider the use of testimony within the Inquiry as a form of evidence, a tool for advocacy, and an affective device.

1.1 Australia's asylum seeker policy

Recent decades have seen a significant influx of asylum seekers and internally displaced persons across the globe, borne out of numerous protracted conflicts and systemic persecution. From the European Migrant Crisis in 2015 to the Trump administration's separation of families arriving across the US–Mexico border, the issue of asylum seekers has proven to be highly controversial within the international community. In the last 10 years, many Western nations have unveiled increasingly stringent immigration policies in attempts to preserve the security of their borders, often at the expense of the safety and human rights of asylum seekers under their custody.

Australia has been no exception to this trend. Since 1994, the Australian government has imposed a system of mandatory immigration detention on all unlawful noncitizens in Australia, including asylum seekers who have arrived without valid visas.⁵ This policy, as provided in section 196 of the *Migration Act 1958* (Cth),⁶ has resulted in the detention of hundreds of children in mainland and offshore processing centres, with no means of seeking protection or settlement.⁷ Based on increasing concerns regarding the prolonged detention of children and adults, exacerbated by the suspension of claims processing under the Rudd Government, the Commission launched the Inquiry into children in immigration detention in 2014.

1.2 Methodology of the Inquiry

Over the course of eight months, the Inquiry was tasked with investigating the alignment of Australia's immigration policies and practices with its international human rights obligations, as well as the effects of detention on the health and wellbeing of these children. Commission teams visited 11 detention facilities, including the Christmas Island Detention Centre. Data was gathered from 1,129 participants through a standardised questionnaire on the health impacts of detention, and children and their families provided testimonies through personal interviews on their experiences in the facilities.⁸ Five public hearings were held across Australia, and witnesses included representatives of the Department of Immigration and Border Protection, medical and child welfare professionals who worked with children in immigration detention, representatives from non-government organisations (NGOs), and former child detainees, among others.⁹ The Inquiry also received submissions from schools, medical service providers and NGOs, and held focus groups with former child detainees who attested to the persisting effects of detention on their wellbeing.¹⁰ Ultimately, the Inquiry found that the protracted nature of mandatory immigration detention had an acutely detrimental impact on the health and development of children, in unequivocal violation of Australia's human rights obligations under the *Convention of the Rights of the Child* (CRC).¹¹

⁵ Terry Hutchinson and Fiona Martin, 'Australia's Human Rights Obligations Relating to the Mental Health of Refugee Children in Detention' (2004) 27 *International Journal of Law and Psychiatry* 529, 531 <doi.org/10.1016/j.ijlp.2004.08.005>.

⁶ Migration Act 1958 (Cth) s 196.

⁷ National Inquiry Report (n 4) 10.

⁸ National Inquiry Report (n 4) 11.

⁹ Australian Human Rights Commission, *Transcripts from the Inquiry's Public Hearings* (11 June 2014) <www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/transcripts-inquiries-public-hearings>.

¹⁰ National Inquiry Report (n 4) 12.

¹¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

2.1 Testimony and its relationship with human rights

The term ‘testimony’ is inherently ambiguous. On one hand, a testimony may be a profession of religious faith. On the other, a testimony is a form of evidence, the statement of a witness in court bound by oath to tell the truth. Somewhere between lies the testimony that takes the form of a personal narrative of an individual who bears witness to a traumatic event, contributing their experience as an emblem of a greater historical movement. Indeed, this is the intrinsic nebulosity of ‘testimony’ as a concept: while it includes stories of personal experience that may not be externally verifiable, as an address to an audience, each account seeks to be regarded as evidence of truth.

How, then, should we approach the concept of testimony within the context of human rights? Casting our minds to the birth of the Universal Declaration of Human Rights (UDHR)¹² in 1948, we might recall that humanity was in a state of moral indignation—we had undergone two cataclysmic World Wars, the latter further scourged by the horrors of the Holocaust and Japanese mass killings. As the articulation of the fundamental rights and freedoms for every individual, the UDHR became the document that sought to bind a fractured international community together, in pursuit of a future that valued human dignity and peace. This transformation of the international community has laid the foundations for the emergence of personal testimonies into the public sphere through human rights advocacy.

2.2 Testimony in human rights practices

Most human rights inquiries seek to uncover and subsequently represent evidence of incidents of widespread harm, which may then be interpreted according to human rights principles and disseminated to the public in the form of written reports.¹³ In this context, testimonies that are firsthand accounts of the traumatic event are increasingly espoused, not only for their evidentiary value but also for their advocative and affective capacity. From the surfacing of Holocaust narratives to the disclosures of abuses in South Africa’s Truth and Reconciliation Commission, testimonies have forced the public to bear witness to the suffering of victims of gross human rights violations. This has had the effect of legitimising such experiences of trauma while eliciting compassion and awareness from the international society, with the aim of precipitating meaningful social change.¹⁴

Indeed, though ostensibly presented as objective fact, testimonies in the hands of human rights activists are frequently engaged for their ability to invoke a sense of empathy and obligation in the reader, soliciting political action. Testimony in the context of human rights is thus used as a source of evidence, a tool for advocacy, and an affective device. The following section will consider the contributions and limitations of testimony to human rights practice through these three functions, by examining the effect of testimonial narratives within the Inquiry.

3.1 Testimony as evidence

The legitimacy of testimony as a form of evidence for the purposes of human rights practices may be derived from analysis of the two forms of ‘witness’. The first is the *testis*, an impartial observer of an event, who is heard and believed on the basis of their apparent neutrality.¹⁵ The second is the *superstes*, the survivor of the ordeal, whose account is empowered by the affective nature of their experience.¹⁶ This affect represents the link to the past—it is the means by which the audience may access a memory; by considering its *effect* on the subject and *affect* on the reader, we may begin to understand the trauma.

¹² *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) (‘UDHR’).

¹³ Meg McLagan, ‘Principles, Publicity and Politics: Notes on Human Rights Media’ (2003) 105(3) *American Anthropologist* 605, 606 <doi.org/10.1525/aa.2003.105.3.605>.

¹⁴ Kay Schaffer and Sidonie Smith, ‘Venues of Storytelling: The Circulation of Testimony in Human Rights Campaigns’ (2004) 1(2) *Life Writing* 3, 14 <doi.org/10.1080/10408340308518258>.

¹⁵ Fassin (n 3) 535.

¹⁶ *Ibid.*

The testimonies of these two witnesses are both credible, but for contrasting reasons. The veracity of the *testis*' testimony is derived from their objectivity, while the testimony of the *superstes* is considered authentic due to their subjective perception as one who has experienced the event.

The Inquiry sought testimonies from both forms of witness, *testis* and *superstes*, in order to obtain reliable information on the conditions of detention facilities and the experiences of the children and families within them, so as to ascertain whether or not violations of human rights had occurred. A total of 1,129 children and parents in detention were interviewed, and 41 witnesses gave testimonies at the public hearings.¹⁷ This allowed witness statements to be corroborated against each other, thereby protecting against inconsistencies in personal memory. Through these testimonies, along with in-person assessments and investigations, the Commission was able to establish that, on numerous occasions, children were unable to enjoy their rights under articles 6(2), 19(1), 24(1), 27, and 37(c) of the CRC.¹⁸

For example, Bashir Yousufi, a former child detainee, stated at the first public hearing:

I saw other kids in detention centre. Many other kids. They were hanging themselves. They are cutting themselves ... the Australian Government they will kill you very slowly with your mind.¹⁹

Yousufi also indicated that he had a 'mental problem' during his detention, and that he 'didn't feel safe when [he] was in the detention centre'.²⁰ Yousufi's experience as a *superstes*, a survivor of immigration detention, was substantiated by the psychiatric professionals who worked with children in immigration detention, occupying the role of *testis* as third-party witnesses of detention conditions. Many attested in their testimonies to the detriment of mandatory detention to children and young people's mental health and psychological development.²¹ In their judgments on the children's behaviour and the markings of self-harm, the silent evidence provided by the children's bodies served to affirm the honesty of Yousufi's narrative.²² These testimonies were then further corroborated by the responses of children and parents in detention to questionnaires provided by the Commission, of whom 85 per cent indicated that their emotional and mental health had been affected while in detention.²³

This cross-examination of testimonies and responses thus allows the audience to accept the personal narrative of Yousufi as legitimate evidence of the severe effects of mandatory detention on the mental health of children. In this way, testimony contributes to the human rights practice of the Inquiry by evidencing the violation of Australia's obligations under article 24(1) of the CRC, to ensure that children have the right to enjoy the highest attainable standard of health.²⁴

Even so, testimony as a form of evidence to human rights practices possesses certain limits. As Kay Schaffer and Sidonie Smith pointed out, the evidentiary requirement of corroboration across multiple witnesses 'renders the individual story less important than the accumulation of many stories of violation', to be repeatedly told in a certain format.²⁵ This is most evident in the way the Commission obtained responses from children and parents in detention through a standardised questionnaire, then collated their responses into straightforward charts, converting each individual experience into a measurable percentage. Indeed, it seems most ironic that the witnesses—who at the time of the Inquiry were experiencing the violations—were denied an opportunity to have the full extent of their experiences communicated to the public; their voices instead consigned to statistics and minor quotes. This format may allow the reader to easily comprehend the scope and extremity of the violations, and readily achieves the objective of the Inquiry, in clearly identifying and evidencing the rights violations

¹⁷ National Inquiry Report (n 4) 42.

¹⁸ Ibid 75.

¹⁹ Australian Human Rights Commission, 'Sydney Public Hearing', *National Inquiry into Children in Immigration Detention 2014*, 4 April 2014 (Bashir Yousufi) <www.humanrights.gov.au/sites/default/files/Mr%20Yousufi.pdf> 1-2.

²⁰ Ibid 3.

²¹ See, for example, Australian Human Rights Commission, 'Sydney Public Hearing', *National Inquiry into Children in Immigration Detention 2014*, 4 April 2014 (Dr Sarah Mares) <www.humanrights.gov.au/sites/default/files/Dr%20Mares.pdf>; see also the testimonies of Professor Karen Zwi, Dr Choong-Siew Yong, and Professor Louise Newman.

²² Schaffer and Smith (n 14) 6.

²³ National Inquiry Report (n 4) 58–59.

²⁴ CRC art 24(1).

²⁵ Schaffer and Smith (n 14) 6.

of children in immigration detention. However, it strips testimony's emotional nuance to data and figures. It obfuscates the value of *superstes*' narratives of suffering as a legitimate form of evidence.

3.2 Testimony as advocacy

As these limits imply, what is presented as 'truth' can also be manipulated. We must ask: who is presenting the testimony, and how are they doing so? Didier Fassin has demonstrated how the boundaries between the *superstes* and the *testis* can be blurred. The survivor, as *superstes*, becomes the *testis* when they bear witness on behalf of the dead. Human rights activists, though inhabiting the structural position of the *testis*, often appropriate the authority to speak for the *superstes*, employing the emotional affect of their experience to lend the weight of truth to a particular cause.²⁶ Although personal narrative as a form of testimony may certainly be used as an educational tool, a frequent consequence of using testimony as a form of advocacy is that it comes pre-framed within the structure of existing human rights norms.²⁷ Thus, in the context of human rights practices, what is often communicated is the activist's moral agenda: the victim's narrative is merely supplementary, disenfranchised of the value of its own experience.²⁸

This aspect of the use of testimony as advocacy is clearly apparent in the Inquiry. Members of the public were permitted to attend the Inquiry's public hearings, which were livestreamed and recorded, with the transcripts of the witnesses' testimonies readily available on the Commission's website.²⁹ Yousufi's description of the Taliban's tyrannisation of his family is a pertinent illustration of how the Inquiry utilised his suffering in order to appeal to the audience:

Taliban did kill my father, I don't have any father anymore in this world ... they were trying to kill me to take my land or take anything that I have ... The other reason they were trying to kill me ... because I am Shia, I am Muslim and do pray ... which is a religious issue that I have in Afghanistan.³⁰

Yousufi continued to describe how his mother died of illness two years after his father passed, and that the only family he has left are his three younger brothers in Pakistan, whose safety remains threatened due to their faith.³¹ Perhaps unknowingly (or knowingly on the part of rights advocates), Yousufi's account used the pathos of child vulnerability and parental bereavement to illustrate the trauma of religious persecution and forced displacement. By allowing him to give his testimony in a public setting, the Inquiry may be said to have treated Yousufi's experience as a tool for advocacy, embedding his narrative within the broader discourse of human rights violations in immigration detention, in order to construct a successful case and precipitate public action.

However, does the exposure of human rights abuses through these means justify the co-opting of personal experiences to a larger cause? It may be argued that testimony as advocacy contributes significantly to human rights practices by instantly capturing the attention of the audience. Through such public hearings and human rights reports, testimonies have the power to subvert the discourse of the government responsible for the violations, by arousing nationwide—and even international—attention to human rights abuses. As Rosanne Kennedy has conceived, there exists a 'circulatory matrix' through which human rights testimonies may travel transnationally, creating a memory across national borders, thereby engendering moral and political support.³²

²⁶ Fassin (n 3) 554.

²⁷ Ian Patel, 'The Role of Testimony and Testimonial Analysis in Human Rights Advocacy and Research' (2012) 1(2) *State Crime Journal* 235, 244.

²⁸ *Ibid.*

²⁹ Australian Human Rights Commission (n 9).

³⁰ Bashir Yousufi (n 19) 4.

³¹ *Ibid.*

³² Rosanne Kennedy, 'Moving Testimony: Human Rights, Palestinian Memory, and the Transnational Public Sphere' in Chiara de Cesari and Ann Rigney (eds), *Transnational Memory: Circulation, Articulation, Scales* (Walter de Gruyter GmbH & Co, 2014) 51, 54.

An example of this may be found in the collection of incident reports from the Nauru detention centre on *The Guardian* (obtained independently from the Inquiry),³³ which is striking in its extent and consequential in the way it brings the totality of the harm caused by Australia's immigration detention system to international scrutiny. Certainly, international news agencies, such as the *New York Times*,³⁴ *Washington Post*,³⁵ and *NPR*,³⁶ have featured coverage of Australia's refugee policies and violations of rights in immigration detention centres, as a result of the work of human rights advocates.

It may also be argued that these narratives have succeeded in initiating political change. By February 2019, all children had left Nauru to be resettled in the United States.³⁷ Anne Richard, then US Assistant Secretary of State for Population, Refugees and Migration, attested that the United States was motivated to remove asylum seekers from Manus Island and Nauru because of the severity of the widely reported conditions at the detention facilities.³⁸ As former President of the Commission Gillian Triggs stated, 'political events and community approaches have quite simply forced the government's hand'.³⁹

Nevertheless, it is difficult to deny that testimony as a tool for human rights advocacy remains a double-edged sword. While it is beneficial and important to individuals who have suffered human rights violations to have their stories heard and legitimised, it cannot be overlooked that these very stories are wielded as a means to provoke a sense of empathy and political indignation in the reader. Schaffer and Smith have put it bluntly: 'NGOs harness their rights agendas to the market and its process of commodification'.⁴⁰ From this perspective, the testimonies received by the Inquiry were ideologically harnessed to further the end that is the promotion of children's rights norms. Indeed, it was expressly stated in the foreword of the Report that one aim of the Inquiry was to 'promote compliance with Australia's international obligations to act in the best interests of children'.⁴¹

Furthermore, at the public hearings, witnesses were only permitted to make a brief opening statement (confined to under five minutes), before their opportunity to testify became limited to responses to questions 'framed by reference to Australia's Human Rights obligations under international law'.⁴² The questions asked of the former detainees, in particular—'did you feel safe in detention?',⁴³ 'can you tell us your impression of the quality of the medical care you received while you were there?',⁴⁴ 'why would the Taliban kill you?'⁴⁵—clearly demonstrate this strategic orchestration of the witnesses' testimonies, prompting them to tell the stories that would generate the most empathy. In this act of supposed empowerment and legitimisation, the narrative voices of the *testis* are subordinated to that of the advocate's rights-based agenda. While the testimonies of survivors are powerful in advocating for the

³³ Nick Evershed et al, 'The Nauru Files: The Lives of Asylum Seekers in Detention Detailed in a Unique Database', *The Guardian* (online at 10 August 2016) <www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive>.

³⁴ See, for example, Lisa Pryor, 'Australia's Refugee Policy of Cruelty', *The New York Times* (online at 16 November 2017) <www.nytimes.com/2017/11/16/opinion/australia-refugees-manus-island.html>.

³⁵ See, for example, David Manne and Kate Fitzgerald, 'This is What Happens When We Prioritise Protecting Borders over People', *The Washington Post* (online at 12 February 2019) <www.washingtonpost.com/opinions/2019/02/12/this-is-what-happens-when-we-prioritize-protecting-borders-over-people/?utm_term=.24a735d041f6>.

³⁶ See, for example, Shannon van Sant, 'Lawsuits Say Australia Subjects Asylum-Seekers to Torture and Crimes against Humanity', *National Public Radio* (online at 10 December 2018) <www.npr.org/2018/12/10/675356306/lawsuits-say-australia-subjects-asylum-seekers-to-torture-and-crimes-against-hum>.

³⁷ Helen Davidson, 'Last Four Refugee Children Leave Nauru for Resettlement in US', *The Guardian* (online at 28 February 2019) <www.theguardian.com/world/2019/feb/28/last-four-refugee-children-leave-nauru-for-resettlement-in-us>.

³⁸ *Ibid.*

³⁹ Helen Davidson and Calla Wahlquist, 'All Refugee Children to be Removed from Nauru by Year's End, Brandis Confirms', *The Guardian* (online at 1 November 2018) <www.theguardian.com/australia-news/2018/nov/01/nauru-children-morrison-removed>.

⁴⁰ Kay Schaffer and Sidonie Smith, *Human Rights and Narrated Lives: The Ethics of Recognition* (Palgrave Macmillan, 2004) 15 <doi.org/10.1057/9781403973665>.

⁴¹ National Inquiry Report (n 4) 10.

⁴² Australian Human Rights Commission, 'Sydney Public Hearing', *National Inquiry into Children in Immigration Detention 2014*, 4 April 2014 (Gillian Triggs) <www.humanrights.gov.au/sites/default/files/GT%20Opening%20Comments.pdf> 3.

⁴³ Australian Human Rights Commission, 'Sydney Public Hearing', *National Inquiry into Children in Immigration Detention 2014*, 4 April 2014 (Rim Jezean) <www.humanrights.gov.au/sites/default/files/Ms%20Jezean.pdf> 4.

⁴⁴ *Ibid.* 5.

⁴⁵ Bashir Yousufi (n 19) 4.

rectification of rights violations, it is not the survivors themselves who possess the power that gives their narrative meaning.

3.3 Testimony as affective device

Perhaps the most powerful contribution of testimony to human rights practices is its affective quality, grounded by its claim to truth. Through this affective dimension, testimony connects people across boundaries through the evocation of trauma, creating ‘solidarity out of difference’.⁴⁶ This brings into discourse certain powerful and emotional tropes, such as the ‘maternal metaphor’ of the forced separation of mother from child,⁴⁷ in order to ‘transmit the texture of traumatic memory’⁴⁸ and enable the audience to engage personally with the horrors within the Report. In doing so, testimonies of traditionally marginalised people, as expressions of suffering, effectively supplant the accounts of political authorities.⁴⁹

This affective quality is clearly palpable in quotes within the Report from mothers in detention. In July 2014, the Inquiry team became aware of incidents of self-harm by mothers of infants at the Christmas Island Detention Centre, who protested immigration authorities’ refusal to relocate their families to mainland Australia.⁵⁰ In an interview with the Inquiry, one husband reported:

I realised [my wife] had taken the Gillette razor and was about to cut her wrists. I hit her and she cut her arm further up instead ... She broke a rigid cup and tried to harm herself ... She is on no medication because she is breastfeeding. They offered a tranquiliser but she is looking after a baby.⁵¹

Another mother commented:

There is no space for my baby, no place to put him down. There are centipedes, insects, worms in the room. Rats run through ... We get out of date food. I don’t want a visa, I just want somewhere safe and clean for my child.⁵²

The graphic and vividly descriptive language of these accounts allows the reader to imagine with clarity the filthiness of the environment and the utter despair experienced by these mothers, whose anguish drove them to violence. By including these accounts in the Report, the Inquiry used the maternal figuration of hopelessness and the pathos of the suffering child to illustrate the trauma within the walls of detention centres. The goriness of the accounts—‘I hit her and she cut her arm further up instead’, ‘I put a rope around my neck’,⁵³ ‘I hit my head on the wall’⁵⁴—depict the unmitigated abjection of the mothers, who represent trauma so intolerable that survival seems pointless.

Though they cannot speak, the infants’ testimonies become apparent from what the reader may glean from these accounts. Young enough to be breastfed, they cannot be put down because of the squalid nature of their environment, surviving only as extensions of their mothers. And yet, their mothers’ suicidal compulsions forcibly alienate them from the comfort and security of the maternal body. The image that thus arises is profoundly affective: incredibly vulnerable infants, exposed to threats from their environment, their refugee situation, and even their own mothers. By including these accounts in the Report, the Inquiry entreats the reader with a moral obligation to act against the perpetrators of their

⁴⁶ McLagan (n 13) 607.

⁴⁷ Claire Kahane, ‘Dark Mirrors: A Feminist Reflection on Holocaust Narrative and the Maternal Metaphor’ in Elisabeth Bronfen and Misha Kavka (eds), *Feminist Consequences: Theory for the New Century* (Columbia University Press, 2001) 161, 164–166 <doi.org/10.7312/bron11704-007>.

⁴⁸ Ibid 164.

⁴⁹ Jan-Melissa Schramm, ‘Testimony, Witnessing’ in Austin Sarat, Matthew Anderson and Catherine O. Frank (eds), *Law and the Humanities: An Introduction* (Cambridge University Press, 2010) 478, 494.

⁵⁰ National Inquiry Report (n 4) 99.

⁵¹ Ibid 100.

⁵² Ibid 101.

⁵³ Ibid 100.

⁵⁴ Ibid 101.

suffering on their behalf.⁵⁵ As Stephen Hapgood argued, the image of the suffering, innocent child is ‘the humanist foundation stone’⁵⁶ on which compassion and justice may be anchored.⁵⁷ Accordingly, this affective quality at once allows these mothers and their children to be construed as victims, while also transforming them into political figures,⁵⁸ capable of mobilising the public to call on authorities to adopt the Commission’s recommendations.

However, as with the other roles of testimony examined in this paper, the use of testimony as an affective device also has its limits. There is no guarantee that the audience will respond with acceptance and recognition. There is always the potential for challenge, contempt, and dismissal.⁵⁹ The audience may fail to identify with the witness, as personal characteristics and beliefs may obstruct identification.⁶⁰ Although the maternal instinct to protect children is a universally recognised trope, negative beliefs about refugees and strong opinions on border security can take precedence over compassion. For instance, in a Lowy Institute poll in 2018, ‘large numbers of immigrants and refugees coming into Australia’ was viewed as a critical threat by 40 per cent of Australians, and results from polls conducted in 2013 and 2016 have indicated strong support among Australians for boat turn-backs and offshore processing.⁶¹

Another significant practical challenge is the precedence of policy considerations among government leaders and legislators over the plight of victims of human rights violations. This can take the form of justification or denial. For example, when asked whether he understood why the mothers were asking to be moved to the mainland, then Minister for Immigration and Border Protection Scott Morrison replied:

I can’t specifically understand. I have not been in that situation personally ... but at the end of the day the Government has to make assessments about the broader policy environment ... the policy is as it is and the policy’s effectiveness is maintained by its consistency.⁶²

In his response, Morrison appeared to brush aside the experiences of the mothers in detention as being of less importance than the maintenance of the current border policy. He rationalised the policy of keeping mothers and children in offshore detention by implying that it was a form of deterrence; that as a result children are ‘not getting on the boats anymore’.⁶³ By doing so, he obscured the plight of the witnesses under a shroud of justification. As author and asylum seeker Behrouz Boochani commented, ‘what should be a debate about people ... has been deliberately poisoned to become a debate about borders and security’.⁶⁴

Denial is also common among political leaders. From Aung San Suu Kyi’s refusal to acknowledge the genocide of Rohingya Muslims,⁶⁵ to the Chinese Government’s rejection of allegations of abuses in Xinjiang detention camps,⁶⁶ denial from resistant national governments has proven to be significantly

⁵⁵ Rosanne Kennedy, ‘The Affective Work of Stolen Generations Testimony: From the Archives to the Classroom’ (2004) 27(1) *Biography* 48, 50 <doi.org/10.1353/bio.2004.0035>.

⁵⁶ Stephen Hapgood, *The Endtimes of Human Rights* (Cornell University Press, 2013) 69.

⁵⁷ *Ibid* 71.

⁵⁸ Kennedy (n 32) 69.

⁵⁹ Schaffer and Smith (n 14) 15.

⁶⁰ Kennedy (n 55) 58.

⁶¹ Kelsey Munro and Alex Oliver, ‘Polls apart: How Australian Views Have Changed on “Boat People”’, *The Interpreter* (online at 19 February 2019) <www.lowyinstitute.org/the-interpreter/polls-apart-how-australian-views-have-changed-on-boat-people>.

⁶² Australian Human Rights Commission, ‘Sydney Public Hearing’, *National Inquiry into Children in Immigration Detention 2014*, 22 August 2014 (Scott Morrison) <www.humanrights.gov.au/sites/default/files/Hon%20Scott%20Morrison%20Mr%20Bowles.pdf> 33.

⁶³ *Ibid*.

⁶⁴ Roza Germian and Alana Calvert, ‘Australian People Not Cruel, Just “Manipulated by Government”’: Behrouz Boochani’, *SBS* (online at 18 May 2018) <www.sbs.com.au/yourlanguage/kurdish/en/article/2018/05/18/australian-people-not-cruel-just-manipulated-government-berouz-boochani>.

⁶⁵ Hannah Ellis-Petersen, ‘From Peace Icon to Pariah: Aung San Suu Kyi’s Fall from Grace’, *The Guardian* (online at 23 November 2018) <www.theguardian.com/world/2018/nov/23/aung-san-suu-kyi-fall-from-grace-myanmar>.

⁶⁶ Maya Wang, ‘“Eradicating Ideological Viruses”: China’s Campaign of Repression against Xinjiang’s Muslims’, *Human Rights Watch* (online at 9 September 2018) <www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs>.

limiting to the outreach potential and affective quality of human rights testimonies. In the context of offshore immigration detention, former prime minister Tony Abbott has remarked that:

health services on Nauru for boat people are much more extensive than the health services that a lot of regional towns get here in Australia ... I've been there. If you like living in the tropics, it's a very, very pleasant island.

As a former political leader, his denial of the substandard quality of healthcare at offshore detention centres has the potential to invalidate witness testimonies, and depict them as false or exaggerated.⁶⁷ Hence, with these limitations, even the most affective testimony may not reach a reader, nor precipitate a meaningful response.

Conclusion

In the absence of national refugee policies that respect and uphold human rights, it is critical that the violation of such rights are recorded and defended through the Commission and other institutions. Despite its limitations, it is abundantly clear that testimony, in its evidentiary, advocative, and affective roles, was crucial in legitimising the findings of the Inquiry by granting it the value of truth. While the future of Australia's refugees remains uncertain, there is no doubt that these testimonies have sparked a movement that has already succeeded in delivering every child from Nauru. One can only hope that the voices of these witnesses continue to resonate throughout public consciousness, such that the imperative to protect the rights of refugees becomes too strong to ignore.

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