

**MISSING SUBJECTS: WOMEN AND GENDER IN
THE ROYAL COMMISSION INTO ABORIGINAL
DEATHS IN CUSTODY**

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ABSTRACT

Although the Australian Royal Commission into Aboriginal Deaths in Custody (RCIADIC) tabled its *National Report* over a decade ago, its 339 recommendations are still used to steer Indigenous justice policy. The inquiry is viewed by many policy makers and scholars as an important source of knowledge regarding the post-colonial lives of Indigenous people. It began as an investigation into Indigenous deaths in custody, but its scope was later broadened to encompass a wide range of matters affecting Indigenous Australians.

There have been numerous criticisms made about the way the investigation was conducted and about the effectiveness and appropriateness of the recommendations made. Of particular relevance to this thesis are those criticisms that have highlighted the failure of the RCIADIC to consider the problems confronting Indigenous women. It has been claimed that although problems such as family violence and the sexual abuse of Indigenous women by police were acknowledged by both the RCIADIC and other scholars as having a significant impact upon the lives of Indigenous women, the RCIADIC failed to address these and other gender-specific problems. The RCIADIC reports themselves do not contradict these claims since they explicitly state that the RCIADIC was primarily concerned with the problems faced by Indigenous men and youth.

This thesis is a critical analysis of the way in which the problems confronting Indigenous women were considered in the Indigenous texts of the Aboriginal Issues Units (AIUs) and in the official reports produced by the RCIADIC, the extent to which these considerations differed, and the reasons why the RCIADIC responded to the problems relating to Indigenous women in the way that it did. Data were collected from close readings of the Indigenous texts and official reports and from 48 interviews with people who either worked for the RCIADIC or were in some other way associated with the RCIADIC.

There are two analyses conducted in the thesis. The *content* analysis is an intersectional race and gender analysis of the Indigenous texts and official reports

with a view to identifying the extent to which the RCIADIC failed to address the concerns of Indigenous women. The *procedures* analysis is a critical analysis of the principal ideological and procedural reasons for the RCIADIC's focus upon men and Indigenous youth and its resultant marginalisation of Indigenous women.

The thesis concludes that although the RCIADIC did not completely ignore Indigenous women, it inadequately considered the problems that posed major risks to their health and safety, namely, family violence and police treatment. The official reports of the RCIADIC contained information about housing, offending patterns of Indigenous women, the problems associated with visiting family members in prison, and the need to inform families of a death in custody and of post-death investigations which was not contained in the Indigenous texts. Importantly, however, the official reports more than the Indigenous texts took a 'community-focused' approach to the problems faced by Indigenous people, and this approach was ultimately framed in a way which emphasised the needs of Indigenous males and youth rather than that of Indigenous women.

Finally, the thesis identifies seven principle reasons for the male-centred focus of the RCIADIC, the most important of which were the emphasis placed on male-centred politics ahead of the concerns of Indigenous women, by Indigenous people and RCIADIC staff, the liberal legal ideology informing the choices of the predominantly male lawyers who controlled the inquiry, and the time and resource constraints imposed on the RCIADIC by federal, State and Territory governments.

STATEMENT OF ORIGINAL AUTHORSHIP

This work contained in this thesis has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Signed: _____

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TABLE OF CONTENTS

LIST OF TABLES AND DIAGRAMS.....	VII
ACKNOWLEDGEMENTS.....	IX
LIST OF ACRONYMS.....	XI
EXPLANATORY NOTES	XI
CHAPTER 1: INDIGENOUS WOMEN AND THE RCIADIC.....	1
I OTHER CRITIQUES OF THE RCIADIC	5
A <i>Overview</i>	5
B <i>Critiques of the Methods and Procedures of the RCIADIC</i>	7
C <i>Critiques of the Way in Which Topics were Addressed in the RCIADIC Reports</i>	10
II RESEARCH QUESTIONS AND HYPOTHESES	15
III CONTRIBUTIONS OF THE RESEARCH	17
IV CHAPTER OUTLINES	22
CHAPTER 2: THEORETICAL FRAMEWORK.....	25
I THEORETICAL FRAMEWORKS SUPPORTING THE CONTENT ANALYSIS	27
A <i>Overview</i>	27
B <i>Feminist Legal Scholarship</i>	28
C <i>Critical Race Scholarship</i>	30
D <i>Critical Indigenous Scholarship</i>	32
E <i>The Intersection of Race and Gender</i>	34
II THEORETICAL FRAMEWORKS SUPPORTING THE PROCEDURES ANALYSIS.....	38
A <i>Overview</i>	38
B <i>Law and Politics Scholarship</i>	39
C <i>Deep Colonising Scholarship</i>	43
D <i>Intersectional Race and Gender Epistemological Scholarship</i>	48
CHAPTER 3: METHODOLOGY	53
I BACKGROUND INFORMATION	53
II DATA COLLECTION.....	57
A <i>Introduction</i>	57
B <i>Textual Material</i>	58
C <i>Interviews with the Commissioners and Key Players</i>	65
III METHODS OF ANALYSIS	77
IV LIMITATIONS OF THE METHODOLOGY	82
CHAPTER 4: ESTABLISHING AND CONDUCTING THE INVESTIGATIONS.....	85
I ESTABLISHING THE RCIADIC	87
A <i>Indigenous Activism</i>	87
B <i>Setting up the RCIADIC Offices</i>	91
C <i>Setting up the AIUs</i>	97
D <i>Political Milieu</i>	100
II THE LETTERS PATENT, TERMS OF REFERENCE AND CHALLENGES MOUNTED	104
A <i>The Letters Patent and Terms of Reference</i>	104
B <i>Legal Challenges Mounted</i>	109
III CONDUCTING INVESTIGATIONS INTO THE DEATHS AND UNDERLYING ISSUES.....	113
A <i>Investigating the Deaths</i>	113
B <i>Investigating the Underlying Issues</i>	119
C <i>Tasks Assigned to the AIUs</i>	121
IV WRITING THE AIU, NATIONAL AND REGIONAL REPORTS AND RECOMMENDATIONS.....	123
A <i>Indigenous AIU Texts</i>	123
B <i>Regional Reports and the National Report</i>	136
C <i>Recommendations</i>	141
CHAPTER 5: INDIGENOUS WOMEN AND INDIGENOUS VOICES.....	143
I EMERGING THEMES	144

A	<i>Alcohol Abuse Generally</i>	144
B	<i>Alcohol Abuse and its Effect on Violence Within Communities</i>	148
C	<i>Problems Pertaining to Police and the Custodial Experience</i>	151
D	<i>Legal Representation</i>	155
E	<i>The Incorporation of Customary Law</i>	155
F	<i>Recruitment of Indigenous Women in the Criminal Justice System</i>	157
G	<i>Motherhood and Birthing Facilities</i>	157
CHAPTER 6: INDIGENOUS WOMEN AND NON-INDIGENOUS VOICES		159
I	THE DEATH REPORTS	160
A	<i>Female Deaths Investigated</i>	160
B	<i>Male Deaths Investigated</i>	170
II	THE INTERIM, NATIONAL AND REGIONAL REPORTS	177
A	<i>Overview</i>	177
B	<i>The Effect of Colonisation on the Status of Indigenous Women and Men</i>	180
C	<i>Family Violence</i>	187
D	<i>Other Concerns of Indigenous Women</i>	194
E	<i>The Focus of the Recommendations</i>	203
III	A COMPARATIVE ANALYSIS OF INDIGENOUS TEXTS AND OFFICIAL REPORTS.....	208
CHAPTER 7: EXPLAINING THE FAILURE TO TAKE AN INTERSECTIONAL APPROACH.....		215
I	OVERVIEW OF RESULTS OF PROCEDURAL ANALYSIS	215
II	RACE AND GENDER POLITICS	219
A	<i>Community (Race) Focus</i>	219
B	<i>The Large Number of Male Deaths and the Deep Disadvantage of Young Indigenous Males</i>	225
III	PROCEDURAL REASONS.....	229
A	<i>The Terms of Reference</i>	229
B	<i>The Legal Procedures Used to Investigate the Deaths</i>	232
C	<i>Deep Colonising Methodologies</i>	234
D	<i>Ideological Values of the Predominantly Male Senior People Appointed</i>	237
E	<i>Time and Resource Constraints</i>	239
CHAPTER 8: INSTITUTIONAL PROCEDURES AND PROCESSES, RACE AND OFFICE POLITICS.....		243
I	INSTITUTIONAL AND OFFICE STRUGGLES, POLITICS AND RACE.....	244
A	<i>The Tension Between Legal and non-Legal Perspectives</i>	244
B	<i>Time and Resource Constraints</i>	248
C	<i>Conservative Interpretation of Terms of Reference and Powers of Investigation</i>	251
D	<i>Adoption of Deep Colonising Methodologies</i>	254
II	LESSONS	261
A	<i>Cultural Awareness Training and Indigenous Staff Appointments</i>	262
B	<i>Communication of the Research Project</i>	263
C	<i>The Need for Preliminary Research</i>	264
D	<i>The Inappropriate Use of Multi-Member Commissions</i>	265
CHAPTER 9: MISSING SUBJECTS.....		269
I	WHAT WAS LEARNED?	269
II	INDIGENOUS WOMEN POST-RCIADIC	275
APPENDIX 1: THE MANITOBA ABORIGINAL JUSTICE INQUIRY		283
APPENDIX 2: LIST OF RCIADIC RECORDS		293
APPENDIX 3: INFORMATION STATEMENT AND CONSENT FORM		297
APPENDIX 4: CODING THEMES AND VARIABLES.....		301
APPENDIX 5: INDIGENOUS MALE DEATHS INVESTIGATED BY THE RCIADIC ..		305
BIBLIOGRAPHY		311

LIST OF TABLES AND DIAGRAMS

DIAGRAM 2.1: THEORETICAL FRAMEWORK.....	26
TABLE 3.1: NUMBER OF PEOPLE INTERVIEWED PER OFFICE	69
TABLE 3.2: ROLES OF THE PEOPLE INTERVIEWED	70
DIAGRAM 3.1: METHODOLOGY	80
TABLE 6.1: INDIGENOUS FEMALE DEATHS INVESTIGATED BY THE RCIADIC	163
TABLE 7.1: SUMMARY OF FINDINGS - INDIGENOUS AND NON-INDIGENOUS	217
TABLE 7.2: SUMMARY OF FINDINGS - LAWYER AND NON-LAWYER	218
TABLE 7.3: NUMBER OF REASONS BY NUMBER OF PEOPLE.....	218

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Finally, I am dedicating my thesis to all of the Indigenous Australians who have died in custody and from the effects of colonisation, and to the friends and families they have left behind. Their grief is my grief and shame.

Elena Marchetti
Brisbane, May 2005

LIST OF ACRONYMS

ABC	Australian Broadcasting Corporation
AIU	Aboriginal Issues Unit
AJI	Public Inquiry into the Administration of Justice and Aboriginal People, Manitoba, Canada
ALS	Aboriginal Legal Service
ATSIC	Aboriginal and Torres Strait Islander Commission
CRU	Criminology Research Unit
IPCHAC	Incarcerated Peoples Cultural Heritage Aboriginal Corporation
OPMC	Office of Prime Minister and Cabinet
NAILSS	National Aboriginal and Islander Legal Services Secretariat
NAA	National Archives of Australia
RCIADIC	Royal Commission into Aboriginal Deaths in Custody

EXPLANATORY NOTES

CODES

In order to maintain the anonymity of the people who were interviewed, each person was allocated a code. The code consists of three categories and a number: the first category indicates whether the person is Indigenous (I) or non-Indigenous (NI); the second category indicates the sex of the person interviewed (M or F); the third category indicates whether the person had legal training (L) or no such training (NL); and a number was allocated to each person (1 to 48).

REFERENCING STYLE

The referencing style used in this thesis is the Australian Guide to Legal Citation. See <http://mulr.law.unimelb.edu.au/PDFs/aglc_dl.pdf>.

DEFINITION OF TERMS

RCIADIC – Although ‘RCIADIC’ is often used to refer to all staff employed to undertake the inquiry, including consultants, and to all the reports and documents produced during the inquiry, I have used the term as referring to the staff employed by and the documents produced by the non-Indigenous units of the inquiry, such as the regional offices and the Criminology Research Unit (CRU). Throughout the thesis, a distinction is made between the units that conveyed a non-Indigenous perspective (the RCIADIC) and the units that conveyed an Indigenous perspective (the Aboriginal Issues Units (AIUs)).

Indigenous texts – This refers to the texts which were produced by the AIUs and which I characterise as containing an Indigenous perspective. A list of the Indigenous texts analysed appears in Chapter 3.

Official reports – This refers to the published reports of the RCIADIC, which were produced by the regional offices and the national commissioner, and which I categorise as containing a non-Indigenous perspective. A list of the official reports analysed appears in Chapter 3.

Indigenous - The word ‘Indigenous’ is used in the Australian context in order to identify the group of people investigated by the RCIADIC. There were three Torres Strait Islander people investigated by the RCIADIC (Nikira Mau, Patrine Misi and Misel Waigana). Therefore, although the RCIADIC uses the term ‘Aboriginal’, this thesis uses the term ‘Indigenous’ to refer to the Aboriginal and Torres Strait Islander people of Australia.

Aboriginal - In the Canadian context, the Public Inquiry into the Administration of Justice and Aboriginal People, which is commonly referred to as the Aboriginal Justice Inquiry of Manitoba (AJI), defined the term ‘Aboriginal’ to include the Indian, Metis and Inuit people as found in the *Constitution Act 1982*, being

Schedule B to the *Canada Act 1982* (UK) c 11.¹ The term ‘Aboriginal’ is therefore used in this thesis when referring to the First People of Canada and elsewhere when it has been used in a direct quote.

CAPITALISATION

- When referring generally to native peoples, the term ‘indigenous’ is used. In this context, ‘indigenous’ is not capitalised since it is being used as an adjective to collectively describe people from a number of cultures and who are normally referred to individually in more specific terms. It has only been capitalised when referring to Indigenous Australians, even when the word ‘Australian’ is implicit, and when capitalised in a direct quote taken from a text.
- There are different conventions for capitalising certain words (for example, ‘Royal Commission’, ‘Commissioner’, ‘Inquiry’ when it relates to a named inquiry, and ‘National Commissioner’), but I have chosen to minimise the use of capitals and not capitalise any of these terms unless the capitalisation occurs in a direct quote taken from a text. The word ‘commissioner’ has only been capitalised when it is used in conjunction with a person’s name. In the same way, the word ‘unit’ when referring to the AIUs or the word ‘head’ (in reference to a head of an AIU) have not been capitalised unless they have been capitalised in a direct quote taken from a text.

¹ Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, Vol 1-2* (1991) vol 1, 7.

CHAPTER 1: INDIGENOUS WOMEN AND THE RCIADIC

There is much to be learned from your study. Lots of researchers and commentators have whinged about the apparent invisibility of Aboriginal women in the Royal Commission into Aboriginal Deaths in Custody reports, but no one (so far as I know) has to date bothered to find out why and how it occurred.

- Non-Indigenous person interviewed¹

When I got your email, one of the reasons I said it was interesting was because up until the moment that I'd read your email, it hadn't occurred to me that we had so fucking monumentally neglected that area [Indigenous women]. And that is why I said to myself 'shit, we did' and I thought 'why?' ... I mean with the ... benefit of hindsight it looks to me like a significant area that we would have neglected.

- Indigenous person interviewed²

INTRODUCTION

In 1991, the reports of two important public inquiries into the relationship between indigenous people and the criminal justice system³ were published. The

¹ Email from NIMNL8 to Elena Marchetti, 25 May 2003.

² Interview with IMNL12 (Face-to-face interview, 26 May 2003).

³ The Canadian reports of other public inquiries and commissions were also tabled in the early 1990s. See for example: Alberta, Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, *Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, Main Report* (1991); Canada, Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice : Equality, Respect and the Search for Justice: As Requested by the Minister of Justice under Subsection 12(2) of the Law Reform Commission Act* (1991); Saskatchewan, Metis Justice Review Committee, *Report of the Saskatchewan Metis Justice Review Committee* (1992); Saskatchewan, Saskatchewan Indian Justice Review Committee, *Report of the Saskatchewan Indian Justice Review Committee* (1992). However the Manitoba Public Inquiry into the Administration of Justice and Aboriginal People (often referred to as the Aboriginal Justice Inquiry and in this thesis abbreviated as the AJI) report will be the only one discussed in detail since it focuses on similar matters to those in the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) *National Report* and since it gives considerable attention to the experiences of Aboriginal women within the criminal justice system. The AJI report was described by the Saskatchewan Indian Justice Review Committee as 'probably the most in-depth public inquiry into aboriginal justice issues undertaken to date': at 4. Other reports that were tabled around the same time in Canada are discussed in Luke McNamara, 'The Aboriginal Justice Inquiry of Manitoba: A Fresh Approach to the "Problem" of Over-Representation in the Criminal Justice System' (1992) 21(1) *Manitoba Law Journal* 47; David F Sunahara, 'Public Inquiries into Policing' (1992) 16(2) *Canadian Police College Journal* 135. The Canadian Royal Commission on Aboriginal Peoples was established on 26 August 1991, but it tabled its report in November 1996 a few years after the RCIADIC ended: Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996).

first, released in Australia on 15 April 1991, was the final national report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The second, released in Canada on 29 August 1991, was the report of the Public Inquiry into the Administration of Justice and Aboriginal People (commonly referred to as the Aboriginal Justice Inquiry of Manitoba, and hereafter abbreviated as AJI). Both reports were the results of lengthy and detailed investigations into the ways in which Australian and Canadian indigenous people were treated by the corresponding justice system, particularly the criminal justice system.⁴

The two inquiries were in many ways similar. Both were initiated due to controversies surrounding the deaths of certain indigenous people and the subsequent investigations of those deaths by police. The establishment of both inquiries was controversial, and challenged by a variety of institutions and organisations. Both inquiries made a large number of recommendations dealing with the dispossession and marginalisation of indigenous people.

There was, however, one glaring difference between the two inquiries. This difference related to the way in which each inquiry considered the problems that confronted indigenous women. The AJI dedicated an entire chapter to a consideration of the relationship between Aboriginal women and the Manitoba justice system.⁵ Within this chapter there were 19 recommendations that specifically related to the problems confronting Aboriginal women. The

⁴ The manner in which other areas of the justice system affected indigenous people were considered by both inquiries; for example the AJI considered the manner in which family laws affected Aboriginal people in Manitoba and the RCIADIC considered the impact of international human rights conventions.

⁵ See Chapter 13 of the Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, Vol 1-2* (1991) vol 1, 475. A summary of how the AJI was established and of the recommendations it made regarding Aboriginal women appears in Appendix 1. The RCIADIC is compared with the AJI throughout this thesis, mainly in footnotes. In comparing the two reports and what they said about indigenous women I do not assume that the inquiries should have uncovered similar problems and experiences of Canadian and Australian indigenous women. Rather my interest is to analyse the extent to which the two groups of women were considered by each inquiry within the scope available to the investigators. Due to time and resource constraints it is impossible to conduct within this thesis as comprehensive an analysis of the AJI's establishment and findings as is conducted in relation to the RCIADIC. Nevertheless, certain comparisons can be made between the two inquiries and their respective reports. Indeed, Luke McNamara has conducted similar comparative analyses of what the two reports had to say about such topics as self-determination, policing and custodial care: Luke McNamara, 'Autonomy-Based Solutions and Criminal Justice Reform' (1992) 2(54) *Aboriginal Law Bulletin* 4. Chapter 9 raises questions arising from the comparisons that I could not answer in this thesis. These questions highlight future research directions.

RCIADIC, however, included no such chapter in the *Royal Commission into Aboriginal Deaths in Custody National Report* (the *National Report*), and it expressly referred to Indigenous women in only five of its 339 recommendations.

Why did the RCIADIC address the problems of Indigenous women in the way that it did? Given that the inquiries were conducted during similar time periods and in jurisdictions with such similar legal systems, histories and Western cultural norms, it is intriguing that the problems of indigenous women were addressed so differently. The primary objective of this thesis is to identify and critically analyse the reasons why the RCIADIC responded to the problems of Australian Indigenous women in the way that it did.

Indigenous women have in the past been described as being invisible in the Australian Indigenous political environment. Lucashenko, for example, writes that '[i]f Aboriginal Australians have been invisible generally, this has been doubly true for Aboriginal women.'⁶ A number of scholars explicitly criticised the RCIADIC, both during the investigation and after the *National Report* was tabled, for not sufficiently considering the problems faced by Indigenous women when engaging with the criminal justice system. Sharon Payne, for example, contends that although the RCIADIC considered the deaths of 11 females in custody and acknowledged the appalling levels of family violence and sexual assault against Indigenous women in the community, 'the Royal Commission into Aboriginal Deaths in Custody did not include specific references to problems faced by women'.⁷ One of the aims of this thesis is to determine whether or not these criticisms are warranted.

It is important to clarify what this thesis does not seek to do. It does not seek to speak for Indigenous women or to categorise Indigenous women solely as victims

⁶ Melissa Lucashenko, 'Violence against Indigenous Women: Public and Private Dimensions' in Sandy Cook and Judith Bessant (eds) *Women's Encounters with Violence: Australian Experiences* (1997) 147, 148.

⁷ Sharon Payne, 'Aboriginal Women and the Law' in Chris Cunneen (ed) *Aboriginal Perspectives on Criminal Justice* (1992) 31, 33. See generally: Chilla Bulbeck, 'The Dark Figures: How Aboriginal Women Disappeared from the Findings of the Royal Commission into Aboriginal Deaths in Custody' (undated); Kate Kerley and Chris Cunneen, 'Deaths in Custody in Australia: The Untold Story of Aboriginal and Torres Strait Islander Women' (1995) 8(2) *Canadian Journal of Women and the Law* 531.

(particularly of physical and sexual abuse). It does not seek to explain how Indigenous women experienced the criminal justice system in the late 1980s and early 1990s or to express how they felt about the RCIADIC. Instead, it is a critical analysis of the extent to which the RCIADIC considered the problems relating to Indigenous women.

I do not seek to assess the effectiveness of the RCIADIC by considering to what extent Australian governments subsequently implemented its recommendations. Whether or not the RCIADIC managed to alter government policies is certainly an important question; one which is, to a certain extent, raised in this thesis in numerous statements by Indigenous and non-Indigenous people who worked for, or were involved in establishing, the inquiry. I do not, however, attempt to comprehensively survey the extent to which the RCIADIC recommendations have been implemented by federal and State governments. Rather, the focus is upon the work of the RCIADIC itself.

It is also important to note that this thesis is not intended to disparage or undermine the importance of the work conducted and the recommendations made by the RCIADIC. Indeed, all of the Indigenous and non-Indigenous people interviewed supported the work of the RCIADIC in some form or another, regardless of any criticisms made. Instead, I seek to determine whether the process of the RCIADIC could have been improved, with a view to better informing the establishment of future inquiries and investigations into the lives of Indigenous people.

Part I of this chapter summarises other critiques and analyses of the RCIADIC in order to place this research within an existing body of literature and to explain the origins of the research questions. Part II explains the main focus of this thesis and outlines the research questions and hypotheses. Part III explains the importance of the research questions and the original contribution my research makes. Although over a decade has passed since the RCIADIC tabled its report, there are many reasons why scholars should continue to analyse and critique its work. Part IV overviews each of the subsequent chapters.

I OTHER CRITIQUES OF THE RCIADIC

A Overview

In 1987, the RCIADIC was established within an environment of political, social and cultural controversy. The circumstances and the sheer number of Indigenous deaths in custody had fuelled the anger and suspicion of the families and relatives of the deceased. They demanded an inquiry into the deaths so that they could understand how the deaths had occurred. The federal government began to take these demands seriously, perhaps in part due to their fear of being embarrassed at the upcoming bicentennial celebrations by the discontent of Indigenous Australians.⁸ Controversy continued to plague the RCIADIC throughout its existence - partly due to the contentious and divisive nature of its investigation, but also because of the furore that so often seems to surround Indigenous politics - and after the RCIADIC had finished its investigation, the controversy continued.

This section describes the criticisms that were directed towards the RCIADIC, either during its existence or once the *National Report* had been tabled. Most of these criticisms were prefaced by a statement acknowledging that the RCIADIC investigation was the most important inquiry conducted in Australia about Indigenous people and that its reports and recommendations should be referred to whenever Indigenous policy reforms are introduced.

The majority of criticisms directed towards the RCIADIC relate not to the work of the RCIADIC itself, but to the extent to which the Commonwealth, State and Territory governments have implemented, or failed to implement, its recommendations. The first recommendation made by the RCIADIC was that the Commonwealth, State and Territory governments, together with the Aboriginal and Torres Strait Islander Commission (ATSIC), instigate a process of monitoring the extent to which Australian governments implement the recommendations of

⁸ Chapter 4 explains the circumstances surrounding the RCIADIC's inception in more detail.

the RCIADIC.⁹ Initially each government was required to report on the extent to which the recommendations were implemented over a five-year period ending 1996-97.¹⁰ All jurisdictions complied with this requirement, but their official commitment ended with the 1996-97 implementation report.¹¹ Nevertheless, government agencies or Aboriginal Justice Advisory Committees in Queensland, New South Wales, Victoria, South Australia, Western Australia and the Australian Capital Territory have continued, after the 1997 deadline, to monitor the implementation of the recommendations within their jurisdiction.

A detailed description and analysis of the extent to which the recommendations have been implemented by Commonwealth, State and Territory governments is outside the scope of this thesis. However, a summary of the numerous reports and books that have been published in the area and which provide jurisdictional summaries can be found in an annotated bibliography prepared by the National Deaths in Custody Program.¹² The National Deaths in Custody Program was established by the Commonwealth government to follow the trends and patterns of deaths in custody. It commenced in 1992 and is managed by the Australian Institute of Criminology.¹³

Other critiques of the RCIADIC can be categorised as follows: those that critique the methods and procedures of the inquiry; and those that critique the manner in which, and extent to which, certain topics were considered in the RCIADIC reports. The critiques that challenge the inquiry and its *National Report* for having failed to address the problems faced by Indigenous women as offenders and victims fall within the second category.¹⁴

⁹ Australia, Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody: National Report, Vol 1-5* (1991) vol 1, 29 (abbreviated as *National Report* in repeated citations).

¹⁰ Chris Cunneen, *The Royal Commission into Aboriginal Deaths in Custody: An Overview of Its Establishment, Findings and Outcomes* (1997) 8.

¹¹ *Ibid.*

¹² Pam Garfoot, *Annotated Bibliography* (undated) Australian Institute of Criminology <<http://www.aic.gov.au/research/dic/bibliography.pdf>> at 8 October 2004.

¹³ The reports produced by the National Deaths in Custody Program can be found on the Australian Institute of Criminology website at: <<http://www.aic.gov.au/research/dic/>>.

¹⁴ See for example: Judy Atkinson, 'A Nation Is Not Conquered' (1996) 3(80) *Aboriginal Law Bulletin* 4; Judy Atkinson, 'Violence against Aboriginal Women: Reconstitution of Community Law - the Way Forward' (1990) 2(46) *Aboriginal Law Bulletin* 6; Diane Bell, 'Intracultural Rape Revisited: On Forging a Feminist Future Beyond Factions and Frightening Politics' (1991) 14(5)

B Critiques of the Methods and Procedures of the RCIADIC

Much of the literature that criticises the methods and procedures of the RCIADIC also criticises its content, since the procedures it adopted affected what it produced. Such criticisms, however, tend to focus predominantly upon the procedures adopted rather than what was contained in the final product. This first category of criticisms emphasise the powerful influence exerted by the legalistic process that pervaded the inquiry.¹⁵

Gillian Cowlshaw and Kathy Whimp, both of whom worked for the RCIADIC, describe the procedures undertaken by the RCIADIC to investigate the 99 deaths in custody, the social, legal and cultural issues relating to those deaths, and the obstacles which arose because of the predominant use of traditional legal processes.¹⁶ Their descriptions are not exactly criticisms of the work of the RCIADIC; rather, they are frank statements about how the RCIADIC was in effect compelled to carry out its work. Cowlshaw acknowledges that

the legal framework can only discover certain limited truths. The facts it emphasises are static. The connections and processes that link events cannot be clarified by adversarial argument about particular events and most certainly the meaning of events to the social actors involved remains absent from legal verdicts.¹⁷

Women's Studies International Forum 385; Bulbeck, above n 7; Kerley and Cunneen, above n 7; Sharon Payne, 'Aboriginal Women and the Criminal Justice System' (1990) 2(46) *Aboriginal Law Bulletin* 9; Payne, 'Aboriginal Women and the Law', above n 7.

¹⁵ See generally: Gillian Cowlshaw, 'Inquiring into Aboriginal Deaths in Custody: The Limits of a Royal Commission' (1991) (4) *Journal for Social Justice Studies, Special Issue Series: Politics, Prisons and Punishment - Royal Commissions and 'Reforms'* 101; Mark Harris, 'Deconstructing the Royal Commission - Representations of "Aboriginality" in the Royal Commission into Aboriginal Deaths in Custody' in Greta Bird, Gary Martin and Jennifer Nielsen (eds) *Majah: Indigenous Peoples and the Law* (1996) 191; Jeannine Purdy, 'Royal Commissions and Omissions: What Was Left out of the Report on the Death of John Pat' (1994) 10 *Australian Journal of Law and Society* 37; Lee Sackett, 'A Post-Modern Panopticon: The Royal Commission into Aboriginal Deaths in Custody' (1993) 28(3) *Australian Journal of Social Issues* 229; Michael Wearing, 'Legal - Administrative Repertoires: Official Accounts of Black Deaths in Custody' (1991) 4 *Journal for Social Justice Studies, Special Issue Series, Politics Prisons and Punishment - Royal Commissions and 'Reforms'* 133; Kathy Whimp, 'The Royal Commission into Aboriginal Deaths in Custody' in Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 80.

¹⁶ Cowlshaw, above n 15; Whimp, above n 15.

¹⁷ Cowlshaw, above n 15, 109.

Similarly, Michael Wearing focuses his critique on the manner in which the RCIADIC constructed images of ‘Aboriginality’ through its use of various systems of discourses or ‘legal-administrative repertoires’. He defines ‘repertoire or system of discourse’ as a ‘set of linguistic (and pre-linguistic) resources that supports and enforces the rhetoric of official “truth” on subject populations’.¹⁸ One of the discourses he identifies as having influenced the construction of the reports produced by the RCIADIC is the legalistic repertoire.¹⁹

A legalistic repertoire organises the interpretative work of speaking subjects (witnesses) into a flow of legal and quasi-legal proofs or facts. The legalistic basis of this repertoire enables the rules and procedures of a legal framework to be followed. Rules and procedures that enable the Commissioner to build the Royal Commission accounts from complex patterns of speech interchange (in adversarial mode) between Commissioner and witnesses.²⁰

Wearing argues that the use of legal-administrative repertoires, which included a legalistic repertoire, only served to support official knowledge about the social realities of Indigenous populations. This resulted in the RCIADIC acting only as a ‘place of confession and testimony – to sift the whites’ “dirty linen” and not to answer fundamental questions about the origins of black deaths’.²¹

Mark Harris limits his critique to the *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* and the 18 death reports produced by Commissioner Wootten. He notes that selective reliance on ‘official’ government reports over Indigenous testimonies and evidence contributed to the silencing of Indigenous voices.²² This ultimately affected the extent to which custodial officers could be blamed for the deaths. Harris argues that the political environment surrounding the establishment of the RCIADIC engendered its

¹⁸ Wearing, above n 15, 134.

¹⁹ Other legal-administrative repertoires which are discussed in the paper are a personalising repertoire and a contrition repertoire: Ibid 138, 147.

²⁰ Ibid 141.

²¹ Ibid 136.

²² Mark Harris notes that ‘[t]he relative absence of a Koorie [sic] perspective in the Wootten reports might be attributed to the decision of the Commissioner to concentrate upon the reports of government officials’: Harris, above n 15, 201.

legalistic nature and that because of the legal standards of proof surrounding such a process, the RCIADIC was unable to find enough evidence to recommend that police and correctional officers be prosecuted.

Jeannine Purdy comes to a similar conclusion in her critique of the investigation into the death of John Peter Pat. Purdy questions how the police officers involved with John Peter Pat's death could have escaped prosecution. She argues that the legal discourse used by the RCIADIC created a space in which only certain voices could be heard which ultimately made it impossible to find any of the officers involved with the death culpable.²³ In particular, only certain evidence was admitted at the hearing into the death and this contributed to constructing the identity of an Indigenous person as one which appeared violent and removed from the context of colonial oppression.

Finally, Lee Sackett's Foucauldian critique of the RCIADIC takes a more explicitly political perspective, and argues that although the inquiry was not 'intentionally fashioned to increase the grip of state knowledge of and power over Aboriginal Australians ... as an instrument of the state it could do nothing else'.²⁴ Sackett believes that the individualisation of the cases by lawyers prohibited their ability to analyse certain phenomena within a broader social context. Subjecting the individual lives of the deceased to such an intense scrutiny only served to further depoliticise the lives of the deceased and further assimilate them into the wider non-Indigenous Australian population. Sackett suggests that rather than exposing the wrongs of colonisation, the RCIADIC exposed how Indigenous Australians needed to be given the same opportunities as non-Indigenous Australians.

Through closing on the evidence from a skewed angle, evoking culturally specific understandings for quitting school, frequent and heavy drinking and the like, and by deducing supposed emotional states of the deceased, the Commissioner simultaneously made the steps leading to the deaths, and the deaths themselves, comprehensible and non-threatening. They became the legacies not of conspiracies

²³ Purdy, above n 15.

²⁴ Sackett, above n 15, 239.

by law enforcers or of wanton acts by Aboriginal people, but of inescapable events. The deceased suffered lives which were, through no fault of their own, careers in self-destruction. Thus in a ghoulish way the Royal Commission accomplished for the state what the state's earlier endeavours failed to achieve. If in life Pat, Anderson, Cameron and their fellows were demonstrably different from other Australians, in death they were assimilated.²⁵

Thus, assimilation occurred because the deceased were viewed as separate cases that individually could not cope with life in the same way as other struggling non-Indigenous Australians.

These procedural critiques highlight the inadequacies of the legalistic processes that dominated the inquiry. Such critiques provide me with a preliminary understanding of how the RCIADIC conducted its inquiry and of how it may have omitted the gender-specific problems of Indigenous women.

C Critiques of the Way in Which Topics were Addressed in the RCIADIC Reports

The literature within the second category of criticisms focuses more on the content of the RCIADIC reports and the recommendations rather than the investigative methods and procedures of the RCIADIC. Many of these critiques, however, acknowledge that the content was influenced by procedural factors.

The literature critiques the ways in which the RCIADIC reports and recommendations addressed topics such as self-determination, police and prison officer training and decision-making, racism, who was to blame for the deaths and the problems relating to Indigenous women.²⁶ For example, both Ron Brunton

²⁵ Ibid 241.

²⁶ See for example: Atkinson, 'Violence against Aboriginal Women', above n 14; Ron Brunton, *Black Suffering, White Guilt? Aboriginal Disadvantage and the Royal Commission into Deaths in Custody* (1993); Richard W Harding, 'Prisons Are the Problem: A Re-Examination of Aboriginal and Non-Aboriginal Deaths in Custody' (1999) 32(2) *The Australian and New Zealand Journal of Criminology* 108; Luke McNamara, 'Aboriginal Human Rights and the Australian Criminal Justice System: Self-Determination as a Solution?' (1992) 21(3) *Manitoba Law Journal* 544; McNamara, 'Autonomy-Based Solutions and Criminal Justice Reform', above n 5; National Aboriginal and Islander Legal Services Secretariat, 'An Interesting and Informative Chat Is Not What I Had in

and Luke McNamara claim that the *National Report* and recommendations did not go far enough in detailing how self-determination could be achieved. Although both acknowledge that the *National Report* and recommendations highlighted the importance of Indigenous political autonomy, they believe that the RCIADIC 'refused to take the next step. It refrained from endorsing any significant exercises of Aboriginal autonomy in terms of justice administration'.²⁷

Similarly, while there were many recommendations made by the RCIADIC in relation to custodial care and police practices, the National Aboriginal and Islander Legal Services Secretariat (NAILSS) argues that there was too much reliance on the discretion of custodial officers to make the changes suggested. This resulted in a loss of autonomy and power for Indigenous people and communities:

Whilst there are injunctions to Aboriginal people to take their part in joining recruitment programs for Aboriginal police and prison officers, there is no policy statement whatsoever about the principles which should apply to ensure that the Aboriginal community, as a community, has some assured way of sharing power with government in the areas of Aboriginal detention and imprisonment. Likewise, there is no stated principle regarding Aboriginal rights to participate in the making of decisions which affect the Aboriginal community.²⁸

Richard W Harding, on the other hand, argues that the RCIADIC focused too much on how Indigenous people are treated in prisons, instead of focusing on the systemic risks that are present in prisons which affect *all* prisoners. Harding argues that had the RCIADIC focused more on how to prevent deaths in custody generally, the significant increase of deaths in prison during the 1990s may have been prevented.²⁹

Brunton also critiques the way the *National Report* constructs the notion of 'Aboriginality' and 'institutional racism'. He claims that the report contained

Mind...' (1989) 2(36) *Aboriginal Law Bulletin* 12; Marina Paxman, 'Women and Children First' (1993) 18(4) *Alternative Law Journal* 153.

²⁷ McNamara, 'Autonomy-Based Solutions and Criminal Justice Reform', above n 5.

²⁸ National Aboriginal and Islander Legal Services Secretariat, above n 26, 4.

²⁹ Harding, above n 26.

inconsistencies in its definition of the terms and silences regarding what each term means. For example, in attempting to define what it means to be Indigenous, Brunton notes:

The National Report frequently – and properly – attacks the stereotyping of Aborigines, pointing to the corrosive effects on social relations between people. Unfortunately, it too perpetuates stereotypes. Of course, many of these may have a different content from the ones it is attacking. But others are quite similar. The noble savage stereotype is questioned in the National Report, but its own portrayal of pre-1788 Aboriginal life is a classic example of the genre, designed to appeal to Western yearnings for community, identity, stability, authority and environmental wisdom. And however the need to tell other Australians about the many Aboriginal success stories is stressed, those recommendations of the Royal Commission which urge special or separate treatment for all Aborigines help to sustain a stereotype that all are disadvantaged in some way merely by being Aborigines.³⁰

A common criticism amongst Indigenous people and organisations about the content of the RCIADIC reports relates to the lack of recommendations that further action be taken against police and prison officers.³¹ Many of these criticisms were made through the media rather than in academic writings.³² According to those interviewed for this research, it is still a common criticism made by Indigenous people about the work of the RCIADIC. Newspaper articles point out that the families of the deceased ‘pushed for a Royal Commission in the hope that criminal charges would be laid where individual custodians were responsible for the deaths’.³³ The failure of the recommendations contained in the death reports and the *National Report* to make more forceful statements about the culpability of police and prison officers left many Indigenous people

³⁰ Brunton, above n 26, 16-17.

³¹ Committee to Defend Black Rights, 'Initial Responses to the First Four Case Reports: Kinsley Dixon, Charlie Michaels, Edward Murray and John Highfold' (1989) 2(36) *Aboriginal Law Bulletin* 6; Paxman, above n 26, 154; Whimp, above n 15, 211.

³² See for example: 'Black Deaths in Custody', *Sydney Morning Herald* (Sydney), 11 May 1991, 30; Pilita Clark, 'Commission Costly Waste, Says Perkins', *Sydney Morning Herald* (Sydney), 20 September 1989, 2; Committee to Defend Black Rights, above n 31, 6; Robert Garran, 'Aboriginal Reform Benchmark', *Australian Financial Review* (Sydney), 10 May 1991, 4; Tony Hewett, 'Black Deaths: Muirhead Blasts Police', *Sydney Morning Herald* (Sydney), 3 February 1989, 1.

³³ 'Lessons from Black Deaths', *Sydney Morning Herald* (Sydney), 13 March 1992, 8.

disappointed. Whether or not the RCIADIC was indeed able to more forcefully condemn the actions of certain custodial officers is explored in Chapters 4 and 8.

Finally, a number of scholars criticise the RCIADIC for not having separately considered the experiences of Indigenous women within the criminal justice system.³⁴ This is the body of literature relating to the RCIADIC which initially informed this research (although this research also falls within the category of criticisms that are procedural in nature). Most of these scholars claim that there was a lack of consideration of the prevalence of family violence within Indigenous communities in the RCIADIC reports. Chilla Bulbeck and Sharon Payne note that in the Northern Territory and in Queensland there were more deaths of Indigenous women in the communities than there were Indigenous male deaths in custody.³⁵ Payne notes that '[t]here were no deaths in custody of Aboriginal women in the [Northern Territory] during the Royal Commission reporting period (1980-1989), yet according to [Northern Territory] police crime reports, 17 Aboriginal women died due to homicide in 1987'.³⁶ Despite such evidence and its acknowledgement in the RCIADIC reports, a number of scholars argue that

the RCIADIC made no recommendations specifically related to violence and in particular violence in the family. It would therefore be assumed that the Commission considers that this particular and serious problem will be dealt with through addressing the issue of alcohol misuse, and through attention to the broader issues of inequality, addressed in its other 338 [sic] recommendations. This denies the reality of the particular needs of women and children.³⁷

³⁴ Judy Atkinson, 'A Nation Is Not Conquered', above n 14; Judy Atkinson, "'Stinkin Thinkin' - Alcohol, Violence and Government Responses' (1991) 2(51) *Aboriginal Law Bulletin* 4; Atkinson, 'Violence against Aboriginal Women', above n 14; Larissa Behrendt, 'Bigger Picture Must Be Considered in Tackling Aboriginal Violence', *Sydney Morning Herald* (Sydney), 26 August 2003, 13; Marie Brooks, 'The Incarceration of Aboriginal Women' in Greta Bird, Gary Martin and Jennifer Nielsen (eds) *Majah: Indigenous Peoples and the Law* (1996) 266; Bulbeck, above n 7; Adrian Howe, 'Aboriginal Women in Custody: A Footnote to the Royal Commission' (1988) 30 *Aboriginal Law Bulletin* 5; Kerley and Cunneen, above n 7; Michael Mackay and Sonia Smallacombe, 'Aboriginal Women as Offenders and Victims: The Case of Victoria' (1996) 3(80) *Aboriginal Law Bulletin* 17; Paxman, above n 26; Sharon Payne, 'Aboriginal Women and the Criminal Justice System', above n 14; Payne, 'Aboriginal Women and the Law', above n 7.

³⁵ Bulbeck, above n 7, 2; Payne, 'Aboriginal Women and the Criminal Justice System', above n 14.

³⁶ Payne, 'Aboriginal Women and the Criminal Justice System', above n 14, 10.

³⁷ Atkinson, "'Stinkin Thinkin' - Alcohol, Violence and Government Responses', above n 34, 4.

All of the critics associate the topic of family violence to the excessive consumption of alcohol in Indigenous communities. It is acknowledged that the RCIADIC reports also made this connection. The critiques claim, however, that this did little to ensure Indigenous women and children would be safe from violence. This is mainly because the RCIADIC reports tended to address the prevalence of alcohol abuse in the context of decriminalising drunkenness and the use of treatment centres or sobering-up shelters, an approach which, according to the critics, failed to address the needs of women and children. For example, as Atkinson points out:

Alcohol treatment centres do not necessarily mean that alcohol abusers will seek treatment. But if women felt safe enough from the violence to examine their behaviour ... then they could facilitate behaviour changes in others by their own non-compliance and non-acceptance of such behaviours. ... There is a need for alcohol treatment centres to develop programs that also acknowledge that very often violence is present in the alcohol abuser's addictive behaviours.³⁸

Other matters which specifically relate to Indigenous women and which scholars claim were missing from the RCIADIC reports include the abusive and disrespectful manner in which Indigenous women are treated by police,³⁹ the inadequacies of the custodial experience for Indigenous women,⁴⁰ the lack of trained Indigenous women to 'investigate sexual offences',⁴¹ the silencing of Indigenous female voices in court processes and lack of community input in court to assist with social control,⁴² the over-representation of Indigenous women in relation to public order offences,⁴³ and the imposition of harsher penalties on Indigenous women for minor offences.⁴⁴ All of these criticisms may be well-founded, but they were not informed by a thorough and comparative analysis of the RCIADIC reports.

³⁸ Ibid 5.

³⁹ Atkinson, 'Violence against Aboriginal Women', above n 14, 6; Paxman, above n 26; Payne, 'Aboriginal Women and the Law', above n 7.

⁴⁰ Brooks, above n 34; Kerley and Cunneen, above n 7; Payne, 'Aboriginal Women and the Law', above n 7.

⁴¹ Atkinson, 'Violence against Aboriginal Women', above n 14, 8.

⁴² Ibid.

⁴³ Brooks, above n 34; Howe, above n 34; Kerley and Cunneen, above n 7; Paxman, above n 26.

⁴⁴ Brooks, above n 34; Kerley and Cunneen, above n 7.

The scholars who focus on the inadequate consideration of the problems confronting Indigenous women do not offer a satisfactory explanation for the omissions they identify, other than claiming that the RCIADIC focused on Indigenous men and that there was little, if any, consultation with Indigenous women during the inquiry. They base their conclusions on the content of the *National Report* and the RCIADIC recommendations. I intend to determine the truth of these claims by documenting the history of the RCIADIC's establishment and procedures.

II RESEARCH QUESTIONS AND HYPOTHESES

This thesis is a critical analysis of the way in which the RCIADIC described the 'underlying issues' pertaining to Indigenous deaths in custody and how they related to Indigenous women, the extent to which those descriptions were inadequate, and the reasons for that inadequacy.

The key questions raised are as follows:

1. How, if at all, were problems confronting Indigenous women considered:
 - (a) in the texts prepared and submitted to the RCIADIC by the Aboriginal Issues Units (AIUs); and
 - (b) in the *Interim*, *National*, regional and death reports, and recommendations of the RCIADIC?
2. To what extent did these considerations differ?
3. Why did the RCIADIC consider the problems relating to Indigenous women in the way that it did?

The answers to the first two questions, while involving substantial research and investigation, are nevertheless descriptive and relatively straightforward. Before I conducted this research I expected to find that the problems confronting Indigenous women (particularly the phenomenon of family violence) had been identified by the AIUs in the reports submitted to the RCIADIC, but were largely overlooked by the RCIADIC and omitted from the final published reports and

recommendations. This expectation emerged from a preliminary reading of the scholarship addressing the concerns of Indigenous women in the late 1980s and early 1990s, from literature that critiqued the RCIADIC's recommendations and from conversations with Indigenous women. Such scholarship and discussions made it apparent that problems such as family violence were evident and of concern to Indigenous women at the time the RCIADIC conducted its inquiry but that the RCIADIC paid scant attention to such concerns.

The third research question is more difficult to answer, and gives rise to a number of other subsidiary questions (reflected in the interview questions). These questions were evoked by my initial thinking about why the RCIADIC did not conduct an intersectional analysis. I hypothesised that the following reasons, which I have grouped in two, would emerge as an explanation for the omission:

Intentional omission

- a. The commissioners consciously ignored material that pointed to particular difficulties faced by Indigenous women because this would have complicated the inquiry by requiring a gendered as well as a racialised approach (an 'intersectional approach').
- b. The commissioners were instructed or influenced by government to ignore gender and to focus on race which implicitly emphasised male problems.

Unintended omission caused by an implicit or explicit 'race focus', liberal legal ideology, and time and resource constraints

- c. The commissioners were not specifically told to take an intersectional approach. They assumed it would be sufficient to make 'gender-neutral race focused' (but implicitly male-centred) recommendations in relation to the 'underlying issues'. The commissioners, in this case, would have acted with a gender bias, even if unconscious and unintended.

- d. The commissioners (all but one of whom were legally trained) adopted legalistic frameworks and assumptions in relation to Indigenous women. In adopting such legalistic frameworks and assumptions, the commissioners acted with gender and race biases, even if unconscious and unintended.
- e. The manner in which the RCIADIC was conducted, the fact that it was organised on a regional basis and the enormity of the investigation all contributed to an outcome in which certain material was inadvertently omitted.
- f. Neither the AIUs nor the RCIADIC considered problems specifically relating to Indigenous women because they were guided by what members of Indigenous communities said about the problems they were experiencing. The people consulted in the communities excluded gender and familial relations from their discussions because it was easier and more politically prudent to focus on the State and its agencies.

These hypotheses guided the questions I asked of the people who were interviewed for this thesis. During the interviews I uncovered a great deal more information about the way knowledge was produced by the RCIADIC which did not directly relate to how Indigenous women were considered. This information is important to convey to fully understand the organisational context of the RCIADIC investigation and it is therefore presented in Chapter 8.

III CONTRIBUTIONS OF THE RESEARCH

This research into the manner in which the RCIADIC considered the problems of Indigenous women is an important contribution to the field of critical Indigenous scholarship in Australia for five reasons.

Firstly, the work of the RCIADIC has not previously been exposed to this form of research analysis. It is the first time that Indigenous texts, other than the Northern Territory AIU report, have been analysed and compared with what was contained

in the official reports of the RCIADIC.⁴⁵ The analysis of the Indigenous texts is an important contribution to the field of critical Indigenous scholarship since all of the AIU reports, aside from the Northern Territory AIU report, remain unpublished. Although my focus is on the missing subjects concerning Indigenous women within the official reports, the fact that most of the AIU reports have never been published represents another set of missing subjects. It is also the first time that a number of people who worked for, or who were in some other capacity involved with, the RCIADIC have been interviewed about their experience. The information collected from the interviews provides a rich account of the historical formation and practices of the RCIADIC.

The second reason this research makes an important contribution to the field relates to its theoretical framework. This thesis applies the scholarship of feminist legal and critical Indigenous theorists to the work of a quasi-legal structure. As is explained further in Chapter 2, such critical legal theorists have in the past considered how judicial reasoning and legislation, both informed by the liberal legal ideology, oppress, discriminate against and marginalise particular members of society. This thesis will extend this body of literature to critique the reports and recommendations produced by a royal commission.

Thirdly, my research provides an account of the material considered and not considered by the RCIADIC as well as the procedural constraints that may have influenced the RCIADIC's choice of focus. The expansion of its Letters Patent and Commissions to encompass an investigation into the 'underlying issues' should have given the RCIADIC the power to look more closely at the problems faced by Indigenous women. Offences against the person contributed to the high rate of incarceration of Indigenous people.⁴⁶ The over-representation of

⁴⁵ Mark Harris briefly compares the contents of the Victorian Aboriginal Issues Unit (AIU) report with the 18 death reports and regional report prepared by Commissioner Wooten: Harris, above n 15. However, there is no overall comparison of the Indigenous texts with all the published reports of the RCIADIC.

⁴⁶ Research paper 11 prepared by the Criminology Research Unit (CRU) analyses the offending patterns of Indigenous people who died in prison. Table 11.11 shows that 58% of all the deceased prisoners had been in custody for offences against the person. It is important to point out, however, that the population considered in the study included more deceased prisoners than were investigated by the RCIADIC: David Biles, David McDonald and Jillian Fleming, 'Research Paper No. 11 - Australian Deaths in Prisons 1980-88: An Analysis of Aboriginal and Non-

Indigenous people in custody was identified by the RCIADIC as being a primary reason for the high number of Indigenous deaths in custody.⁴⁷ An investigation into why offences against the person were such a common occurrence, and how this affected incarceration rates, was certainly within the scope of the RCIADIC's Letters Patent and Commissions. In asking such questions, the RCIADIC would have had cause to consider the effects of such behaviour on Indigenous women. Many scholars claim this did not happen, and that instead the RCIADIC paid scant attention to the problems concerning Indigenous women. To date, however, no one has pursued this claim in detail, by analysing why and how the omission occurred. The research I have undertaken endeavours to remedy this oversight.

Fourthly, this thesis substantially expands upon previous critiques of the RCIADIC. For example, there were many criticisms levelled at the inquiry that identified the lack of focus on problems confronting Indigenous women, but these criticisms primarily identified family violence as the paramount missing subject. My research, however, demonstrates that there were other gender-specific problems that were overlooked by the inquiry and specifically considers the extent to which Indigenous women were ignored by the RCIADIC.⁴⁸

The fifth and final reason why this research makes an important contribution to the field of critical Indigenous scholarship stems from the impact that the RCIADIC inquiry has had on Indigenous public policy. The *National Report*⁴⁹ itself stated that

Aboriginal Deaths' in David Biles and David McDonald (eds) *Deaths in Custody Australia, 1980-1989: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (1992) 213, 224.

⁴⁷ The *National Report* states that Indigenous people die in custody at such high rates because 'the Aboriginal population is grossly over-represented in custody': *National Report*, above n 9, vol 1, 6.

⁴⁸ Other problems which emerged from this research included the sexual and physical abuse of Indigenous women by police, the ways in which customary law was unable to deal with problems of family violence, and the lack of birthing facilities and community support for mothers.

⁴⁹ The *National Report* uses the term 'I' throughout its five volumes, referring to its named author, Commissioner Johnston. However, according to people who were interviewed for this thesis, the report was produced by many people, and as is explained further in Chapter 4 of this thesis, the national commissioner, himself, saw it as a product to which all the commissioners contributed and supported. Therefore, the text is referred to as the *National Report* rather than as the product of one person.

there has never before been such a comprehensive inquiry as that conducted by this Royal Commission. The whole range of societal and historical factors which impact on Aboriginal lives came into focus from the investigations of the deaths of so many of them which occurred whilst ostensibly under the care and protection of the State.⁵⁰

The RCIADIC has significantly informed Indigenous criminal justice research and policy reform over the past thirteen years. According to Robyn Lincoln and Paul Wilson in 2000 '[m]ore than any other work done in the field of Aboriginal criminal justice studies, the Commission's work provides a wealth of information ...'.⁵¹ More recently, a number of Supreme Court justices (particularly in South Australia) have referred to the RCIADIC recommendations when making decisions about sentencing Indigenous offenders.⁵²

The RCIADC is one of the most important and influential pieces of research ever conducted about the lives of Indigenous people.⁵³ Accordingly, it is essential to reflect critically upon the way in which the inquiry was conducted and to consider, with the benefit of hindsight, whether or not alternative processes could or should have been utilised. Without such critical reflection there is a significant risk that the recommendations of the RCIADC will be relied upon inappropriately. Government policies implementing the recommendations may not reflect the actual views of Indigenous people, or they may inadequately address the concerns of Indigenous people. Questioning the fundamental ability of non-Indigenous constructs to adequately represent the views of Indigenous people is particularly pertinent in the current political climate. The government's announcement in May 2004 regarding the mainstreaming of delivery of public services to Indigenous people and the abolition of the ATSIC indicates that scrutiny of the

⁵⁰ *National Report*, above n 9, vol 1, 5.

⁵¹ Robyn Lincoln and Paul Wilson, 'Aboriginal Criminal Justice: Background and Foreground' in Duncan Chappell and Paul Wilson (eds) *Crime and the Criminal Justice System in Australia: 2000 & Beyond* (2000), 205. See also Whimp, above n 15.

⁵² See for example *R v Scobie* [2003] SASC 85; *Gray v Police* [2004] SASC 109; *R v Tjami* [2000] SASC 311.

⁵³ Another inquiry that has also had a substantial influence on Indigenous policy-making and on research involving Indigenous Australians is the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families: Australia, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

processes of future agencies controlled by non-Indigenous bureaucrats and that affect the lives of Indigenous people is more essential than ever. Indigenous Australians continue to die in custody, but the problem of deaths in custody has disappeared almost entirely from the public political agenda.⁵⁴ It is time that the work of the RCIADIC is revisited and reconsidered.

A gendered analysis of the RCIADIC processes and reports produced will also inform future inquiries into race-related problems. Many of the inquiries and studies which delve into the lives of Indigenous people are headed by non-Indigenous people who continue to view Indigenous communities as homogenous, that is, they fail to consider the different experiences of Indigenous men and women.⁵⁵ The studies conducted often make recommendations for the whole community rather than specific groups within those communities and are based on consultations with various individuals without consciously identifying the need to classify perspectives and experiences according to categories such as gender. This may lead to recommendations that are not suited to all members of that community. As Judy Atkinson claims, without a race and gender analysis any solutions offered will 'only create venues for further oppression, of both Aboriginal men, and women'.⁵⁶ Similarly, Marina Paxman notes:

Aboriginal women need to be systematically included in decision making. Currently, all too often, only Aboriginal men are being consulted and this dispossesses Aboriginal women of their place in society, causing attitudes which promote social disruption and violence. Women need to be included in decision-

⁵⁴ The topic has been raised to a certain extent by the deaths in 2004 of Cameron Doomadgee, who was in custody in Palm Island, Queensland, and of Thomas Hickey in Redfern, New South Wales who died during a police chase. Findings of an autopsy carried out in April 2005 on the body of Douglas Scott (one of the deceased whose death was investigated by the RCIADIC) which contradicted the findings of the RCIADIC has also drawn some attention to the topic of Indigenous deaths in custody.

⁵⁵ This has been the case particularly with inquiries relating to land claims. For example, Deborah Bird Rose notes that the 'written record of land claims is a product not only of the centrality of men in the professions that prepare and present claims; it also stands as testimony to a tunnel vision approach on the part of Land Councils which assert that as long as people get their land, it does not matter who gives evidence. In this view, gender equity appears to be classed as an optional extra that Land Councils simply cannot afford': Deborah Bird Rose, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6, 8.

⁵⁶ Atkinson, 'Violence against Aboriginal Women', above n 14, 9.

making processes otherwise further subjugation and dispossession of Aboriginal women and communities will continue.⁵⁷

It is therefore imperative that the importance of conducting an intersectional analysis is highlighted when research is commissioned to investigate the lives of Indigenous people.

The results of this research into the extent to which the RCIADIC was able to take a gendered as well as race approach in its analysis will inform future research in the area about the perils of focusing solely on race. This thesis also suggests strategies that can be used to improve Western research methods when investigating matters concerning Indigenous people.

IV CHAPTER OUTLINES

Chapter 2 describes the theoretical framework informing this research. The work of feminist legal and critical race and Indigenous scholars that has considered the specific needs of Indigenous women within the Australian criminal justice context and the ways in which legal processes are unable to accommodate both race and gender is documented. Law and politics literature that has critiqued the establishment of, and processes undertaken by, royal commissions is also outlined.

Chapter 3 firstly describes the Indigenous texts and official reports of the RCIADIC which I have analysed. These texts and reports enabled a comparative analysis to be conducted of the way each considered problems relating to women. Secondly, I explain how I selected the 48 people interviewed and formulated the questions asked. The people selected had either worked for the RCIADIC or were substantially involved with the establishment of the inquiry. Finally, the qualitative thematic approach used to analyse the data is described.

⁵⁷ Paxman, above n 26, 157.

The remaining chapters tell the story of the RCIADIC. Chapter 4 describes how the RCIADIC came to be established, how it conducted its inquiry and how it satisfied its reporting responsibilities. Chapters 5 and 6 present what was contained in the Indigenous texts and official reports about problems confronting Indigenous women. The extent to which the Indigenous texts and official reports differed is summarised at the end of Chapter 6. The content analysis compares the two sets of texts using an intersectional race and gender approach.

The RCIADIC's failure to adopt an intersectional approach is explained in Chapter 7. This failure is explained using both ideological and procedural reasons gleaned from the 48 interviews. These reasons assist in determining the extent to which race and gender politics, the liberal legal ideology, and political and procedural constraints influenced the processes undertaken to conduct the investigations.

Institutional procedures and racialised office politics identified by the people I interviewed and which indirectly affected the RCIADIC's consideration of Indigenous women are presented in Chapter 8. Suggestions are made at the end of Chapter 8 regarding the ways in which many of the procedural problems encountered by the RCIADIC could have been avoided.

The final chapter, Chapter 9, summarises the findings of this thesis and considers how the RCIADIC might have better addressed the circumstances and needs of Indigenous women.

CHAPTER 2: THEORETICAL FRAMEWORK

INTRODUCTION

Two main analyses are undertaken in this thesis. The first examines the *content* of the Indigenous texts and official reports produced by RCIADIC to determine the extent to which such texts and reports considered Indigenous women ('the content analysis'). The second examines the *procedures* of the RCIADIC to determine whether or not the prevailing liberal legal ideology and the procedural constraints imposed upon the RCIADIC by governments prevented the RCIADIC from undertaking an intersectional approach in its investigations ('the procedures analysis'). The following chapter sets out the theoretical framework within which these analyses are located. The theoretical framework is informed by critical legal scholarship¹ that critiques the liberal legal ideological framework from gendered and racial perspectives, and by law and politics scholarship that examines royal commission processes.

The *content analysis* includes (a) an analysis of the themes in key published reports and recommendations prepared by the RCIADIC; and (b) a comparison of the Indigenous texts and official reports and what each said about the problems confronting Indigenous women. Interviews conducted with Indigenous and non-Indigenous participants also inform this content analysis.

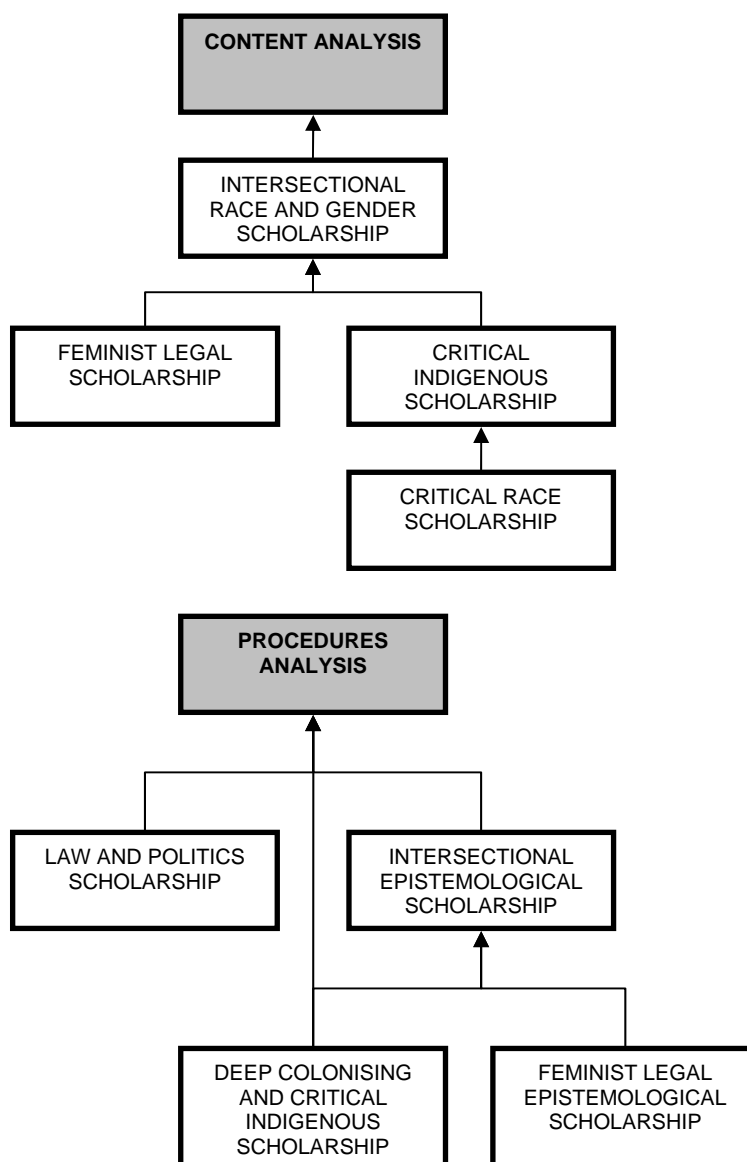
The *procedures analysis* reviews the processes of the RCIADIC to determine whether they limited the matters the RCIADIC could consider.² Various texts and data collected from interviews with people who worked for the RCIADIC provide a picture of the procedural framework within which the RCIADIC investigations took place and within which the *National*, *Interim*, death and regional reports were written.

¹ The use of the term critical legal scholarship in this thesis is used in a general sense and is not intended to refer to the Critical Legal Scholarship (CLS) movement.

² It is acknowledged that this is in some ways analogous to the autopoiesis and law argument: Niklas Luhmann, *Law as a Social System* (2004). I explain this phenomena by using critical legal scholarship to illustrate how the liberal legal ideology which was present in the RCIADIC inquiry was unable to go beyond its own boundaries to embrace an intersectional race and gender approach.

Diagram 2.1 depicts the theoretical frameworks that inform each of the analyses.

Diagram 2.1: Theoretical Framework



An intersectional race and gender approach underpins both the content and procedures analyses, albeit in different ways. The feminist, and critical race and Indigenous theories that have informed intersectional race and gender analyses of law and legal procedures are described below (rather than simply describing the

intersectional scholarship) to more fully explain the application of the theoretical frameworks upon which this research is based.

I THEORETICAL FRAMEWORKS SUPPORTING THE CONTENT ANALYSIS

A Overview

The official reports produced by the RCIADIC were created by a quasi-legal structure³ informed by a liberal legal ideology. One would therefore assume that they contained race and gender biases. Five of the six commissioners were senior lawyers and the inquiry employed numerous researchers and consultants, many of whom were also lawyers. As Kathy Whimp observes, '[t]he ethics and practice of the legal profession dominated the methodology characteristic of the Commission's investigation' particularly in the early stages.⁴ The term 'liberal legal ideology' describes an ideology which dominates the contemporary Western system of law and is often equated with 'liberalism'.⁵ There is no single form of liberalism and a precise definition is therefore difficult to elaborate. Nevertheless, liberal ideals are typically present in capitalist economies that subscribe to a political democracy; these ideals include the principles of liberty, individualism and equality. Of particular relevance is the manner in which liberal legal systems

³ Royal commissions are considered to take the form of a hybrid structure because they act as a 'tool of the executive branch of government' but when imbued with coercive powers, they also function in a similar way to a court of law: Leonard Arthur Hallett, *Royal Commission and Boards of Inquiry: Some Legal and Procedural Aspects* (1982) 10.

⁴ Kathy Whimp, 'The Royal Commission into Aboriginal Deaths in Custody' in Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 80, 85. Despite the fact that the terms of reference were widened to include an investigation of the 'underlying issues' associated with the deaths and an attempt was therefore made to incorporate social science research, Kathy Whimp suggests that '[t]he domination of commissions by lawyers creates ample possibilities for conflict in methodology, ideology and perceptions. Lawyers tend to be preoccupied with oral testimony, eyewitness accounts and the theatrical participatory elements of formal hearings. Sociologists, on the other hand, prefer systematic data collection and analysis, and qualify findings with an awareness of the value-judgements which are necessarily involved': at 84. According to Whimp although a social science methodology was incorporated into the inquiry the investigation was still predominantly ruled by legal processes partly due to the way the RCIADIC was staffed and partly due to its policy oriented function.

⁵ For a discussion of liberalism and how it impacts on law and legal systems see: Stephen Bottomley and Stephen Parker, *Law in Context* (2nd ed, 1997); Margaret Davies, *Asking the Law Question* (2nd ed, 2002); Ian Ward, *An Introduction to Critical Legal Theory* (1998); David Wood, Rosemary Hunter and Richard Ingleby, 'Themes in Liberal Legal and Constitutional Theory' in Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds) *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (1995) 41.

espouse formalistic notions of equality. As critical legal scholarship generally insists, the liberal notion of equality contains implicit race and gender biases.

The underlying premise of such critical scholarship is the notion that law and legal systems are not ‘benign, neutral and autonomous ...’.⁶ Instead, critical legal scholars claim law and legal systems are institutions of power that discriminate and oppress on the basis of various categories including gender and race. As Gerry J Simpson and Hilary Charlesworth explain, liberal legal ideology

argues that law is above politics (or at least distinguishable from it) and merely resolves the competing claims of equal members of society. Accordingly, law involves the application of principles and rational argument. Logic and doctrine rather than power and influence are considered decisive. ... [C]ritical schools [instead] attempt to demonstrate the highly contingent nature of these claims and the ideologies underlying them. The theories ... are diverse, contradictory and intricate. However, they each share, to varying degrees, a radical scepticism about liberal claims to objectivity and universalism.⁷

By using the work of critical legal scholars who have adopted feminist and race perspectives,⁸ the official reports of the RCIADIC can be analysed to determine the extent to which they silenced the concerns of Indigenous women.

B *Feminist Legal Scholarship*

Because this thesis focuses on Indigenous *women*, feminist legal thought is an essential starting point. Numerous feminist legal scholars have focused on the need for law and legal cultures⁹ to recognise and embrace the experiences of

⁶ Gerry J Simpson and Hilary Charlesworth, ‘Objecting to Objectivity: The Radical Challenge to Legal Liberalism’ in Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds) *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (1995) 86, 86.

⁷ *Ibid* 86-87.

⁸ For example see: Anne Cossins, ‘Saints, Sluts & Sexual Assault: Rethinking the Relationship between Sex, Race & Gender’ (2003) 12(1) *Social & Legal Studies* 77. Also for a general summary of this scholarship see: Simpson and Charlesworth, above n 6.

⁹ The term ‘legal cultures’ is used in the same way that Anne Cossins uses the term. Cossins uses the term ‘legal cultures’ to ‘highlight the diversity of different parts of the legal system’: Cossins, above n 8, 99.

women.¹⁰ Feminist critiques of the liberal legal ideology have included a variety of perspectives ranging from liberal to postmodern feminism.¹¹ Early feminist legal scholars critiqued the patriarchal nature of law by claiming that laws were made, interpreted and applied by men and that legal discourse therefore treated women as subordinate and as not existing in the public domain.¹² Subsequent scholars extended this argument by claiming that not only do men make, interpret and apply laws, but that as an institution, law is imbued with a masculine perspective, and that even the notion of 'woman' is simply a social construct created by men.¹³

Many contemporary feminist legal scholars argue that neither law nor legal systems represent a coordinated effort to honour only male interests since the law is 'not the coherent, logical, internally consistent and rational body of doctrine it professes to be.'¹⁴ Scholars such as Carol Smart have instead argued for a more focused approach whereby particular areas of the law and their effect on particular groups of women are scrutinised, thereby avoiding essentialism and grand theorising. In particular, Smart states:

¹⁰ The body of work that exists in the area of feminist legal scholarship is voluminous and difficult to fully summarise in a couple of paragraphs: Bottomley and Parker, above n 5, 200. Some noteworthy texts and articles in the area are Clare Dalton, 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (1987-1988) 3 *Berkeley Women's Law Journal* 1; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990); Regina Graycar, 'Yes, Virginia There Is Feminist Legal Literature: A Survey of Some Recent Publications' (1986) 3 *Australian Journal of Law and Society* 105; Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (1997); Jocelyne Scutt, *Women and the Law* (1990); Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5.

¹¹ Bottomley and Parker, above n 5; Simpson and Charlesworth, above n 6.

¹² Ngaire Naffine, *Law and the Sexes* (1990).

¹³ One of the leading feminist legal scholars during this phase was Catharine MacKinnon: Catharine A MacKinnon, 'Feminism in Legal Education' (1989) 1 *Legal Education Review* 85; Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); Catharine A MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7 *Signs* 515; Catharine A MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635; Catharine A MacKinnon, 'Feminist Discourse, Moral Values and the Law - a Conversation' (1985) 34 *Buffalo Law Review* 21; Catharine A MacKinnon, 'Introduction' (1981) 10 *Capital University Law Review* i; Catharine A MacKinnon, 'Pornography as Sex Discrimination' (1986) 38 *Law and Inequality: A Journal of Theory and Practice* 4; Catharine A MacKinnon, 'The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion' (1983) 17 *Radical America* 23; Catharine A MacKinnon, 'Pornography, Civil Rights and Speech' (1985) 20 *Harvard Civil Rights-Civil Liberties Law Review* 1; Catharine A MacKinnon, *Sexual Harassment of Working Women* (1979); Catharine A MacKinnon, 'Toward Feminist Jurisprudence' (1982) 34 *Stanford Law Review* 703.

¹⁴ Naffine, above n 12, 12.

It is not the space now occupied by traditional positivist or even liberal abstract jurisprudence which we should seek to fill with another abstraction called feminist jurisprudence, rather – or so it seems to me – we should seek to construct feminist discourses on laws. ... [T]he last thing we need is a feminist jurisprudence on a grand scale which will set up general principles based on abstractions as opposed to the realities of women's (and men's) lives.¹⁵

The theoretical assumptions in feminist theories are important, but they cannot be used for this research without acknowledging the influence of race.¹⁶

C *Critical Race Scholarship*

Feminist theories, even those that take a postmodern and non-essentialist perspective, have been criticised for not fully incorporating the experiences of racialised women.¹⁷ For that reason, scholarship that evaluates how substantive laws treat racialised others must be considered.

Critical race theories emerged in the United States in the mid-1970s when African American and white scholars such as Derrick Bell¹⁸ and Alan Freeman¹⁹ became disillusioned with the ability of the civil rights movement to redress racist policies and practices. Their dissatisfaction with the civil rights movement was in response to the movement's quest for equal rights without recognising that people were in fact different and that they therefore had different needs. These new critics assumed racism was a normal feature of American society and that formal equality could never rectify subtle (and not so subtle) forms of racism that maintained the subordination of non-whites.²⁰ Instead, critical race scholars

¹⁵ Carol Smart, *Feminism and the Power of Law* (1989) 69.

¹⁶ It is also necessary, however, to avoid generalising the race analysis by way of locality and jurisdiction. Therefore, as much as possible, differing accounts of Indigenous women's experiences have been acknowledged. References to locality by the people I interviewed, however, cannot be fully reported in this thesis, in order to protect their confidentiality and anonymity.

¹⁷ Aileen Moreton-Robinson, *Talkin' up to the White Woman: Indigenous Women and Feminism* (2000).

¹⁸ Derrick A Bell Jr, 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' (1976) 85 *Yale Law Journal* 470.

¹⁹ Alan D Freeman, 'Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 *Minnesota Law Review* 1049.

²⁰ Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989)

argued for the need to increase race consciousness and ‘to highlight alternative voices and perceptions’.²¹ They claimed that ‘white elites will tolerate or encourage racial advances for blacks only when they also promote white self-interest’.²² Additionally, it became recognised that oppression and racism can occur even when racist beliefs are denied and claims of colour-blindness are made because ‘neoconservatives ... rely on their own political interpretations to give meaning to their respective concepts of rights and oppression’.²³ These interpretations are grounded in historical contexts which make them difficult to change. Critical race scholars therefore critique the ability of the prevailing liberal legal ideology and legal constructs of race to remedy overt and covert racial oppression.

Recently the critical race movement in America has been criticised for being overly focused on African Americans to the exclusion of other minority identities such as Asian, Latino and colonised peoples.²⁴ The acknowledgement that minority groups are not homogenous has been adopted by a number of Australian scholars. For example Larissa Behrendt notes that

Aboriginal people do not have the same history of formal slavery that black Americans do. ... In Australia, a covert system operated to exploit the labour of Aboriginal people, a practice that is rarely acknowledged outside of the Aboriginal community. Aboriginal people have experienced a brutal colonisation. This creates issues of regaining land and recognition of sovereignty that are not on the agenda for black Americans.²⁵

Critical race scholarship is therefore not entirely appropriate as a critical scholarship for Indigenous Australians. The discourse that has emerged in

University of Chicago Legal forum 139; Richard Delgado, 'Introduction' in Richard Delgado (ed) *Critical Race Theory: The Cutting Edge* (1995) xiii.

²¹ Davies, above n 5, 288.

²² Delgado, above n 20, xiv. See also Kimberle W Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101(7) *Harvard Law Review* 1331.

²³ Crenshaw, 'Race, Reform and Retrenchment', above n 22.

²⁴ Davies, above n 5, 290-291.

²⁵ Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1 *Australian Feminist Law Journal* 27, 40.

Australia has, instead, been predominantly in the form of postcolonial and whiteness scholarship.

D *Critical Indigenous Scholarship*

A critical Indigenous scholarship made its debut in the late 1980s and early 1990s. Scholars such as Chris Cunneen,²⁶ Aileen Moreton-Robinson,²⁷ Heather McRae et al,²⁸ and Irene Watson²⁹ have highlighted the manner in which the process of colonisation oppressed and marginalised Indigenous Australians. Such an historical context has resulted in the recognition that Indigenous people in Australia have lived experiences that differ from non-Indigenous Australians and that they therefore need a specifically critical Indigenous discourse.³⁰

Postcolonial scholarship has largely focused on Indigenous claims in relation to land rights, the right to self-determination, the recognition of customary law and the rights of the 'stolen generation'.³¹ These various claims have resulted from what Margaret Davies describes as 'an attempt to define the Indigenous people out of existence ...' by the process of colonialism.³² This process was put in place by Captain Cook's actions in 1788. The manner in which Cook took over Australia implied the land was 'terra nullius', which meant that under international law, 'settlement' by an outsider could occur because there were no previous inhabitants recognised as owning the land. By virtue of Cook's actions, the laws, culture and land tenure of Indigenous Australians was extinguished. In

²⁶ Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (2001).

²⁷ Moreton-Robinson, above n 17.

²⁸ Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (3rd ed, 2003).

²⁹ Irene Watson, 'There Is No Possibility of Rights without Law: So Until Then, Don't Thumb Print or Sign Anything' (2000) 5(1) *Indigenous Law Bulletin* 4.

³⁰ Behrendt, above n 25, 27-28.

³¹ The term 'stolen generation' was used by the Human Rights and Equal Opportunity Commission in their 1997 report to describe the Indigenous children that had been taken from their families due to the assimilation policy: Australia, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997). For further information regarding contemporary rights that are sought by Indigenous people see Chris Cunneen, 'Criminology, Genocide and the Forced Removal of Indigenous Children' (1999) 32(2) *The Australian and New Zealand Journal of Criminology* 124; Penelope Mathew, Rosemary Hunter and Hilary Charlesworth, 'Law and History in Black and White' in Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds) *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (1995) 3.

³² Davies, above n 5, 274.

1992, the application of terra nullius to Australia was declared a legal fiction in *Mabo v Queensland*³³ (*Mabo*) by the High Court's creation of 'native title'. Many have argued, however, that in substance the *Mabo* decision has done little to further the recognition of Indigenous sovereignty.³⁴

The Australian literature on whiteness has followed in the footsteps of North American minority scholars such as Richard Dyer, bell hooks and Sherene Razack.³⁵ Such scholarship critiques the manner in which legal and other systems assume a position of whiteness (which is reflective of an Anglo-Saxon Western culture) without acknowledging a position of humanity and without recognising that the dominant white culture is also raced. As Aileen Moreton-Robinson, an Australian Indigenous academic, explains, '[w]hiteness remains the invisible omnipresent norm. As long as whiteness remains invisible in analyses "race" is the prison reserved for the "Other"'.³⁶

An example of the application of whiteness scholarship in the Australian context can be found in Moreton-Robinson's critique of the High Court decisions in *Mabo* and *Wik v the Commonwealth* (*Wik*).³⁷ In that critique she explains how white principles of justice applied by the Court and subsequently enshrined in the *Native Title Act 1993* (Cth) force Indigenous people, when claiming native title, to satisfy white rules.

Tragically and ironically, even though we were dispossessed of our lands by White people, the burden of proof for repossession of our lands is now placed on us, and it must be demonstrated in accordance with the White legal structure in courts controlled by predominantly White men. As the written word is generally regarded as more reliable by courts, all claimants must be able to substantiate their oral histories with documents written by White people such as explorers, public

³³ *Mabo v Queensland* (1992) 175 CLR 1.

³⁴ See for example: Paul Patton, 'Reconciliation, Aboriginal Rights and Constitutional Paradox in Australia' (2001) 15 *Australian Feminist Law Journal* 25; Lisa Strelein, 'The "Courts of the Conqueror": The Judicial System and the Assertion of Indigenous People's Rights' (2000) 5 *Australian Indigenous Law Reporter* 1; Watson, above n 29.

³⁵ Richard Dyer, *White* (1997); bell hooks, *Black Looks: Race and Representation* (1992); Sherene H Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (1998).

³⁶ Moreton-Robinson, above n 17, xix.

³⁷ *Wik v the Commonwealth* (1996) 141 ALR 129.

servants, historians, lawyers, anthropologists and police. ...Whiteness is centred by setting the criteria for proof and the standards for credibility.³⁸

Critical Indigenous scholarship is crucial for this thesis since it provides a framework within which to analyse the extent to which race was considered by the RCIADIC in its discussion of underlying issues. However, as previously indicated, race cannot be considered alone. Since the thesis considers how the RCIADIC treated Indigenous women, it needs to adopt an intersectional race and gender approach.

E *The Intersection of Race and Gender*

The intersection of feminist and critical race theories³⁹ has been difficult for scholars to conceptualise. Mainstream feminists have been criticised for taking a majority (white) gendered approach without considering the experiences of minority women.⁴⁰ White feminist scholars such as Rosemary Hunter have been conscious of the need to avoid essentialising the position of women for some time and have therefore questioned how to appropriately incorporate other feminist perspectives in their works.⁴¹ Hunter concludes that there are

³⁸ Aileen Moreton-Robinson, 'Witnessing Whiteness in the Wake of Wik' (1998) 17(2) *Social Alternatives* 11, 12.

³⁹ Kimberle Crenshaw was the first to use the term 'intersectionality' to describe how race and gender intersect to influence the legal employment experience of African American women: Crenshaw, 'Demarginalizing the Intersection of Race and Sex', above n 20. I use the term in the same way as Crenshaw; intersectionality allows Indigenous women to be seen as both Indigenous and as women. Without an intersectional approach 'Indigenous' normally means men and 'women' are presumed white. Some North American legal scholars would characterise my analysis as exemplifying critical race feminist theory, however, I prefer to label it as an intersectional race and gender analysis to differentiate the experiences of Australian Indigenous women from the experiences of African American women.

⁴⁰ For excellent summaries of the problems involved and the criticisms levelled at mainstream feminists see Paula Stewart Brush, 'Problematizing the Race Consciousness of Women of Colour' (2001) 27(1) *Signs* 171; Kathleen Daly, 'Class-Race-Gender: Sloganeering in Search of Meaning' (1993) 20(1-2) *Social Justice* 56; Kathleen Daly, 'Different Ways of Conceptualising Sex/Gender in Feminist Theory and Their Implications for Criminology' (1997) 1(1) *Theoretical Criminology* 25; bell hooks, *Talking Back: Thinking Feminist, Thinking Black* (1989); Rosemary Hunter, 'Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice' (1996) 6 *The Australian Feminist Law Journal* 135.

⁴¹ Around the time of the RCIADIC, a debate arose regarding whether non-Indigenous women had the right to speak and write about the experiences of Indigenous women, particularly in relation to their position as victims of violence. The debate was ignited in 1989 by the publication of the following article: Diane Bell and Topsy Napurrula Nelson, 'Speaking About Rape Is Everyone's Business' (1989) 12(4) *Women's Studies International Forum* 403. Jan Larbalestier criticised 'the appropriateness of the theory and practice of "radical feminism" for Aboriginal women's struggles

strategies for avoiding essentialism in feminist theory and practice; incorporating difference into feminist analysis and feminist politics through research and consultation; the proliferation of feminist theories and strategies built around particular experiences and needs; the recognition of intersectional experience and political intersectionality through coalitions; and the deconstruction of constraining identity categories in feminist and legal discourse.⁴²

Many minority feminist scholars have undertaken to create their own discourse, claiming that white legal feminist discourse does not and cannot incorporate their experiences.⁴³

As a black woman, in my opinion the experience of black women is too often ignored both in feminist theory and in legal theory, and gender essentialism in feminist legal theory does nothing to address this problem. ... To be fully subversive, the methodology of feminist legal theory should challenge not only law's content but its tendency to privilege the abstract and unitary voice, and this gender essentialism also fails to do.⁴⁴

Australian Indigenous women indeed have claimed that there is no such thing as universal sisterhood and that much of Australian feminist discourse has been Eurocentric in nature.⁴⁵ Indigenous female scholars such as Larissa Behrendt,⁴⁶ Jackie Huggins,⁴⁷ Aileen Moreton-Robinson,⁴⁸ Sharon Payne,⁴⁹ and Irene

and the ability and moral responsibility of one White woman to discuss such issues': Jan Larbalestier, 'The Politics of Representation: Australian Aboriginal Women and Feminism' (1990) 6(2) *Anthropological Forum* 143. Bell later responded to Larbalestier's criticism in Diane Bell, 'A Reply from Diane Bell' (1990) 6(2) *Anthropological Forum* 158. Since this time, debates about violence in Indigenous communities and other problems concerning Indigenous women have been discussed more openly by both Indigenous and non-Indigenous scholars: Joan Kimm, *A Fatal Conjunction: Two Laws Two Cultures* (2004).

⁴² Hunter, above n 40, 162.

⁴³ See for example Crenshaw, 'Demarginalizing the Intersection of Race and Sex', above n 20; Angela Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581.

⁴⁴ Harris, above n 43, 585.

⁴⁵ Behrendt, above n 25; Jackie Huggins, 'A Contemporary View of Aboriginal Women's Relationship to the White Women's Movement' in Norma Grieve and Ailsa Burns (eds) *Australian Women: Contemporary Feminist Thought* (1994) 70; Larbalestier, above n 41; Moreton-Robinson, *Talkin' up to the White Woman*, above n 17.

⁴⁶ Behrendt, above n 25.

⁴⁷ Huggins, above n 45; Jackie Huggins, *Sister Girl* (1998).

⁴⁸ Moreton-Robinson, *Talkin' up to the White Woman*, above n 17.

Watson⁵⁰ have in fact criticised non-Indigenous women for participating in the colonial racial oppression of Indigenous people. They have claimed that the marginalisation and oppression of Indigenous people resulted in Indigenous and non-Indigenous women having different needs. For example, they have argued that Indigenous women do not want to be considered in isolation from Indigenous men; that Indigenous women view racial oppression of both Indigenous men and women as the primary problem in need of change; that Indigenous women do not seek abortion rights, but instead the right to bear and keep their children; and that Indigenous women need to urge for the correct understanding and recognition of traditional laws and practices in order to combat family violence.⁵¹

It would be a fair statement to make that many Black women do not want to know about white feminism. I can't say I blame them. There are a multitude of reasons why this is so: (a) a closed women's movement which has never addressed the needs of Aboriginal women, (b) inherent racism within feminist circles, (c) white women's unfamiliarity with the process of colonisation and how it has affected all Aboriginal people (that is, the non-support of Black men and families), (d) elitism and subordination of subjects and objects, (e) exclusion of Black women by white women, (f) our struggle as Blacks first.⁵²

Despite the insistence that Indigenous people need to be unified in their pursuit of Indigenous rights, there has also been an increasing recognition by Australian Indigenous female scholars that female voices have been silenced in critical Indigenous discourse and that a separate Indigenous feminist scholarship is required, which recognises the position of colonised women within the criminal justice system and in other legal and social institutions.⁵³ This perspective has

⁴⁹ Sharon Payne, 'Aboriginal Women and the Law' in Chris Cunneen (ed) *Aboriginal Perspectives on Criminal Justice* (1992) 31.

⁵⁰ Irene Watson, 'Power of the Muldarbi, the Road to Its Demise' (1998) 11 *Australian Feminist Law Journal* 28.

⁵¹ Jackie Huggins, 'A Contemporary View of Aboriginal Women's Relationship to the White Women's Movement', above n 45; Melissa Lucashenko, 'Violence against Indigenous Women: Public and Private Dimensions' in Sandy Cook and Judith Bessant (eds) *Women's Encounters with Violence: Australian Experiences* (1997) 147, 157; Payne, above n 49.

⁵² Jackie Huggins, *Sister Girl*, above n 47, 118.

⁵³ See for example Judy Atkinson, 'Violence against Aboriginal Women: Reconstitution of Community Law - the Way Forward' (1990) 2(46) *Aboriginal Law Bulletin* 6; Jackie Huggins, *Sister Girl*, above n 47; Moreton-Robinson, *Talkin' up to the White Woman*, above n 17; Marina

emerged, in particular, when discussing violence against Indigenous women and children:

Groups of Aboriginal women are saying that they are being subjected to three types of laws. As women in the Northern Territory have so appropriately described it: 'white man's law, traditional law and bullshit law'; the latter being used to explain a distortion of traditional law used as a justification for assault and rape of women, or for spending all the family income on alcohol and sharing it with cousins, justifying the action as an expression of cultural identity and as fulfilling familial obligations.⁵⁴

Similarly, when it comes to considering the offending patterns and needs of Indigenous offenders, Indigenous and non-Indigenous scholars have recognised that little attention is paid to Indigenous female offending and their specific custodial needs. Adrian Howe notes that 'when we turn the spotlight on Aboriginal women prisoners, the focus blurs'.⁵⁵ There has in the past decade been some recognition that different theories are required to explain the circumstances of Indigenous women who offend.⁵⁶

Such an intersectional approach is important because it circumvents the dangers of considering race in isolation from gender when making determinations of law or drafting policies concerning Indigenous people. The following quote from Melissa Lucashenko illustrates how solely adopting a race or gender perspective

Paxman, 'Women and Children First' (1993) 18(4) *Alternative Law Journal* 153; Payne, above n 49.

⁵⁴ Payne, above n 49, 37. See also Lucashenko, above n 51.

⁵⁵ Adrian Howe, 'Aboriginal Women in Custody: A Footnote to the Royal Commission' (1988) 30 *Aboriginal Law Bulletin* 5, 5.

⁵⁶ Aboriginal and Torres Strait Islander Commission, 'Social Justice Report 2002' (Human Rights and Equal Opportunity Commission, 2002); Marie Brooks, 'The Incarceration of Aboriginal Women' in Greta Bird, Gary Martin and Jennifer Nielsen (eds) *Majah: Indigenous Peoples and the Law* (1996) 266; Margaret Cameron, 'Women Prisoners and Correctional Programs' (2001) (194) *Australian Institute of Criminology - Trends & Issues in Crime and Criminal Justice* 1; Dot Goulding, 'Severed Connections: An Exploration of the Impact of Imprisonment on Women's Familial and Social Connectedness' (Centre for Social and Community Research, Murdoch University, 2004); Kate Kerley and Chris Cunneen, 'Deaths in Custody in Australia: The Untold Story of Aboriginal and Torres Strait Islander Women' (1995) 8(2) *Canadian Journal of Women and the Law* 531; Rowena Lawrie, 'Speak Out Speak Strong: Researching the Needs of Aboriginal Women in Custody' (New South Wales Aboriginal Justice Advisory Council, 2003); Paxman, above n 53.

can lead to inadequate recommendations for change for both victims and perpetrators of family violence.

There seems to be a tendency, problematic among both Black and feminist politics, to seek to situate oneself in the position of most oppressed and then use this position not as a tool for change but as a justification for a politics of victimhood. This tendency masks an open discussion of hierarchies of oppression and overlooks the power that may be held by individuals in contrast to their theoretical position.⁵⁷

Intersectional perspectives were present in the mid to late 1980s as evidenced by the Manitoba Aboriginal Justice Inquiry (AJI) and other scholarship that argued for the positioning of minority women within race and gender frameworks. As is explored further in the content analysis in Chapter 6, the RCIADIC positioned Indigenous males in the role of victim without considering how they held a position of power in relation to Indigenous women. By doing so, little was achieved to improve the position of either Indigenous men or women within the dominant non-Indigenous culture.

II THEORETICAL FRAMEWORKS SUPPORTING THE PROCEDURES ANALYSIS

A Overview

The procedures analysis is a critical review of the processes and procedures undertaken by the RCIADIC. The extent to which the RCIADIC was *capable* of incorporating a race *and* gender approach is assessed using: (a) law and politics scholarship that has critiqued the processes used by royal commissions by utilising political and liberal legal ideological frameworks; (b) ‘deep colonising’ and ‘decolonising’ scholarship; and (c) intersectional race and gender epistemological scholarship. It is not always easy to separate questions concerning how knowledge is derived from what is actually known and constructed,⁵⁸ but in the case of this thesis the distinction is an important one.

⁵⁷ Lucashenko, above n 51, 157.

⁵⁸ Graycar and Morgan, above n 10, 56.

B *Law and Politics Scholarship*

There have been a number of scholarly texts and articles written about the role, functions and powers of royal commissions.⁵⁹ These texts have critiqued the manner in which royal commissions have been established and the parameters within which they can conduct their investigations. Of particular relevance to this thesis is the scholarship that has discussed the way in which procedures and processes can be manipulated by the commissioners or the government without exceeding any statutory authority. It is important, however, to also understand the general and specific powers of investigation that were granted to the RCIADIC in order to fully comprehend the idiosyncratic challenges that were made to the Letters Patent and Commissions issued. The outcomes of the challenges ultimately shaped the way the RCIADIC used its powers. These powers were in some jurisdictions granted under the enactment of specific legislation and in other cases appeared in general evidentiary provisions. A detailed discussion of the powers that were granted to the RCIADIC and the challenges that were mounted against them is given in Chapter 4.

Aside from matters of procedural power, royal commissions have been critiqued for their administrative structure, decisions and functions. For example, some scholars have considered the propriety of appointing judges to head such investigations.⁶⁰ Their concern stems from the belief that judges should avoid political controversy.⁶¹ Leonard Hallett, a legal expert on royal commissions,

⁵⁹ See for example Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001); Hallett, above n 3; A Paul Pross, Innis Christie and John A Yogis (eds), *Commissions of Inquiry* (1990); Janet Ransley, *Inquisitorial Royal Commissions and the Investigation of Political Wrongdoing* (PhD thesis, Griffith, 2001); Tom Sherman, *Executive Inquiries in Australia: Some Proposals for Reform. Law and Policy Paper No 8* (1997); Patrick Weller (ed), *Royal Commissions and the Making of Public Policy* (1994). Note that some authors use the term 'commissions of inquiry' and others 'royal commissions': See Ransley, above n 59, ch 2 for a detailed discussion of how these terms are related. Also Leonard Hallett states that the proper way to refer to a royal commission is 'royal commission of inquiry' and that simply calling it a royal commission is technically incorrect: Hallett, above n 3, 1. Unless quoting directly from an author, this thesis uses the terms 'royal commission', 'commission' or simply 'inquiry' interchangeably to include references to royal commissions of inquiry.

⁶⁰ Leonard Arthur Hallett, 'Judges as Royal Commissioners' (1987) 61(8) *Law Institute Journal* 811; Hallett, *Royal Commission and Boards of Inquiry*, above n 3; George Winterton, 'Judges as Royal Commissioners' (1987) 10 *UNSW Law Journal* 108.

⁶¹ For example see Winterton, above n 60, which summarises the case for and against judges being appointed as royal commissioners.

argues that judges are meant to remain impartial and separate from the executive, something which may be difficult to do when heading a royal commission established by Parliament. If commissioners appear to be connected with the executive and show preference for a particular view, then Hallett notes that the public might lose confidence in the judiciary as being an impartial umpire in the justice system. As a compromise, Hallett supports the use of retired judges. This, he argues, would avoid problems of conflict of interest that judges still serving on the bench may experience.⁶²

However, the appointment of judicial officers per se raises other matters of concern. Hallett acknowledges that those who head 'investigatory inquiries might require qualities that are more likely to be found in persons who are not judges, persons trained in the science of collection, analysing and evaluating data'.⁶³ This does depend on the type of inquiry conducted, that is, whether the inquiry is primarily inquisitorial or investigative.⁶⁴ It is not difficult to imagine investigative inquiries crossing disciplinary boundaries that are foreign to commissioners who are solely legally trained.

One way to resolve the problems associated with appointing commissioners who do not have adequate social science research skills is to appoint more than one commissioner. This in fact happened with the Western Australian office of the RCIADIC, although the appointment of an additional commissioner in that State occurred mainly because of the large number of deaths that needed investigating rather than as an effort to address any inadequacy of skills. Nationally, the RCIADIC used a multi-member approach due to the enormity of the task. Hallett notes, however, that the establishment of an inquiry that has more than one commissioner may also cause problems. In particular, there may be delays in

⁶² Hallett, *Royal Commission and Boards of Inquiry*, above n 3, 73.

⁶³ Ibid. See also Patrick Weller, 'Royal Commissions and the Governmental System in Australia' in Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 259.

⁶⁴ For example George Winterton notes that '[i]nquiries best suited to be chaired or solely conducted by an eminent lawyer, including a judge or retired judge, are obviously those raising issues analogous to those arising in civil or criminal trials': Winterton, above n 60, 117. An inquisitorial inquiry is one which focuses on fact-finding and quasi-judicial processes whereas an investigative inquiry focuses on the 'development of policy or the resolution of policy conflicts': Ransley, above n 59, 67.

delivering reports and recommendations.⁶⁵ Commissioners may have their own agenda and it may take time to prepare more than one report or to reach agreement. Hallett suggests that the executive government should have the benefit of all the differing opinions, although this may create more confusion rather than a clarification of the issues.⁶⁶

The use of a royal commission to conduct both a fact-finding and an advisory investigation can create other problems, such as those associated with the collection, management and dissemination of voluminous amounts of information.⁶⁷ Innis Christie and A Paul Pross⁶⁸ suggest that many of the problems associated with royal commissions can be avoided if governments use other forums (eg ombuds and courts) to deal with individual misbehaviour: 'If the dichotomy between investigative and advisory commissions could be maintained, and the former used very sparingly, commissions of inquiry might continue to be useful instruments of policy formulation.'⁶⁹ However, these authors acknowledge that this dichotomy may not be maintainable because the giving of policy advice may require the conducting of a fact-finding inquiry to determine what went wrong in the past. 'Thus, in reality the best we can call for is clarity of thought in drawing the mandates of commissions of inquiry, not the absolute separation of advisory and investigatory roles.'⁷⁰ The RCIADIC started out as a quasi-judicial investigative inquiry, but its Letters Patent and Commissions were later amended so that it also conducted a social science investigation about why it was that so many Indigenous people were being incarcerated and dying in custody (the 'underlying issues' portion of the inquiry). Combining these two approaches may have inhibited the RCIADIC's ability to fully address all of the problems that it uncovered because of the enormity of the task.

⁶⁵ Hallett, *Royal Commission and Boards of Inquiry*, above n 3.

⁶⁶ *Ibid* 73-74.

⁶⁷ For a general discussion of the problems that can occur when a commission is required to perform dual investigative roles see: Innis Christie and A Paul Pross, 'Introduction' in A Paul Pross, Innis Christie and John A Yogis (eds) *Commissions of Inquiry* (1990) 1.

⁶⁸ *Ibid* 17.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

Whether royal commissions can ever make radical recommendations that may more aptly satisfy the expectations of complainants is a question that Liora Salter claims is paradoxical because the process of a royal commission itself inhibits such a thing from happening.⁷¹ Salter uses the Canadian Berger Inquiry⁷² as an example of an inquiry that was able to engage in a radical debate. It was able to do so because of the extensive investigative procedures it undertook which included wide-ranging consultations and close attention to the language used in making recommendations. Conversely, Richard Simeon identifies factors such as time constraints, the complexity of the process, political pressure, 'conventional wisdom', 'disciplinary norms', and maintaining ownership of one's work, in explaining why inquiries do not produce results or recommendations that are revolutionary.⁷³

Finally, Janet Ransley notes that for an inquiry to be 'successful', it is important that it maintain its independence from the executive while retaining a degree of political and public support.⁷⁴ All too often, however, the public perceives the establishment of an inquiry as being merely symbolic. That is, it is a mechanism used by government as a delaying tactic while it considers its options, rather than being a legitimate method of investigating misconduct.⁷⁵ Those appointed to head royal commissions therefore have a responsibility to maintain the apparent integrity of the investigation conducted. This requires management of both the process and the media.⁷⁶ Management of the media is difficult, however, if the complainants of alleged misconduct lack public sympathy. In such a situation, an inquiry needs to ensure that the public receives a sufficient amount of information that accurately reflects the concerns of the complainants. Management of the media would have been most pertinent to the RCIADIC because it was dealing

⁷¹ Liora Salter, 'The Two Contradictions in Public Inquiries' in A Paul Pross, Innis Christie and John A Yogis (eds) *Commissions of Inquiry* (1990) 173.

⁷² The Canadian Berger Pipeline Inquiry was headed by Justice Thomas Berger and it considered the social, economic and environmental impact of building a gas pipeline from the Beaufort Sea in Northern Canada to the Alberta boarder in the Northwest Territories. The final report, which was released on 9 May 1977, recommended a 10 year moratorium on building a pipeline while Native land claims were settled.

⁷³ Richard Simeon, 'Inside the Macdonald Commission' (1987) 22 *Studies in Political Economy* 167.

⁷⁴ Ransley, above n 59, 184, 222.

⁷⁵ Scott Prasser, 'Royal Commissions and Public Inquiries: Scope and Uses' in Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 1.

⁷⁶ Ransley, above n 59, 221-222.

with a controversial and complicated topic, particularly when it started investigating underlying issues.

Much of the literature that critiques the processes and outcomes of royal commissions focuses on problems that are specific to a particular inquiry.⁷⁷ Such work provides an informative framework from which to critique the RCIADIC's processes. I use this literature to analyse the procedures used, identifying the constraints that are typically associated with using royal commissions to investigate public and official misconduct. In addition I use decolonising, and intersectional epistemological perspectives to critically evaluate whether these procedural constraints affected the extent to which the RCIADIC was able to take both race *and* gender into account in conducting its inquiry.

C *Deep Colonising Scholarship*

The concept of 'deep colonising practices' assists with fully comprehending the extent to which the practices used by the RCIADIC were able to acquire knowledge about and ultimately understand the position of Indigenous people.⁷⁸ This concept overlaps with and also informs an intersectional epistemological approach described below. It has been noted that the collection and admission of evidence by a court is typically not carried out in a culturally sensitive manner.⁷⁹ The use of inappropriate methodological and analytical processes often leads to unsuitable conclusions and outcomes.

Deborah Bird Rose uses the term 'deep colonising practices' to describe how a land claim tribunal, which is meant to assist in reversing one of the consequences of conquest, actually reinforces and 'perpetuates the colonising practice of conquest and appropriation'.⁸⁰ For Rose deep colonising practices exist when

⁷⁷ See for example Mike McConville and Lee Bridges (eds), *Criminal Justice in Crisis* (1994); Pross, Christie and Yogis, above n 59; Weller, above n 59.

⁷⁸ Deborah Bird Rose, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6.

⁷⁹ McRae et al, above n 28.

⁸⁰ Rose, above n 78, 6.

[c]olonising practices are embedded within decolonising institutions ... [which] may conceal, naturalise, or marginalise continuing colonising practices. ... Deep colonising is the term used for this process – conquest embedded within institutions and practices which are aimed toward reversing the effects of colonisation.⁸¹

Rose uses the concept of deep colonising to explain how Indigenous women's views were not heard in a land claim case. Two apparently contrary things occurred: Indigenous women's presence was erased from the claim, and at the same time, Indigenous women's presence was over-determined by stereotypical views of gender relations. Rose credits these problems as arising from the predominant use of male lawyers, anthropologists, and land commissioners in collecting the evidence, and a more general stereotypical view of gender relations in Indigenous societies:

The written record reflects processes of consultation, investigation, preparation, presentation and representation. It clearly reflects the male dominance of the legal profession and the greater numbers of men who have been employed as senior anthropologists in the preparation of land claims. The written record thus tends to confirm the androcentric heritage of anthropology as well as to reinforce the stereotype, commonly held by many men and women of non-Aboriginal culture, that Aboriginal societies are male dominated, and that women are essentially pawns in social life.⁸²

In addition to documents that present both white and male dominance, the process of giving testimony ignores Indigenous gender protocols. For example, when claiming native title with reference to sacred 'women's business', Indigenous women are required to give this evidence to male judicial officers or lawyers. While this breach of Indigenous gender protocols routinely occurs for women, it does not for men, whose 'secret men's business' can be heard by any male. Rose concludes that:

⁸¹ Ibid.

⁸² Ibid 8.

What matters in land claims ... is not whether women reveal secrets. The important issue is whether women have opportunities fully and freely to give their evidence.⁸³

The example of Indigenous women's inability to speak 'fully and freely' in a land claim tribunal has its analogy in the methods by which the RCIADIC conducted its inquiry. Although an Indigenous commissioner was appointed and Aboriginal Issues Units (AIUs) were established (albeit 18 months after the RCIADIC began) with the stated aim of incorporating an Indigenous perspective, it is uncertain whether this aim was, or even could be, achieved.

Whether these two modifications sufficiently allowed Indigenous perspectives, particularly those of Indigenous women, to emerge within the RCIADIC process is an important question to consider. Indeed, it may have been too late in the process to 'correct for' a hegemonic white starting point. Kathy Whimp, a solicitor and the associate to the national commissioner, surmises that:

It is doubtful whether any inquiry which was not as independent as a royal commission could have as successfully brought Aboriginal people into its process.⁸⁴

Although this may be true, it is also possible that the RCIADIC process, a process Rose would describe as a decolonising institution, continued the practice of colonisation.

Linda Tuhiwai Smith, in her book *Decolonizing Methodologies: Research and Indigenous Peoples*⁸⁵ describes the way imperialism has directed the research agenda in colonised nations and how this has influenced the manner in which indigenous peoples all over the world have been portrayed and considered. Tuhiwai Smith wrote her book primarily for indigenous social science researchers; however, the ideas espoused are useful for non-indigenous people

⁸³ Ibid 10.

⁸⁴ Whimp, above n 4, 89.

⁸⁵ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (1999).

who are conducting research, whether legal or sociological, about indigenous people. By ‘decolonising methodology’, Tuhiwai Smith does not call for a ‘total rejection of all theory or research or Western knowledge’.⁸⁶ Instead ‘it is about centring our concerns and world views and then coming to know and understand theory and research from our own perspectives and for our own purposes’.⁸⁷

Similarly, Irene Watson recognises the need to decolonise *herself* when writing about ‘raw law’, which is how Watson describes the traditional laws of her people.⁸⁸ She acknowledges that her attempts to write in a decolonising manner, ‘does not always follow the rules of grammar or “normal” academic structure, ... the ideas and arguments are there, they are perhaps just positioned differently’.⁸⁹ Although Watson talks about the need to decolonise her writing and representations and Tuhiwai Smith focuses on the research process itself, both provide insights into how research can be structured by non-Indigenous people to include Indigenous perspectives. Tuhiwai Smith warns that researchers who research minority cultures should always be conscious of the ‘power dynamic which is embedded in the relationship with their subjects’.⁹⁰ Unless they do so, privileged information will inevitably be used to further the colonising project despite well-meaning intentions to do otherwise:

They have the power to distort, to make invisible, to overlook, to exaggerate and to draw conclusions, based not on factual data, but on assumptions, hidden value judgements, and often downright misunderstandings. They have the potential to extend knowledge or to perpetuate ignorance.⁹¹

Therefore, a decolonising methodology, whether it is used for writing or conducting research, needs to be something that is consciously embraced. Without adopting such a perspective, the conduct and reporting of Western

⁸⁶ Ibid 39.

⁸⁷ Ibid.

⁸⁸ Irene Watson, 'Kaldowinyeri - Munaintya in the Beginning' (2000) 4(1) *Flinders Journal of Law Reform* 3, 13.

⁸⁹ Ibid.

⁹⁰ Tuhiwai Smith, above n 85, 176.

⁹¹ Ibid.

research may silence the voices of the colonised and may cause more harm than good. As Tuhiwai Smith notes:

Although most researchers would believe sincerely that they wish to improve the conditions of their research participants, this has not always happened. Research projects are designed and carried out with little recognition accorded to the people who participated – ‘the researched’. Indigenous people and other groups in society have frequently been portrayed as the powerless victims of research which has attributed a variety of deficits or problems to just about everything they do. Years of research have frequently failed to improve the conditions of the people who are researched.⁹²

It may be unrealistic to expect non-Indigenous researchers, appointed by governments, and with limited time and a constant pressure to produce, to engage in an Indigenous methodology. To develop such a project would require the researchers to become familiar with and trained in the intricacies of exactly what it means to use a decolonising epistemology. It is a difficult perspective and position to understand and conceptualise. Moreover this epistemology was conceptualised several years after the RCIADIC finished its investigation. Critical Indigenous perspectives which to some degree acknowledged the need for decolonising practices were, however, present in the 1980s in Australia, as evidenced by the 1986 Australian Law Reform Commission’s inquiry into the recognition of Aboriginal customary laws.⁹³ Despite the difficulties, the use of more simple techniques such as maintaining a critical perspective, using culturally sensitive approaches, and being mindful of the need to encourage and advance Indigenous voices and experiences were achievable.

Although the RCIADIC, by establishing AIUs and employing Indigenous staff, may have been attempting to acquire Indigenous knowledge and adopt more appropriate research strategies, it is possible that it simply did what most Western researchers have done in the past. Namely, as a research institution, it may have continued to inadvertently advance the values, culture and practices of the

⁹² Ibid 175-176.

⁹³ Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

dominant ideology. Although Tuhiwai Smith's conceptual framework has only recently been published, it is still important to consider her ideas when evaluating the RCIADIC processes. Significant lessons can be learned from such an analysis.

D *Intersectional Race and Gender Epistemological Scholarship*

Scholarship that considers the intersection of feminist and critical Indigenous epistemological perspectives when analysing legal procedures and decision-making processes is important for this analysis. Although Rose's deep colonising critique of a land claim tribunal examined the position of Indigenous women, she was more interested in applying the concept of deep colonising to critique the tribunal's ability to incorporate Indigenous perspectives in general. Therefore, although 'deep colonising' informs an intersectional race and gender analysis, it is useful to distinguish between them to emphasise the fact that an Indigenous critique is important and that it forms a basis from which the intersectional approach begins.

Over a decade ago, Regina Graycar and Jenny Morgan considered whether legal processes are able to adopt a feminist perspective. They asked '[g]iven the nature of the feminist critique of law, can strategies involving traditional legal forums and methods be effective'?⁹⁴ In the same way, regard should be given to whether a royal commission which was investigating not only the Indigenous deaths in custody, but also the social, cultural and legal factors surrounding the deaths, and which was controlled by lawyers, could appropriately address the problems confronting Indigenous women (let alone Indigenous people in general).

Mary Jane Mossman⁹⁵ claims that because of the way judicial reasoning characterises legal problems, uses precedent to validate decisions that are made and applies the rules of statutory interpretation, legal method could not incorporate a feminist perspective. Indeed she states that judicial statements do

⁹⁴ Graycar and Morgan, above n 10, 400.

⁹⁵ Mary Jane Mossman, 'Feminism and Legal Method: The Difference It Makes' (1986) 3 *Australian Journal of Law and Society* 30.

everything they can to distance legal problems from politics and morality, and they are consequently constrained by the boundaries of ‘legality’ from considering other perspectives. Mossman does not admit defeat for feminists, however, and instead recognises that ‘if feminism has a power to transform the perspective of legal method, it must be because it permits us “a new way of seeing” both the reality of our present lives and a new way of imagining a better one’.⁹⁶ Catharine McKinnon is also optimistic when she states:

[c]onsciousness raising is its quintessential expression. Feminism does not appropriate an existing method – such as scientific method – and apply it to a different sphere of society to reveal its preexisting political aspect. Consciousness raising not only comes to know different things as politics; it necessarily comes to know them in a different way. Women’s experience of politics, of life as sex object, gives rise to its own method of appropriating that reality: feminist method. As its own kind of social analysis, within yet outside the male paradigm just as women’s lives are, it has a distinctive theory of the *relation* between method and truth, the individual and her social surroundings, the presence and place of the natural and spiritual in culture and society, and social being and causality itself.⁹⁷

Adopting such an epistemology will not necessarily lead to the truth, but it does permit the recognition of difference, something that liberal legal processes do not achieve.⁹⁸ As an example of the incorporation of a feminist methodology within legal processes, Christine Boyle considers how a feminist judge would determine the definition of sexual assault. She argues that such a judge would use a ‘consciousness-raising process’ which would involve talking to a number of

⁹⁶ Ibid 48.

⁹⁷ MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory', above n 13, 535-536.

⁹⁸ Graycar and Morgan, above n 10. A pioneer in the area of feminist epistemology was Sandra Harding: Sandra Harding and Merrill B Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (1983); Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (1991). Her work informed the critiques of feminist legal scholars who took an epistemological perspective. A more recent publication of Harding’s focuses on postcolonial social science methodologies: Sandra Harding, *Is Science Multicultural? Postcolonialisms, Feminisms, and Epistemologies* (1998). Her work is not referred to in the body of this thesis because it does not specifically relate to legal systems.

women in order to understand their views of the world, while at the same time sharing and analysing her own experience.⁹⁹

As we have already observed from critical race and Indigenous scholarship, feminist legal critique alone is inadequate in analysing the experiences of Indigenous women. Instead, as well as the concept of decolonising practices, scholarship that has taken an intersectional race and gender approach is needed. Minority and white feminist scholars who have used an intersectional analysis when conducting research about the position of minority women in legal cultures include Anne Cossins, Kimberle Crenshaw, and Kathleen Daly.¹⁰⁰ These scholars focused on the intersection of race and gender in the United States in considering whether there were differences in the judicial treatment of, and sentencing of, females in minority groups.

Other scholars such as Donna Coker,¹⁰¹ Anne Cossins,¹⁰² Sherene Razack,¹⁰³ Julie Stubbs and Julia Tolmie¹⁰⁴ have focused on indigenous women who have been victims of family violence or sexual abuse. They have analysed the appropriateness of court processes and the legal reasoning used, and how certain dispute resolution methods and judicial reasoning have affected indigenous women differently to indigenous men.¹⁰⁵ The authors ask whether legal and quasi-legal processes (such as the presentation of evidence, the interpretation of that evidence and the type of forum within which disputes are heard) are capable of including the voices and experiences of indigenous women. For example, Razack's critique of how Canadian judges interpreted evidence of Aboriginal cultural and community behaviours when sentencing offenders convicted of

⁹⁹ Christine Boyle, 'Sexual Assault and the Feminist Judge' (1985) 1 *Canadian Journal of Criminology* 93, 102.

¹⁰⁰ Cossins, above n 8; Crenshaw, 'Demarginalizing the Intersection of Race and Sex', above n 20; Kathleen Daly, 'Criminal Law and Justice System Practices as Racist, White, and Racialized' (1994) 51(2) *Washington and Lee Law Review* 431; Kathleen Daly, *Gender, Crime, and Punishment* (1994).

¹⁰¹ Donna Coker, 'Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking' (1999) 47(1) *UCLA Law Review* 1.

¹⁰² Cossins, above n 8.

¹⁰³ Razack, above n 35.

¹⁰⁴ Julie Stubbs and Julia Tolmie, 'Race, Gender and the Battered Woman Syndrome: An Australian Case Study' (1995) 8 *Canadian Journal of Women and the Law* 122.

¹⁰⁵ These critiques also identify the manner in which legal discourse categorises Indigenous women, although this will not be something which will be explored in this thesis.

family or sexual violence shows that deeply ingrained cultural assumptions affected the interpretations in favour of Aboriginal men. Behaviours typically (but often inaccurately) associated with Aboriginal people, such as alcohol abuse and the sexual promiscuity of young Aboriginal women, were identified by Razack as mitigating the sentences imposed by non-Aboriginal judges on male Aboriginal sex offenders. Unfortunately, well-meaning non-Aboriginal judges and academics often misunderstood Aboriginal cultural customs and behaviours. They thereby imposed sentences and made broad-sweeping statements, believing them to be culturally sensitive and appropriate, but which were in effect inappropriate for the offence committed. Razack concludes that Aboriginal women are often the ones who are disempowered when white lawyers and judges misunderstand and misinterpret cultural norms. Her analysis vividly portrays how culture can be used against women. Similarly, the RCIADIC's ability to understand Indigenous cultural norms and how such norms affected the communication and interpretation of information presented at the hearings and consultations is assessed from an intersectional perspective. Thus, the masculine racialised (white) bias of the processes used by the commissioners and other legal staff who conducted the investigations and produced the RCIADIC reports can be brought to light.¹⁰⁶

Although it is unrealistic to imagine that the RCIADIC could have fully embraced an intersectional methodology, there are certain aspects of this methodology that could have easily been adopted during the inquiry. For instance, the appointment of an Indigenous female commissioner or the use of separate meetings for Indigenous men and women may have allowed different information to emerge. This may ultimately have produced different recommendations. Whether or not such processes could and should have been introduced is considered in the procedures analysis.

¹⁰⁶ There were non-legal staff who also assisted with the production of the RCIADIC reports. As is explained further in this thesis, these people were, however, guided and influenced in their writings by the dominant legal culture.

CONCLUSION

In summary this thesis uses, firstly, an intersectional theoretical framework to support a content analysis of the Indigenous texts and official reports. Secondly, law and politics literature relevant to the operation of royal commissions, deep and de-colonising theoretical concepts, and intersectional epistemological scholarship are used to analyse of the procedures and processes of the RCIADIC to explain why it focused on race rather than race and gender.

The following chapter explains the methods and rationale used to collect the data for this research, the methods used to analyse the data and the limitations of the methodology.

CHAPTER 3: METHODOLOGY

INTRODUCTION

The two main analyses undertaken within this thesis are: (a) an analysis of the content in the texts and reports produced by the Aboriginal Issues Units (AIUs) and the RCIADIC to determine the extent to which they each considered Indigenous women ('the content analysis'); and (b) an analysis of the RCIADIC's procedures within the context of the prevailing liberal legal ideology and the procedural constraints imposed upon the RCIADIC by governments to determine whether or not such ideology and constraints prevented the RCIADIC from undertaking an intersectional approach in its investigations ('the procedures analysis'). This chapter explains the methodology used to conduct the two analyses.

Part I sets out background information which describes the way in which the RCIADIC and the AIUs were established. Although the establishment and conduct of the RCIADIC and the AIUs is described more fully in Chapter 4, it is important to understand their structure to fully appreciate the methodology used for this thesis. Part II explains how the two types of data used in this thesis, textual data and interview data, were collected. Part III describes the method of analysis of the data collected, and Part IV discusses the limitations of the methodology.

I BACKGROUND INFORMATION

The RCIADIC was initiated in 1987 at both a Commonwealth and a State and Territory level. Letters Patent were issued by the Governor-General of Australia and the Governors of New South Wales, Victoria, Queensland, South Australia and Tasmania, and Commissions were issued by the Governor of Western

Australia.¹ The Administrator of the Northern Territory issued Letters Patent under the *Commission of Inquiry (Deaths in Custody) Act 1987*.

The set up of the inquiry reflected the number of deaths in each jurisdiction. Western Australia, which had the largest number of deaths (32), had a separate office in Perth to investigate the individual deaths, and was headed by Commissioner Daniel O’Dea. The Western Australian AIU was also based in Perth. Due to the large number of deaths that required investigation in Western Australia, Commissioner Patrick Dodson was subsequently appointed to investigate the underlying issues associated with the deaths; his office was based in Broome.

Queensland had 27 deaths in custody needing investigation. A separate office in Brisbane was therefore established, headed by Commissioner Lewis Wyvill. The Queensland AIU was also based in Brisbane.

New South Wales, Victoria and Tasmania had 19 deaths in total (15, 3 and 1 respectively). A main office was established in Sydney, headed by Commissioner John (Hal) Wootten, and a sub-office was established in Melbourne. A temporary office in Hobart was established for the death hearing that was conducted there. AIUs were located in Sydney, Melbourne and Hobart.

South Australia and the Northern Territory had 21 deaths in total (12 and 9 respectively). Commissioner Elliott Johnston headed the offices in Adelaide and Darwin, although he was mainly based in Adelaide. He was also the national commissioner. AIUs were set up in Adelaide and Alice Springs. The AIU office in Alice Springs was used by Commissioner Johnston when he was in town for the death hearings.

A Canberra office was also established where the national secretary and those working in the Criminology Research Unit (CRU) were based.²

¹ See the footnote at Australia, Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody: National Report, Vol 1-5* (1991) vol 5, 161 (abbreviated as *National Report* in repeated citations).

The process of the RCIADIC investigation consisted of two phases. The first phase, which commenced when the RCIADIC was established in October 1987, involved the investigation of the deaths in custody of Indigenous people from 1 January 1980 to 31 May 1989. The second phase, which commenced when the Letters Patent and Commissions were extended in May 1988, related to the inquiry into and reporting of the underlying social, cultural and legal factors that were associated with the deaths.³

In the first phase the commissioners took a quasi-judicial approach by conducting formal hearings with interested parties present.⁴ The focus of these hearings was to find out how the deaths had occurred. The commissioners at this stage were more interested in finding whether there was any foul play on the part of police and prison officers.⁵ Even in cases where foul play had been ruled out, such as where the death had resulted from some pre-existing medical condition, the focus was still on the custodial care that had been provided, such as the delivery of health services. The commissioners were not concerned with other 'underlying issues'.⁶

The second phase was initiated when it became evident that the major reason for the large number of deaths in custody 'involved a much broader range of factors than those immediately associated with the custodial experience'.⁷ At this time the Letters Patent and Commissions were broadened to encompass an investigation into the underlying issues relating to the deaths. In order to investigate the underlying issues the RCIADIC adopted a social science approach and gathered information from:

² This office was sometimes referred to as the national office although the national commissioner and national counsel assisting were based in Adelaide.

³ *National Report*, above n 1, vol 5, 157-158; Kathy Whimp, 'The Royal Commission into Aboriginal Deaths in Custody' in Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 80.

⁴ Interested parties included the family of the deceased, State government representatives, police unions/representatives and other individuals associated with the deaths: *National Report*, above n 1, vol 5, 244.

⁵ *Ibid* vol 1, 2.

⁶ *Ibid* vol 5, 244.

⁷ *Ibid* vol 1, xlvii.

- government files and interviews;
- public meetings;
- submissions received from interested parties that were both publicly invited and solicited privately (mainly from Indigenous organisations);
- research conducted through its CRU and AIUs (set up in each of the six States and the Northern Territory); and
- research that was commissioned from various consultants on selected topics.⁸

The archival material of the RCIADIC is an extensive collection of data. A summary of the records compiled by the RCIADIC is contained in the guidebook prepared for the RCIADIC records administered by the National Archives of Australia (NAA) office.⁹ The RCIADIC created or collected about 200 shelf meters of records. It produced more than 100,000 pages of transcripts, together with 97 individual case reports that were each about 100 pages long.¹⁰ The *National* and regional reports comprised approximately 5039 pages.¹¹

Certain records of the RCIADIC, including records pertaining to 16 of the deaths, administration records and other records that are culturally sensitive, are not available to the public until the material is 30 years old. Other records cannot be accessed unless the Office of Prime Minister and Cabinet (OPMC), after consulting with relevant government agencies and Indigenous organisations, gives approval. Records such as transcripts of open hearings, research papers and submissions that were publicly available at the time of the RCIADIC are still readily available.¹²

⁸ Ibid vol 5, 245-251.

⁹ Peter Nagle and Richard Summerrell, *Aboriginal Deaths in Custody: The Royal Commission and Its Records, 1987-91* (1998).

¹⁰ Commissioner Wyvill wrote a combined report for the investigations into the deaths of Richard Frank Hyde, David Mark Koowootha, and Perry Daniel Nobel.

¹¹ Mark Harris, 'Deconstructing the Royal Commission - Representations of "Aboriginality" in the Royal Commission into Aboriginal Deaths in Custody' in Greta Bird, Gary Martin and Jennifer Nielsen (eds) *Majah: Indigenous Peoples and the Law* (1996) 191; Nagle and Summerrell, above n 9. My calculations also indicate that these reports contain over 5000 pages.

¹² Nagle and Summerrell, above n 9.

II DATA COLLECTION

A Introduction

The RCIADIC has generated a substantial body of scholarship. The perspectives range from critiquing the manner in which the RCIADIC conducted its inquiry, to critiquing how its recommendations have been implemented by federal, State and Territory governments. Scholars have mainly used the *National, Interim*, regional and death reports prepared by the commissioners, submissions made to the RCIADIC, statements collected by various government agencies regarding certain deaths, and personal observations as their primary source materials.¹³ These materials have been analysed using discourse analysis,¹⁴ or a critical narrative perspective.¹⁵ Personal observations have also been used to substantiate such analyses.

¹³ See for example Chilla Bulbeck, 'The Dark Figures: How Aboriginal Women Disappeared from the Findings of the Royal Commission into Aboriginal Deaths in Custody' (undated); Kerry Carrington, 'The Death of Mark Quayle: Normalising Racial Horror in Country Towns & Hospitals' (1991) 4 *Journal for Social Justice Studies, Special Issue Series, Politics Prisons and Punishment - Royal Commissions and 'Reforms'* 161; Gillian Cowlshaw, 'Inquiring into Aboriginal Deaths in Custody: The Limits of a Royal Commission' (1991) (4) *Journal for Social Justice Studies, Special Issue Series: Politics, Prisons and Punishment - Royal Commissions and 'Reforms'* 101; Richard W Harding, 'Prisons Are the Problem: A Re-Examination of Aboriginal and Non-Aboriginal Deaths in Custody' (1999) 32(2) *The Australian and New Zealand Journal of Criminology* 108; Harris, above n 11; Kate Kerley and Chris Cunneen, 'Deaths in Custody in Australia: The Untold Story of Aboriginal and Torres Strait Islander Women' (1995) 8(2) *Canadian Journal of Women and the Law* 531; David McDonald and Kathy Whimp, 'Australia's Royal Commission into Aboriginal Deaths in Custody: Law and Justice Issues' in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (1995) 188; Jeannine Purdy, 'Royal Commissions and Omissions: What Was Left out of the Report on the Death of John Pat' (1994) 10 *Australian Journal of Law and Society* 37; Lee Sackett, 'A Post-Modern Panopticon: The Royal Commission into Aboriginal Deaths in Custody' (1993) 28(3) *Australian Journal of Social Issues* 229; Michael Wearing, 'Legal - Administrative Repertoires: Official Accounts of Black Deaths in Custody' (1991) 4 *Journal for Social Justice Studies, Special Issue Series, Politics Prisons and Punishment - Royal Commissions and 'Reforms'* 133; Whimp, above n 3,.

¹⁴ See for example Harris, above n 11; Purdy, above n 13; Wearing, above n 13.

¹⁵ See for example Judy Atkinson, "'Stinkin Thinkin'" - Alcohol, Violence and Government Responses' (1991) 2(51) *Aboriginal Law Bulletin* 4; Ron Brunton, *Black Suffering, White Guilt? Aboriginal Disadvantage and the Royal Commission into Deaths in Custody* (1993); Committee to Defend Black Rights, 'Initial Responses to the First Four Case Reports: Kinsley Dixon, Charlie Michaels, Edward Murray and John Highfold' (1989) 2(36) *Aboriginal Law Bulletin* 6; Cowlshaw, above n 13; Chris Cunneen and David McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission in Aboriginal Deaths in Custody* (1997); National Aboriginal and Islander Legal Services Secretariat, 'An Interesting and Informative Chat Is Not What I Had in Mind...' (1989) 2(36) *Aboriginal Law Bulletin* 12.

Like previous research, I rely on certain reports and texts prepared by the RCIADIC and the AIUs. However, I have access to some that were unpublished and more importantly, I interviewed people who either worked for the RCIADIC or were involved in some crucial way with it. The interviews substantiate the material contained in the texts and reports and allow comparisons to be made between jurisdictions, between Indigenous and non-Indigenous employees, and between the views of people who held different positions within the RCIADIC.¹⁶ It is the first time interviews have been used to assess the RCIADIC's work.¹⁷

B *Textual Material*

1 *Selection and Classification of the Texts and Reports Used*

All of the final published reports of the RCIADIC, coupled with various Indigenous reports and submissions made to the RCIADIC, constitute a vast resource for analysis. Due to the enormity of the material gathered and the time constraints in completing this thesis, only certain pivotal reports are analysed.¹⁸ I chose to focus on the death reports, and the *National, Interim*,¹⁹ and regional

¹⁶ One of the main distinctions used in relation to roles is whether a person was legally trained or not. The use of this overarching categorisation has been used not only because it best reflects any effect of the dominant liberal legal ideology but also because it best maintains the confidentiality of the responses and the anonymity of the respondents.

¹⁷ The two types of data gathered for this research – documents and interviews with key actors in the RCIADIC – each informed the collection and analysis of the other. For example, the information obtained from analysing the texts provided further insights about who should be interviewed and what questions should be asked. Similarly, the information obtained from the people who were interviewed provided knowledge about how the texts should be read and how the contents should be analysed. This related in particular to the death and regional reports. Two of the people I interviewed suggested that I read the death reports in chronological order because the information that was included in the reports changed over time as the focus of the RCIADIC changed. Although I did not initially adopt this approach, it later informed how I extracted certain material from those reports. In the same way, knowledge that some of the regional reports were prepared around the same time as the *National Report* informed my reading of that report. The analysis of the data was an ongoing process which did not end until this thesis was completed.

¹⁸ For a list of the types of documents produced and collected by the RCIADIC see Appendix 2. Not all of these reports were analysed for this thesis. I have chosen to consider only the final published reports of the RCIADIC rather than focusing on transcripts of hearings, non-Indigenous submissions and other evidence submitted at the hearings. This is because the final published reports are the documents that inform policy making and they are also the documents that best reflect the final findings of the RCIADIC.

¹⁹ The *Interim Report* does not focus on the social and cultural underlying issues. Instead the *Interim Report* was to '[f]irstly, ... inform Governments of the Commission's activities to date, to update information concerning custodial deaths of Aboriginal persons and to outline briefly the work ahead. Secondly, ... to express recommendations and suggestions which if implemented may serve to improve practices and procedures and limit future custodial deaths ...': Australia,

reports of the RCIADIC which I have labelled ‘official reports’. These reports predominantly reflect non-Indigenous views.

When considering how the RCIADIC treated problems confronting Indigenous women, matters pertaining to underlying issues are arguably more relevant than those relating to how people died. Nevertheless, the death reports prepared by the commissioners for each deceased have been reviewed in order to obtain a profile of the 11 females that died. Information regarding those behavioural characteristics of the 88 males who died that particularly affected Indigenous women has also been extracted from the death reports.

Although Commissioner Dodson is Indigenous, his report has been labelled as an official report of the RCIADIC rather than as an Indigenous text for two reasons. Firstly, his role in the inquiry was first and foremost as a commissioner and not as an Indigenous representative. He was therefore constrained by the dominant (non-Indigenous) legal discourse and the various parameters of the investigation in the same way as the other commissioners. Secondly, non-Indigenous members of relevant communities, and not just Indigenous people and organizations, substantially informed his report. Commissioner Dodson gathered data from community meetings, individual consultations, hearings, the death reports prepared by Commissioners O’Dea, Johnston, Wyvill and Muirhead, and from consultations with the Western Australian AIU.²⁰ His final regional report, which described the underlying issues relating to the deaths in Western Australia, has therefore been considered in the same way as the reports of the other commissioners.

Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody: Interim Report* (1988) 3 (abbreviated as *Interim Report* in repeated citations). Therefore the *Interim Report* is not technically an ‘underlying issues’ report, however, it provides some information about the underlying issues surrounding the custodial experience and deaths in custody and is therefore also analysed.

²⁰ Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Underlying Issues in Western Australia, Vol 1-2* (1991) ch 1 (abbreviated as *Regional Report of Inquiry into Underlying Issues in Western Australia* in repeated citations). Commissioner Wootten did not investigate any deaths in Western Australia. Information obtained from interviews confirmed and supported this categorisation of Commissioner Dodson’s report.

Additionally, I analyse certain documents prepared by the AIUs which I have labelled 'Indigenous texts'. These were all written by Indigenous people and they are perceived as predominantly reflecting the views of the Indigenous communities that were consulted. As such, they permit a comparative analysis of what the Indigenous texts said about the problems faced by Indigenous women and what the commissioners said in national or State reports about the same thing. This analysis contributes to an understanding of the process by which Indigenous accounts are either incorporated into or marginalised by the legal liberal ideology and procedural constraints.

According to the information that I obtained, the New South Wales, Northern Territory, Queensland, Tasmanian, Western Australian and Victorian AIUs all produced a final report. The South Australian AIU was the only AIU that apparently did not produce a final report. As explained in more detail below, I was unable to obtain copies of the *Fighting for Rights* report of the Western Australian AIU and the final reports of the New South Wales, Tasmanian and Victorian AIUs, despite many requests. I did manage to obtain a copy of the Western Australian AIU's *Progress* and *Interim* reports, which I was told were similar to the *Fighting for Rights* report. The South Australian AIU produced discussion papers on various topics. I was able to obtain a copy of one of those discussion papers titled *Aborigines and the Media*.

2 *Finding and Accessing the Indigenous Texts*

The *Interim*, *National*, death and regional reports prepared by the commissioners have all been published and were therefore easily accessible. Furthermore, accessing the Northern Territory AIU report was straightforward as it was published in Volume 5 of the *National Report*.

Other AIU reports, however, were not published. I attempted, unsuccessfully, to locate such reports and submissions through various university libraries, the Aboriginal and Torres Strait Islander Commission (ATSIC), the Australian Institute of Criminology, and the Australian Institute of Aboriginal and Torres Strait Islander Studies. There were also conflicting views about whether or not all

the AIUs actually prepared written reports. The *National Report* of the RCIADIC refers to the AIU reports in a number of places throughout the text and also lists them in Volume 5, Appendix D. Some people who had worked for the RCIADIC claimed however that some of the AIUs did not write reports because they preferred to communicate their findings to the commissioners orally.

In October 2002, I conducted a search of the NAA office database for the AIU reports. The database was very difficult to negotiate and it was not at all clear what records were contained in the collection. After an extensive search of a number of series of records, I identified thirteen documents that appeared to be AIU reports as well as other documents that appeared to be submissions made by Indigenous organisations and individuals. However, based on advice received from the NAA office, I decided to delay a request to access those other documents until access had been granted to what appeared to be the AIU reports.

I first made an application to the OPMC, the department which oversees access to NAA records, to access the AIU reports in October 2002. To date, more than two and a half years later, I have not been granted access. I contacted the OPMC by email and by telephone twenty-six times to inquire about the status of my application and I personally visited the OPMC twice in June 2003. However, my attempts to resolve the problem of access did little to change the situation. On all of these occasions, the officer processing the application claimed that there were problems with the nature of the documents requested and with the obtaining of approval from the ATSIC. My last contact with the OPMC was in January 2005 when I was told that only a few of the reports that I requested had been located in NAA offices in various States. These reports had been forwarded to the OPMC in Canberra for appraisal. Not all of the reports that I had requested were able to be accessed by the OPMC because of the enormity of the database and because they were not sure where the reports were located. The database which is used to locate the records was prepared a long time ago and it did not necessarily match the actual documents held by the NAA office, nor did it accurately reflect the locations of the records. In January 2005 I was told that all that remained to do in order to process my application was for the approving officer to sign off on my application. This person was on leave at the time. Once approval had been

granted, the OPMC would send me copies of the documents. I have yet to receive confirmation of the approval and the copies of the documents.

Many of those interviewed expressed surprise and disappointment at my inability to obtain approval from the OPMC and suggested canvassing the support of senior people who worked on the RCIADIC to try and force a solution. I did not feel comfortable in asking for such assistance since they were already generously allowing me to interview them. I did not consider it appropriate to take advantage of the interviewer-interviewee relationship to ask for other assistance with my research. Some of these senior people were dismayed to learn of the difficulties I was experiencing in seeking the Indigenous texts. None, however, offered to help me expedite the process, which I took as an indication of their reluctance to become involved.

Fortunately, I was able to obtain a number of AIU reports and working papers in the course of conducting the interviews. Because I was not able to obtain any documents from the NAA office, I had to limit my analysis of Indigenous texts to those obtained informally from the people I interviewed. I decided to include working papers of the AIUs and not only final reports because of the limited number of texts available which reflected the work of the AIUs. My analysis of the RCIADIC reports and documents includes only the final reports because these were readily available and they are highly detailed.

The officer at OPMC who processed my application told me that if I had obtained documents that the NAA office either could not find or that were not listed in the database, then those documents probably did not form part of the RCIADIC records. The officer suggested that I could use such documents in my thesis without the approval of the OPMC as long as I had the author's approval to use them. This suggestion was not given in writing, nor was the officer completely confident with her advice. In order to ensure that all ethical considerations have been satisfied, I have placed a confidentiality clause on the chapters describing the contents of the AIU texts rather than rely on the officer's advice.

3 *Indigenous Texts and Official Reports*

The following Indigenous texts and official reports of the RCIADIC have been analysed:

Indigenous AIU Texts

- Northern Territory AIU report, titled *Too Much Sorry Business*, undated, published in Volume 5 of the *National Report*;
- Northern Territory AIU draft report, titled *Draft #1: Too Much Sorry Business*, dated July 1990;
- Northern Territory AIU transcripts and notes of 16 interviews and meetings with the following Indigenous groups and individuals:²¹
 - Aboriginal women from Laynhapuy Women's Resource Centre and Sally Wagg (co-ordinator);
 - Daymbalipu Mununggurr (chairman), Wirrilma Mununggurr (manager), Banambi Wununmurra (secretary) of Laynhapuy Women's Resource Centre;
 - Phillip Bush, trainee co-ordinator, Ngukurr;
 - Julalikari council members, Tennant Creek;
 - Allan Clough and Sidoni, Croker Island;
 - Peter Earngey, Department of Social Security Aboriginal liaison officer, Darwin while he was visiting Maningrida;
 - John Christopherson and his brother Andrew, members of the Murran Clan, Iwadja;
 - Barry Abbott, city service officer, Wallace Rockhole;
 - Maningrida Council;
 - Minjilang Council staff;
 - Young Men from Gurungu Camp, Elliott;
 - Nyirripi Council and young men;
 - Members of North Camp, Gurungu Camp, Elliott;

²¹ There were many more interviews and meetings that the Northern Territory Aboriginal Issues Unit (AIU) had conducted. A list of the meetings are contained in the Northern Territory AIU report: *National Report*, above n 1, vol 5, 503-508. As mentioned, I could only obtain copies of some of the transcripts and notes of the meetings and consultations.

- Gunbalunya Council;
 - Aboriginal Alcoholics Anonymous Group, Alice Springs;
 - Yirrkala community and outstations.
- Northern Territory AIU report, titled *Webula Talk on Grog*, dated September 1989;
- Western Australian AIU report, titled *Progress Report*, dated April 1990;
- Western Australian AIU report, titled *Interim Report*, dated July 1990;
- Queensland AIU report, titled *Discussion Paper No. 1*, dated 26 January 1990;
- Queensland AIU report, titled *The Aboriginal Issues Unit Report to Commissioner Wyvill: Royal Commission into Aboriginal Deaths in Custody*, dated November 1990;
- New South Wales AIU report, titled *AIU Field Trip: Walgett*, dated 5 – 8 September 1989;
- South Australian AIU report, titled *Aborigines and the Media*, dated 7 October 1990.

Official Reports of the RCIADIC

- *Interim Report* (1988) prepared by Commissioner Muirhead;
- *National Report* (1991) (which comprised five volumes).
- *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) (which comprised two volumes and which was prepared by Commissioner Dodson).
- *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* (1991) (which comprised two volumes and which was prepared by Commissioner O’Dea).
- *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) (which comprised one volume and which was prepared by Commissioner Wootten).
- *Regional Report of Inquiry in Queensland* (1991) (which comprised one volume and which was prepared by Commissioner Wyvill).

- The 97 death reports²² prepared by Commissioners Muirhead, Johnston, O’Dea, Wootten and Wyvill.

C Interviews with the Commissioners and Key Players

The second source of data is interviews of 48 people who either worked for the RCIADIC or had some key involvement with the establishment or organisation of the RCIADIC. Although I had initially hoped to collect a large amount of textual data from the NAA office, this was not possible. For this reason, greater reliance was placed on gathering as much information as possible from interviews with various key players.

Families of the deceased were intentionally excluded from the sample for two reasons. The first reason is that this study analyses the manner in which the RCIADIC conducted its inquiry and how this affected the way in which Indigenous women were considered. Although the views of those consulted in the communities informed the direction of the investigation, the main concern of this research is the way in which decisions were made regarding the importance placed on the views espoused. The focus of this research is therefore primarily the RCIADIC itself rather than other sources of information. Indigenous views reflected in the Indigenous texts that were produced and the Indigenous staff members interviewed were canvassed for comparative reasons.

The second, and possibly more important, reason is that I did not want to expose the families of the deceased to another interrogation about the circumstances of the death of their family member. According to the data collected, many of the families of the deceased believe that the RCIADIC unnecessarily exposed the lives of the deceased without achieving any change. I did not want to once again delve into the life of the deceased to determine how it may have impacted on the lives of Indigenous women. This type of information was available from the many reports prepared by the commissioners.

²² There were 97 death reports because three deaths were combined in one report by Commissioner Wyvill.

1 *Sampling Strategy*

The RCIADIC established six offices under the control of five commissioners: Queensland; South Australia and the Northern Territory; Western Australia (Perth); Western Australia (Broome); New South Wales, Victoria and Tasmania; and an office in Canberra. In conducting the interviews the six offices were used to guide the selection of people to be interviewed.²³ At times the commissioners and their counsel and instructing solicitors carried out investigations in jurisdictions other than the one in which they were initially appointed.²⁴ However, for the purposes of this thesis, those people were assigned to the main office in which they were initially appointed unless they spent a substantial amount of time (that is, longer than 6 months) in another office and they themselves mentioned that they had worked in and were more connected with that other office.

In selecting the people to be interviewed, a purposive or strategic sampling strategy was used. This involved selecting people who would be an authoritative source of information about the workings of the RCIADIC and its various sub-units. The aim was to interview enough people from each office so that a clear picture could be constructed of how the investigations and research regarding the underlying issues were conducted and whether there were any political or ideological constraints placed on the way the research was carried out. Emphasis was therefore placed on locating people who had an extensive amount of involvement with the AIUs and the RCIADIC in that they had worked with the RCIADIC or AIUs for longer than six months (in total) or had had some other important connection with them. The other criteria used for selecting people was that they were representative of a range of positions created within the AIUs and the RCIADIC.²⁵

²³ One of those interviewed that I allocated to the office in Canberra was not actually based in Canberra. She was involved with agitating for the establishment of a royal commission, which I have labelled as a 'national' activity, and therefore one falling within the Canberra office, rather than an activity that fell within one of the other regional offices.

²⁴ The Letters Patent allowed this.

²⁵ The spread of people interviewed according to their sex and race, and according to their role is depicted in Tables 3.1 and 3.2 respectively.

The names of people who appeared in the published reports of the RCIADIC and in the guide to the NAA records were initially used to compile a possible list of people to be interviewed. A ‘snowballing’ technique was then used to locate the names of other people who could assist with the research. Each person I interviewed was asked whether there were other people who, in their opinion, I should approach.²⁶ Based on the sampling strategy used, interviews were conducted until a point of saturation was reached; that is, interviews were conducted until no new significant ideas emerged from the information gathered and the responses became repetitive.²⁷

In total, 48 people were formally interviewed. There were approximately 130 people employed by the RCIADIC and the AIUs at its peak.²⁸ The sample selected was constrained by whether particular people could be located or were still living, and whether or not the people who were located consented to being interviewed. Thirteen people declined or did not respond to repeated requests for an interview. This did not affect the validity and reliability of the research because it was still possible to obtain interviews with a reasonable number of people, a wide range of roles are represented in the sample interviewed, and the most senior people employed by the AIUs and the RCIADIC (other than the RCIADIC national secretary) were interviewed.²⁹

²⁶ This sampling technique has been recognised as being one of the best ways to ‘locate subjects with certain attributes or characteristics necessary in a study’: Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (5th ed, 2004) 36.

²⁷ Christine Parker used a snowballing sampling technique to locate and gather data from 41 lawyers about their views regarding the regulation of the legal profession. Parker also used saturation of data as an indication of how many interviews were sufficient: Christine Parker, *Just Lawyers: Regulation and Access to Justice* (1999) 230.

²⁸ This information was obtained from Whimp, above n 3 and from my interviews. These sources estimate that between 120 and 135 were employed. The number of people counted as having been employed by the RCIADIC depends on how the employment of various staff is counted. Commissioners, counsel assisting and instructing solicitors were considered to be technically independent of the RCIADIC in order to maintain their independence from the executive arm of government. Their independence was reflected by the way their employment was funded. Whether or not these people were counted as ‘employees’ of the RCIADIC varies and affects what is considered to be the total number of employees of the RCIADIC. The number of people who were employed by the RCIADIC is impossible to determine accurately since I cannot obtain access to archived administrative records of the RCIADIC.

²⁹ The former RCIADIC national secretary did, however, clarify and confirm some of the procedural information contained in this thesis.

The majority of people contacted were willing to discuss their experiences and were very generous with both their time and their knowledge. Most of those interviewed had never been asked about their experiences while working for the RCIADIC and the AIUs and were enthusiastic to have the opportunity to discuss them with a third party. Others (particularly some of the lawyers) were initially a little reluctant to participate in an interview without the assistance of documents and memoranda to refresh their memory. These people questioned the validity and reliability of using interviews to gather data because they were concerned about their ability to recall specific details about their experience while working for the RCIADIC. They instead suggested that reliance should be placed on the archival records of the RCIADIC. Two lawyers asked that they be given copies of administrative records so that they could verify their responses. When I explained that access to such records was proving difficult, if not impossible, and that approximately 50 people would be interviewed to ensure the accuracy of the data collected, they seemed to accept and understand the need to interview them.

In addition to the 48 formal interviews 11 other people were approached informally. These people were either involved with the RCIADIC (six)³⁰ or are currently involved with research or work concerned with deaths in custody or the overrepresentation of Indigenous people in custody. They provided me with background information about the workings of the RCIADIC and about how the RCIADIC recommendations have been implemented. These discussions have not been counted as formal interviews, however, because the person either declined an interview but was willing to meet informally, or provided background information rather than direct information about the way the RCIADIC was conducted. The discussions were useful because they helped me to better understand the RCIADIC's work.

Table 3.1 below shows the spread of people interviewed according to the office in which they were located and according to their sex and race. The distribution of people in each office is reflective of the size of the office, but is not meant to reflect the number of males and females or the number of Indigenous and non-

³⁰ Therefore, together with the people who were formally interviewed, I spoke to almost half of the people who had at some point worked for the RCIADIC.

Indigenous people that were *actually* employed by the RCIADIC. Although it would be interesting to compare the distribution of people interviewed according to their sex and race with the total number of people that were actually employed with the RCIADIC, it would be impossible to do so. Access to those administrative records of the RCIADIC which contain such data is prohibited, and the people interviewed could not accurately recall this type of information about the RCIADIC.

Table 3.1: Number of People Interviewed Per Office

	NSW/ Vic/Tas	SA/ NT	Qld	WA (Perth)	WA (Broome)	Canberra	TOTAL INDIGENOUS/ NON- INDIGENOUS
MALE							
Indigenous	3	1	3	1	2	1	11
Non- Indigenous	4	4	7	1	2	2	20
TOTAL MALE	7	5	10	2	4	3	31
FEMALE							
Indigenous	1	5	1	1	0	1	9
Non- Indigenous	1	2	0	2	2	1	8
TOTAL FEMALE	2	7	1	3	2	2	17
TOTAL PER OFFICE	9	12	11	5	6	5	48

Table 3.2 depicts the number of people interviewed according to their role. This table shows that the sample interviewed reflected the views of people from a wide range of positions.

Table 3.2: Roles of the People Interviewed

ROLE	TOTAL PER ROLE
Commissioner	5
Counsel Assisting	7
Instructing Solicitor	6
Assistant/Associate to Commissioner	2
Administration or Executive Officer with the RCIADIC	2
Research Officer with the RCIADIC	7
Field Officer with the RCIADIC	2
Head of AIU	7
Field/Project Officer with the AIU	2
Administration Officer with the AIU	1
Relative of Head of AIU (who is now deceased)	1
Counsel Representing/Solicitor Instructing families of the deceased	2
CRU	2
Agitator for the RCIADIC	1
Indigenous Consultant	1
TOTAL	48

Of the 48 persons interviewed, 23 were legally trained, including both Indigenous and non-Indigenous counsel, commissioners, solicitors, research officers, assistants to the commissioners and heads of AIUs. Only three Indigenous people had such qualifications. There were two people who moved offices during their time with the RCIADIC without changing their roles, one person who both moved office and changed role, and one person who changed their role during the RCIADIC without moving office. These people were allocated to the office and role that they occupied for the longest amount of time and best described their functions.

Three of the people interviewed had both a national as well as State or Territory profile. These people were allocated to a State or Territory office rather than the national office. This was done to reflect the fact that their work, although

encompassing a national perspective, was very much aligned with a particular State or Territory office.

There were a number of people who moved to the Adelaide office at the end of the inquiry to assist with the writing of the *National Report*. These people spent between two weeks to three months in the Adelaide office. I assigned these people to their 'original' office for the purposes of determining the distribution of the number of people I had interviewed. I did this because their role in Adelaide was only for a short period of time and it was not their primary role in the RCIADIC. These people did, however, disclose useful information about the way in which the *National Report* was drafted.

2 *Locating and Contacting the People Interviewed*

In most cases, the contact details of people I wished to interview were obtained either through others that had been interviewed or from the Internet. The Australian Electoral Commission and current or former employment details also proved useful in locating some people. More often than not, a number of sources had to be consulted before a particular person was found. There were some people who were too difficult to locate and who were ultimately eliminated as potential interviewees. Again, it is important to emphasise that their elimination does not affect the validity or reliability of the results presented since the most senior people involved with the RCIADIC and the AIUs have all been interviewed, and the views of people who held various roles within each office have been canvassed.

I initially contacted people in writing, either by email or by letter. For some, no postal or email address could be found and the initial contact had to be made by telephone. The telephone contact was in most cases followed up with some form of written contact. Most responded using email; some however, replied by telephone to arrange an appropriate time to talk.

There were some people who did not respond after my initial contact, but who did respond when I attempted to contact them again after some time had elapsed.

There were two, however, who were particularly difficult to contact. I finally made contact with one of them by telephone, at which time I obtained their consent to be interviewed. Despite this person's assurance that they would soon contact me when they had some spare time, I did not hear from them and had to instead again initiate contact. I was on this occasion successful in finalising a date for an interview. I decided with the other person who was difficult to contact to travel to their hometown and approach them once I was there. I did this with the knowledge that they would at the time not be travelling elsewhere. This approach proved successful and I was very fortunate to be able to speak to this person, who when we met profusely apologised for failing to respond to my numerous attempts to make contact.

3 *Questions Asked*

Consistent with a feminist approach to interviewing, the interview questions were semi-structured and open-ended.³¹ This interviewing method suited the diversity of the participants involved in the research and allowed for a certain amount of digression and probing of answers. The questions asked corresponded with themes identified within the literature reviewed, but were also tailored to suit the role of the person being interviewed. The questions were also modified according to whether the person was Indigenous or non-Indigenous, which is consistent with a decolonising approach to research.

Feminist and decolonising approaches to interviewing are typically concerned with building a rapport with the people being interviewed.³² This was particularly

³¹ In conducting qualitative interviews with female offenders and engaging in feminist research practices Pamela Davies notes that she employed various techniques including the use of semi-structured in-depth interview questions 'because such interviews seek not to be exploitative but to be appreciative of the position of women': Pamela Davies, 'Doing Interviews with Female Offenders' in Victor Jupp, Pamela Davies and Peter Francis (eds) *Doing Criminological Research* (2000) 82, 86. Many of my participants were women (both Indigenous and non-Indigenous) and it was important to ensure that they had every opportunity to answer the questions asked. The subject matter of my research also focuses on topics relating to women and in this way needed to be as exploratory as possible.

³² W Lawrence Neuman notes that '[f]eminist researchers are not objective or detached; they interact and collaborate with the people they study. They fuse their personal and professional lives. For example, feminist researchers will attempt to comprehend an interviewee's experiences while sharing their own feelings and experiences': W Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (5th ed, 2003) 299. Bruce L Berg also makes

important with the Indigenous participants in order to offset any cultural differences and feelings of distrust. It was important to acknowledge that ‘research is not an innocent or distant academic exercise but an activity that has something at stake and that occurs in a set of political and social conditions’.³³ With this in mind I offered a certain amount of self-disclosure about why I was interested in the topic being researched and what personal experiences affected my views regarding the disadvantage and oppression of Indigenous people.³⁴ This participatory model of interviewing also attempted to address any power imbalances that may have been present.³⁵

It was also necessary to build a rapport with the non-Indigenous participants, particularly with the former commissioners and legal staff. These participants, when approached, may have viewed the research as simply wanting to be critical of the work they had carried out during the inquiry, which in turn may have caused them to be less open and honest when responding. Many of the lawyers did admit to being distrustful of the interview process. Such suspicion and distrust was allayed by reassuring the participants that the research was exploratory, that I did not hold any preconceived ideas about the work conducted by the RCIADIC, and that I was also legally trained and was conscious of the sensitivity of the material that may be revealed.

The following general questions were asked of all the people who were interviewed:

- What was your role during the RCIADIC?
- When did this role commence and terminate?
- What did your role entail? That is, what kinds of things did you do in the position?

a similar observation: Berg, above n 26, 99. See also Linda Tuhiwai Smith, *Deconlonizing Methodologies: Research and Indigenous Peoples* (1999).

³³ Tuhiwai Smith, above n 32, 5.

³⁴ Berg recognises that such disclosure forms part of a feminist approach to interviewing: Berg, above n 26, 105.

³⁵ The exchange of personal information and the development of a relationship allows the creation of ‘a nonhierarchical, non-manipulative research relationship’: Ibid 99.

- Were you given instructions on how to carry out your role? If so, by whom? (Even the commissioners were asked this because it was important to find out whether the national commissioner or the Commonwealth, State or Territory governments controlled or influenced how they were to carry out their mandate).
- Was gender considered or was it a complication?
- Were there Indigenous organisations that agitated for more of a response to the problems confronting women? If so, what sorts of problems were these?
- Was there ever a discussion of family violence? If so, what in fact was discussed?
- Generally, what were your views of the RCIADIC? Do you think it was effective in the way it conducted its inquiry? Was it too broad or too narrow?
- Is there anyone else I should talk to?

Other questions asked of the commissioners and the lawyers (including those representing the relatives of the deceased) included:

- Did you focus only on the cause of the deaths for each investigation or did you also consider underlying issues?
- What emerged as the most important factors leading to the deaths and the over-representation of Indigenous people in custody from your investigations?
- Why were very few police and correctional officers blamed for the deaths?
- Were there any matters concerning the deaths or underlying issues that were ignored or omitted? If so, why?
- Was it difficult to include all the relevant underlying issues?
- Did you find that the material available that could be included in the *National* or regional report was overwhelming?
- Were there any key meetings where women were discussed?
- Were there any powerful Indigenous or non-Indigenous women involved with your office?
- What were the factors that stopped the RCIADIC from considering the concerns of men and women separately?

- How was the regional or *National* report prepared?
- How were regional reports and the individual death reports incorporated into the *National Report*?
- Do you know whether the AIUs wrote reports? Do you have copies?
- How did the government in your State/Territory react to the RCIADIC? Was it supportive or uncooperative of the investigations?

Questions asked of the lawyers and the research and field officers included:

- From your consultations with the communities, what were the main concerns of Indigenous people concerning the deaths?
- Did both men and women attend community meetings and, if so, what sorts of matters were raised by Indigenous women?

Questions asked of the staff employed by the AIUs included:

- What did the AIU in your State/Territory mainly focus on? How was this decided?
- Was there an AIU report? Do you have a copy?
- Was it difficult to set up the AIU and get others involved?
- Do you think there was a lot of interest in the RCIADIC in your State/Territory? Did the interest vary depending on the region?
- How much consultation with other Indigenous people was there? And with whom? What were the main things that were raised during these consultations?
- How did the AIU assemble the material used?
- Was there any material that was omitted and, if so, why?
- Were there any key meetings where women were discussed? What was said?
- Were there any powerful Indigenous women involved in the investigation?
- What were the factors that stopped the AIU from pursuing the concerns of men and women separately?
- Do you think that the matters the AIU considered important were adequately reflected in the regional or *National Report*?

- Were there meetings with other AIUs to compare notes?
- Which other AIUs wrote reports?

Some of the people interviewed had more unique roles or associations with the RCIADIC, such as those that held an executive or senior staff position with the RCIADIC; researchers for the CRU; those that agitated for a royal commission to be established; one person who acted as an Indigenous consultant; and one relative of a person who had worked for one of the AIUs and who had since passed away. These people were asked more specific questions about their experiences with setting up offices or with mobilising people for political action.

4 *Conducting the Interviews*

The Griffith University Human Research Ethics Committee granted ethics approval for my research in April 2003. One of the main concerns of the Committee was that the anonymity of the respondents and the confidentiality of their responses be maintained. The information statement and consent form given to the people interviewed therefore included an undertaking that their identity would remain anonymous and would not be linked to their responses.³⁶ This is achieved in this thesis by referring to the respondents only by their role and without disclosing their office.

Relevant reports or published articles or texts written by the person I was interviewing for or about the RCIADIC were read before each interview. This ensured that the questions asked were well informed.

I conducted all of the interviews between April 2003 and November 2004. Forty-two of the interviews were performed face-to-face. Six of the interviews were conducted over the telephone because I was unable to travel to meet with the person. These people either lived in remote locations outside major cities or were contacted after I had already once travelled to their home town.

³⁶ A copy of the information statement given to each person who was interviewed and the consent form signed by each person appear in Appendix 3 of this thesis.

The face-to-face conduct of the interviews assisted with developing rapport with the people interviewed, and indeed some of the Indigenous people indicated, when organising the interview, that they preferred that it be conducted face-to-face. As already mentioned, the lawyers were a particularly wary group of people to interview. Meeting with them in person, however, gave me the opportunity to allay any concerns they may have had regarding anonymity or about the purpose of the research.

Interviews were conducted in Adelaide and surrounding towns, Sydney, Melbourne, Shepparton, Canberra, Perth, Broome, Brisbane and other regional centres close to Brisbane. Thirty-eight interviews were conducted at either the person's office or their home. Four were conducted in other locations that were more convenient for the person being interviewed. The average length of time of the actual interviews was approximately one hour, although the total time spent with each person tended to be longer than the actual interview. The interviews were recorded using a digital recorder. Five of the interviews were not recorded because in three cases the interviews were conducted on an impromptu basis, in one case the recording did not work, and in one case the respondent refused to allow the interview to be recorded. A professional company transcribed the recordings, which I then checked for accuracy.

III METHODS OF ANALYSIS

The data described above – the texts and reports, and the interviews – are categorised as either 'Indigenous narratives' or 'non-Indigenous narratives'. Both the Indigenous narratives - the Indigenous texts and interviews with Indigenous participants – and the non-Indigenous narratives - the *Interim, National*, regional and death reports (the official reports) and interviews with non-Indigenous participants – are subjected to standard empirical readings in order to conduct the content analysis and the procedures analysis described earlier.

It is important to acknowledge that I am a non-Indigenous female attempting to interpret records prepared, and verbal accounts given, by Indigenous groups and

individuals.³⁷ I believe that since my analysis has been informed by critical race and Indigenous theories it is sympathetic and open to the Indigenous accounts of the experiences contained within those records and oral testimonies. By using critical race and Indigenous scholarship, I am expanding Linda Tuhiwai Smith's conceptual framework. Tuhiwai Smith did not intend for her conceptual framework to be used by non-Indigenous people to analyse documents created by Indigenous individuals and organisations or non-Indigenous scholars about Indigenous people.³⁸ My analysis does this, however, by using an augmented and modified version of decolonising practices and by incorporating aspects of critical race and Indigenous theories. Certain aspects of Tuhiwai Smith's framework, such as having an awareness of the importance and uniqueness of Indigenous knowledge, the importance of providing feedback to participants, and the need to restructure hegemonic assumptions, values and concepts, have been utilised for this research.

Discourse analysis, used by scholars such as Mark Harris, Jeannine Purdy, Lee Sackett and Michael Wearing³⁹ to analyse how the RCIADIC aligned itself with certain discourses and generated certain images and realities of Indigeneity in its reports, has not been used in this thesis. This thesis does not explore how the texts and reports produced, and the processes used by commissioners and other key players constructed, an image of Indigenous women. Rather I focused on critical legal frameworks to examine how the RCIADIC considered Indigenous woman.

Nor was a quantitative content analysis of the texts and reports, similar to that used by James Frideres, considered appropriate for this research. Frideres examined newspaper articles dated between 1991 and 1994 that discussed the Canadian Royal Commission on Aboriginal People and the submissions that were

³⁷ This problem of correctly interpreting the voice of another has been acknowledged by a number of feminist, critical race and Indigenous scholars: Gloria Ladson-Billings, 'Racialized Discourses and Ethnic Epistemologies' in Norman K Denzin and Yvonna S Lincoln (eds) *Handbook of Qualitative Research* (2nd ed, 2000) 215; Virginia L Olesen, 'Feminisms and Qualitative Research at and into the Millennium' in Norman K Denzin and Yvonna S Lincoln (eds) *Handbook of Qualitative Research* (2nd ed, 2000) 215; Tuhiwai Smith, above n 32.

³⁸ Nor did she intend it to be used to analyse documents and reports prepared by non-Indigenous people from a critical race or Indigenous perspective.

³⁹ Harris, above n 11; Purdy, above n 13; Sackett, above n 13; Wearing, above n 13.

made during the first round of hearings which related to the question of self-government.⁴⁰ When analysing the newspaper articles, Frideres noted the day of the week the article was published, the location of the article within the newspaper, the quantity of space devoted to its content and the main themes and words that appeared in the article. In relation to the submissions made in the first round of hearings, Frideres focused mainly on determining ‘the extent to which the issue of self-government was present in the submissions ... as well as how it was presented [and] ... the context in which the presentation was made’.⁴¹ Such a methodology was considered inappropriate for this thesis due to the enormity and complexity of the texts that have been analysed. The analysis conducted in this thesis also goes beyond simply reporting the amount and number of times the RCIADIC reports discussed problems confronting Indigenous women. It instead provides a critical reflection upon those discussions.

Texts, reports and interview data are analysed by summarising the topics that were discussed in relation to Indigenous women, describing the parameters and discourse within which Indigenous women were considered, and then critiquing these descriptions using the critical legal theoretical and epistemological frameworks, and law and politics scholarship described in Chapter 2. A similar analytical methodology is apparent but not explicitly described within many research projects produced by feminist, critical race and Indigenous scholars.⁴² Margaret Davies describes such methodology as a ‘critical method’ that involves ‘theory which is reflective about the positioning of subjects in the construction of knowledge’.⁴³

⁴⁰ James S Frideres, ‘The Royal Commission on Aboriginal Peoples: The Route to Self-Government?’ (1996) XVI(2) *The Canadian Journal of Native Studies* 247.

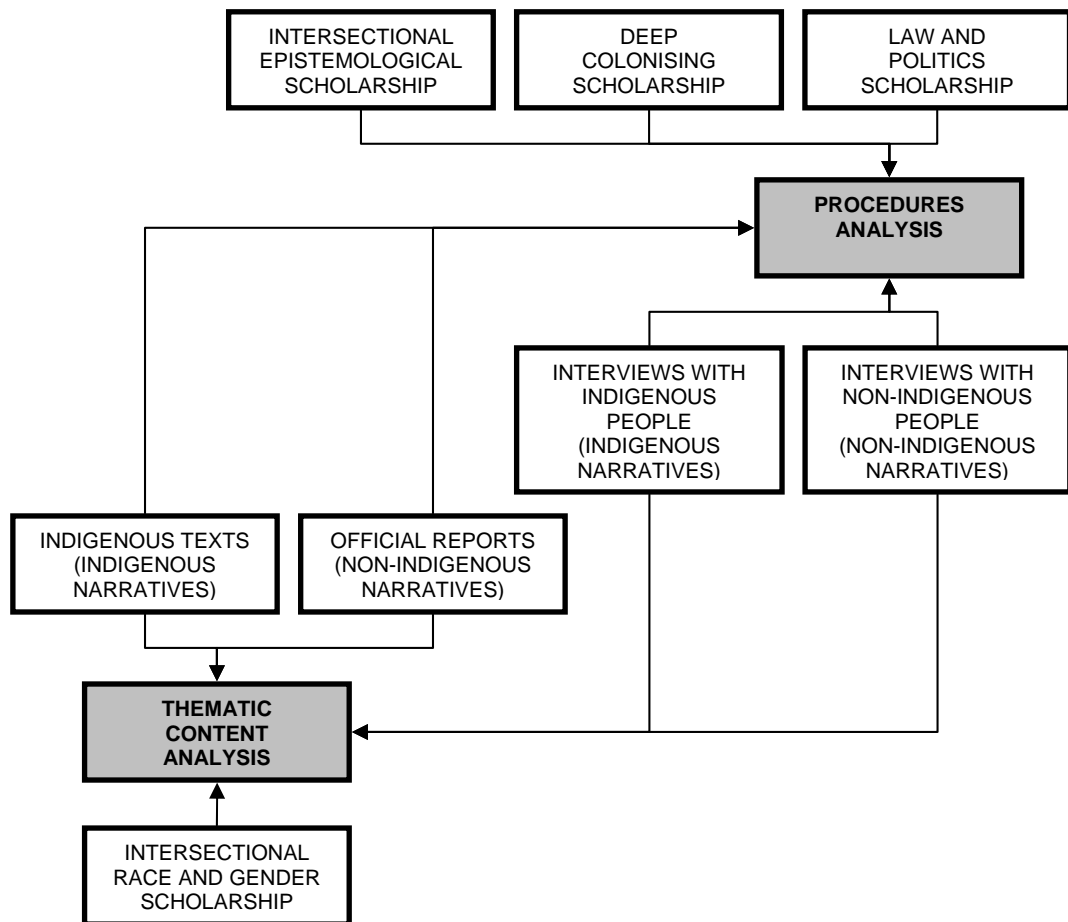
⁴¹ *Ibid* 258.

⁴² Scholars that have conducted an empirical reading of texts produced by legal cultures and then used feminist and critical race theories to analyse the findings in those texts include: Bulbeck, above n 13; Anne Cossins, ‘Saints, Sluts & Sexual Assault: Rethinking the Relationship between Sex, Race & Gender’ (2003) 12(1) *Social & Legal Studies* 77; Kimberle Williams Crenshaw, ‘Beyond Racism and Misogyny: Black Feminism and 2 Live Crew’ in Cathy J Cohen, Kathleen B Jones and Joan C Tronto (eds) *Women Transforming Politics: An Alternative Reader* (1997) 549; Deborah Bird Rose, ‘Land Rights and Deep Colonising: The Erasure of Women’ (1996) 3(85) *Aboriginal Law Bulletin* 6; Julie Stubbs and Julia Tolmie, ‘Race, Gender and the Battered Woman Syndrome: An Australian Case Study’ (1995) 8 *Canadian Journal of Women and the Law* 122.

⁴³ Margaret Davies, ‘Ethics and Methodology in Legal Theory: A (Personal) Research Anti-Manifesto’ (2002) 6 *Law Text Culture* 7, 22.

The Indigenous and non-Indigenous narratives are subjected to two levels of analysis. The content analysis sets out the differences that exist between Indigenous and non-Indigenous narratives in relation to how each described the experiences of Indigenous women. This descriptive component was extracted using a thematic approach⁴⁴ (see Appendix 4 for a list of the themes used to code the materials). The procedures analysis involves placing the themes that emerge from the content analysis within the political and legal ideological contexts that were present whilst the RCIADIC was conducting its inquiry. Law and politics, deep colonising, and intersectional epistemological scholarship is used to analyse the descriptive themes identified and the procedures undertaken. Diagram 3.1 shows the sources of data and theoretical frameworks used in conducting the two analyses.

Diagram 3.1: Methodology



⁴⁴ Berg, above n 26, 273-274.

The themes identified in the content analysis were initially constructed from the feminist and critical Indigenous literature informing the research, and the themes identified in the procedural analysis were initially constructed from intersectional race and gender, and deep colonising epistemological scholarship, and law and politics literature. This process was, however, fluid and inductive, with new themes emerging and others being refined as the analyses progressed.⁴⁵

Although it was possible to identify and report every reference made to Indigenous women in the Indigenous texts in some detail, this was not the case with the official reports of the RCIADIC; their sheer length precluded such an analysis in a limited number of words and in any event, such analysis is unnecessary to accurately convey the extent to which problems concerning Indigenous women were considered. Rather, in conducting the analysis of the official reports, notes were made of each reference to Indigenous women and these notes were then used to summarise the extent to which the official reports either focussed on Indigenous women or took a gendered approach by focusing on either Indigenous women or men. Interestingly, despite accepted wisdom that Indigenous culture varies from region to region,⁴⁶ the concerns of Indigenous women were generally similar in each of the Indigenous texts and official reports of the RCIADIC. However, this is not to say that there are not particularities amongst Indigenous communities, and where relevant, these particularities are noted.

Early in the data reduction phase, an independent criminology researcher was used to validate the categorisation of the interview data to ensure a proper interpretation of the responses given by the people interviewed. The researcher was given six randomly selected interview transcripts, one from each office.⁴⁷ By counting the number of times we each coded a response to a question using a

⁴⁵ See *ibid* 272-273. where Berg discusses the difference between a deductive and inductive approach to content analysis. This thesis used a combination of deductive and inductive approaches. When starting the research a deductive approach was used but it later developed into an inductive approach.

⁴⁶ Stephen Bottomley and Stephen Parker, *Law in Context* (2nd ed, 1997) 241.

⁴⁷ It is difficult to quantify the exact differences of our thematic categorisations since the interview questions were semi-structured rather than structured and the responses were therefore difficult to code according to exact themes.

different major theme, I estimated that 80% of the data was coded in the same way. The researcher and I discussed the differences in order to understand why we had coded certain data differently. I incorporated any important differences into the analysis.

In reporting the results, those relating to the Indigenous texts and interviews with Indigenous people are reported first in order to normalise the Indigenous voices and subvert the orthodox approach. In the same way the use of the term ‘non-Indigenous’ throughout this thesis has been an intentional one.

Unless a direct quote is used, interview data have been reported without attributing it to a specific source, primarily to protect the anonymity and confidentiality of the person interviewed. It is possible that if such information was attributed to a source the anonymity of the person interviewed may be compromised because of the context within which it is reported. Therefore only quotes containing general statements have been included and the source of the quote is cited using the coding system identified at the start of the thesis.

Although consent was obtained from each person interviewed to refer to their responses according to the position they held with the RCIADIC, I decided that doing so may jeopardise their anonymity and that in most cases it would be safer and more informative to simply refer to whether the person had had legal training or not. This better reflects whether there were any distinctions in views between those who had had some legal training and those who had not. It also provides the opportunity to consider the extent to which the liberal legal ideology influenced the RCIADIC’s work by revealing whether a particular process was due to the commissioners’ influence or endorsed by other legally trained staff.

IV LIMITATIONS OF THE METHODOLOGY

The methodology used in this thesis is subject to four main limitations.

First, I was not able to interview everyone who worked for the RCIADIC and the AIUs because it was impossible to identify and locate all of them. However my

sample contains a sufficient number of participants from each office and reflects the various roles established during the inquiry, and is therefore suitably representative of the population.

Second, interviewing those involved with the RCIADC and the AIUs 13 years after the RCIADIC tabled its *National Report* had its advantages as well as disadvantages. There was a significant risk that the people I interviewed would no longer accurately remember their experience during the inquiry, or that they would engage in a form of ‘euphoric recall’. As it turned out, not all of the recollections were positive, and there was a striking degree of consistency between the accounts of those interviewed as well as with what was contained in the texts and reports. In fact, the passing of time appeared to allow those interviewed to take a considered and detached view of what happened during the three and a half years that the inquiry was active. Conducting a reflective study before now may not, in fact, have been possible or advisable. The inquiry considered an extremely sensitive topic, and there was much controversy surrounding its inception and operation. It was an inquiry that deeply affected many of those involved as well as the families and friends of the deceased. Time has allowed many harms to heal, and the RCIADIC certainly uncovered and even created a number of harms. Reflecting critically upon the RCIADIC over a decade after it finished also allows the people interviewed to assess its appropriateness within the context of policy reforms, the implementation of its recommendations and ultimately whether or not it improved the lives of Indigenous people.

Third, there is a possibility that the people I interviewed have not been completely frank in divulging all the important information about the way the RCIADIC was conducted. I am however confident that since I spent a considerable amount of time with each person developing a rapport, they were as open as possible with their responses.

The fourth and final limitation is that I was unable to obtain copies of all of the AIU reports. The reports that I was unable to access may have contained information about Indigenous women that might have more closely reflected the

views contained in the official reports. This is unlikely, however, because I interviewed all of the heads of the AIUs (aside from those that are no longer alive) and I did not uncover any information about Indigenous women which varied significantly from what was contained in the AIU reports that I was able to access. The heads of the AIUs that I did interview also provided me with their recollections of what the communities they consulted disclosed about Indigenous women.

CONCLUSION

There is much that is known and publicly available about the RCIADIC, but there is also much that is hidden, apparently lost and not available. My efforts to gather documents especially those written by Indigenous people, demonstrate that the Indigenous 'view' may be suppressed in more than one way. This lesson should be salutary for any future research intending to analyse the RCIADIC.

The next chapter describes how the RCIADIC and AIUs were established and how they conducted their investigations. It reveals the constraints imposed upon the RCIADIC's operations by governments and explains a great deal about how the RCIADIC made its decisions. As we will see in later chapters, these factors contributed to the RCIADIC's failure to take an intersectional race and gender approach.

CHAPTER 4: ESTABLISHING AND CONDUCTING THE INVESTIGATIONS

INTRODUCTION

Without understanding the history, the structure and the procedures of the RCIADIC and the Aboriginal Issues Units (AIUs) it would be difficult to satisfactorily critique the RCIADIC's work. This chapter therefore explains how the RCIADIC and AIUs were established, describes the types of people who worked for them and outlines the processes used to conduct the inquiry and produce the AIU and RCIADIC texts and reports. This chapter informs the procedures analysis conducted in Chapters 7 and 8.

The manner in which the investigations of the deaths and underlying issues were conducted is described in varying detail in the death, *Interim*, *National* and regional reports of the commissioners. There are also a number of secondary sources that have briefly outlined how the RCIADIC was established and the processes it used.¹ Although these resources exist, it is difficult to obtain a clear picture of the entire process because the information is scattered throughout a number of scholarly works. This chapter makes an important contribution to the literature by collating and summarising the information available and presenting it in a chronological and abridged version.² It was informed by the interview

¹ See for example Helen Corbett and Tony Vinson, 'Black Deaths in Custody: Instigating the Royal Commission' in Eileen Baldry and Tony Vinson (eds) *Actions Speak: Strategies and Lessons from Australian Social and Community Action* (1991) 95; Gillian Cowlshaw, 'Inquiring into Aboriginal Deaths in Custody: The Limits of a Royal Commission' (1991) (4) *Journal for Social Justice Studies, Special Issue Series: Politics, Prisons and Punishment - Royal Commissions and 'Reforms'* 101; Chris Cunneen, *The Royal Commission into Aboriginal Deaths in Custody: An Overview of Its Establishment, Findings and Outcomes* (1997); Duncan Graham, *Dying Inside* (1989); Mark Harris, 'Deconstructing the Royal Commission - Representations of "Aboriginality" in the Royal Commission into Aboriginal Deaths in Custody' in Greta Bird, Gary Martin and Jennifer Nielsen (eds) *Majah: Indigenous Peoples and the Law* (1996) 191; David McDonald and Kathy Whimp, 'Australia's Royal Commission into Aboriginal Deaths in Custody: Law and Justice Issues' in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (1995) 188; Jeannine Purdy, 'Royal Commissions and Omissions: What Was Left out of the Report on the Death of John Pat' (1994) 10 *Australian Journal of Law and Society* 37; Kathy Whimp, 'The Royal Commission into Aboriginal Deaths in Custody' in Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 80.

² One of the more detailed accounts of the establishment of the RCIADIC is in Chapter 7 of Duncan Graham's book *Dying Inside*. This chapter does not, however, contain as comprehensive

material and, to that extent, goes further than what has been presented in the official reports of the RCIADIC and other secondary sources.

Part I of this chapter explains *why* the RCIADIC was established. It describes the context within which the federal, State and Northern Territory governments conceded to public pressure and established the inquiry, the speed with which it was set up and why the terms of references contained in the Letters Patent and Commissions were originally framed to only investigate the deaths.

Part II describes the Letters Patent and Commissions, the terms of reference and the challenges mounted. Other scholars have elsewhere described the general legislative powers that govern the work of a royal commission.³ This part briefly outlines the powers that specifically governed the establishment and the procedure adopted by the RCIADIC. Understanding the scope of the RCIADIC's legislative powers is particularly important since they informed the manner in which the deaths and underlying issues were investigated. Related to this is the need to understand what the RCIADIC's terms of reference specified, because these guided the RCIADIC's determination of what would and would not be considered. The legislative powers and terms of reference could not be modified without legislative reform, nor could changes to the Letters Patent and Commissions be made without the agreement of all governments; thus they do not form a substantial part of my critique. Instead, my critique concentrates on the processes and procedures that the commissioners and other staff were able to control. More specifically, for the purposes of this research, I do not explore why the RCIADIC did what it did based on its legislative powers; rather, I examine why the RCIADIC did what it did, when it was within its power to do something else. Included in this is an examination of the manner in which the terms of reference were interpreted. For this reason, I focus mainly on the discretionary administrative and procedural features of the RCIADIC.

account of the work of the RCIADIC because it was published in 1989 prior to the conclusion of the RCIADIC: Graham, above n 1, ch 7.

³ See for example Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001); Leonard Arthur Hallett, *Royal Commission and Boards of Inquiry: Some Legal and Procedural Aspects* (1982); Janet Ransley, *Inquisitorial Royal Commissions and the Investigation of Political Wrongdoing* (PhD thesis, Griffith, 2001).

Although the focus of my thesis is predominantly concerned with the investigation into the underlying issues, the second part of this chapter includes a brief explanation of the RCIADIC's powers to investigate the deaths. Knowledge of the latter ultimately also assists in understanding the former. The legal challenges mounted by various governments, unions which represented police and prison officers, and individuals, against the RCIADIC's inquisitorial and investigative powers, are also described because they influenced and helped mould the interpretation taken by the RCIADIC of its terms of reference.

Part III is a detailed description of the manner in which the RCIADIC investigated the deaths and underlying issues. Part of this description includes an explanation of why certain procedural methods were adopted and how the death reports were written. Also described is how the AIUs carried out their assigned tasks.

Part IV describes the production and contents of the AIU texts that I analysed as well as how the *National* and regional reports and recommendations were drafted and written.⁴ The official reports and recommendations were the final product of the RCIADIC. They were informed and influenced by various factors, including the reasons why the RCIADIC was first established, its powers and mandate and the way it chose to proceed with the investigations.

I ESTABLISHING THE RCIADIC

A *Indigenous Activism*

In late September 1983, a number of media outlets around Australia focussed on the death of John Peter Pat, a sixteen-year-old boy who had been in custody in the Roebourne Police Station, Western Australia. His death attracted the attention of the media because it had occurred in circumstances that were considered suspicious by many within the Roebourne community.⁵ Prior to his arrest, the

⁴ The production of the *Interim Report* is not described, mainly because its author, Commissioner Muirhead is no longer alive to explain the process undertaken. The contents of the *Interim Report* that related to Indigenous women are described in Chapter 6.

⁵ The story of John Peter Pat's death is outlined in a number of papers and reports. For example see Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the*

young boy, together with other Indigenous males, had been involved in a pub brawl, initially with a single off-duty police officer, but later with a number of other police officers who were also off-duty. Witnesses claimed that John had been kicked in the head by one of the police officers during the fight and was later beaten by police when he was taken to the police station. He was found dead on the floor of the juvenile cell of the Roebourne Police Station lockup, an hour or two after his arrest (the exact time was never established). The cause of his death was found to be head injuries, which according to Commissioner Johnston (who conducted the inquiry into the death and authored the death report) were probably sustained during the fight at the pub, although again this was never definitively resolved.⁶

Helen Corbett (formerly Boyle), a young Indigenous woman who had previously worked as a legal stenographer in Western Australia and who was living in Sydney at the time, decided to conduct her own research into what had happened in Roebourne. Other colleagues and friends (who were mainly women from Western Australia but who were at the time also living in Sydney) joined her in her pursuits and as they collected more and more newspaper clippings about the investigation into the death and the eventual unsuccessful prosecution of the police officers involved, they became increasingly incensed at how such matters had been resolved. Their rage and anger motivated them to organise the National Committee to Defend Black Rights (CDBR) and to eventually hold a public meeting to voice their protest at what they perceived to be a cover up. This growing political activism began capturing the concern and imagination of many.

At their first meeting they attracted the support of approximately 30 people, both Indigenous and non-Indigenous. Subsequent meetings organised by the CDBR attracted hundreds of supporters, and at some, over 90% were non-Indigenous.⁷ This was a surprise for the organisers because they were not used to having such support from the non-Indigenous community. Some of the non-Indigenous people

Death of John Peter Pat (1991) (abbreviated as *Report of the Inquiry into the Death of John Peter Pat* in repeated citations); Corbett and Vinson, above n 1; Graham, above n 1; Purdy, above n 1.

⁶ *Report of the Inquiry into the Death of John Peter Pat*, above n 5.

⁷ Corbett and Vinson, above n 1.

who attended the meetings were considered to be prominent in political and professional circles.

Various unions, including the Seaman's Union, assisted with the campaign. Experiencing such support strengthened the resolve of the Indigenous community. The *National Report* acknowledged that:

It is a revealing commentary on the life experience of Aboriginal people in 1987 and of their history that it would have been assumed by so many Aboriginal people that many, if not most, of the deaths would have been murder committed if not on behalf of the State at least by officers of the State. But disquiet and disbelief in official explanations was not only expressed by Aboriginal people; many non-Aboriginal people shared the assumption that police and prison misconduct would be disclosed by a Royal Commission. Thus many non-Aboriginal people, whilst not sharing the life of Aboriginal people, had seen and heard sufficient evidence of the mistreatment of Aboriginal people to share their expectation that Aboriginal people would suffer and die from the same discrimination and brutality as they experienced during life.⁸

The campaign may have begun with the death of John Peter Pat in 1983, but it eventually gained an even greater momentum when other Indigenous detainees such as Lloyd James Boney, Edward Cameron, Charles Sydney Michaels and Robert Joseph Walker were found dead in their cells in circumstances which their families believed were suspicious.⁹ These subsequent deaths highlighted the increasing phenomena of Indigenous deaths in custody in Australia. The CDBR continued to hold weekly meetings about matters concerning deaths in custody and Indigenous rights, as well as organising regular rallies, and it consequently continued to attract new members. The main philosophy of the CDBR was to encourage all members to be productive and to work as a team. In 1986 a number of members of the CDBR, together with six families of the deceased, embarked on a speaking tour of Australia.¹⁰ The tour generated an enormous amount of

⁸ Australia, Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody: National Report, Vol 1-5* (1991) vol 1, 1 (abbreviated as *National Report* in repeated citations).

⁹ This information was obtained from interviews and Corbett and Vinson, above n 1.

¹⁰ *Ibid.*

publicity, and this publicity impelled the Commonwealth Department of Aboriginal Affairs to give the CDBR A\$13000 (Australian dollars) to establish a prima facie case that there was a need for a royal commission.

In 1987, while the CDBR was putting together a case for the Department, the founder Helen Corbett was invited to speak at the European Nuclear Disarmament Convention in Coventry and at the United Nations Working Group of Indigenous People in Geneva.¹¹ This gave the campaign international exposure. On 11 August 1987, shortly after the United Nations presentation and in the lead-up to the 1988 Bicentenary celebrations, Prime Minister Bob Hawke announced that a royal commission would be established to investigate the large number of Indigenous deaths in custody.¹²

This announcement was made even though the CDBR had yet to finish establishing that a prima facie case existed. There are two possible explanations for the announcement: one is that during 1987 there was an Indigenous death in custody almost every two weeks; the other is that the federal government was in the international spotlight because of the upcoming Bicentenary and needed to divert any unfavourable publicity. Either of these explanations or a combination of the two compelled the Australian government to take some action regarding the seemingly large number of Indigenous deaths in custody.¹³ Whatever the reason for its establishment, the primary focus of the RCIADIC was, in the government's view, to explain why there had been (and still were) so many deaths in custody. This view became the view of the commissioners and the lawyers who were appointed to work for the RCIADIC.

¹¹ Ibid; Richard W Harding, 'Prisons Are the Problem: A Re-Examination of Aboriginal and Non-Aboriginal Deaths in Custody' (1999) 32(2) *The Australian and New Zealand Journal of Criminology* 108.

¹² Robert Garran, 'Inquiry into Black Deaths', *The Age* (Melbourne), 12 August 1987, 1; Harding, above n 11.

¹³ As with most political decisions, it is difficult to establish exactly why the government announced that a royal commission would be established to look into the matter of Indigenous deaths in custody. The reasons given are the most cited: Corbett and Vinson, above n 1; Harris, above n 1, 210.

The purpose of the commission ... was to find out how these people had come to die and also why their deaths hadn't previously been properly investigated.¹⁴

B *Setting up the RCIADIC Offices*

The RCIADIC was established on 16 October 1987 to inquire into and report on the deaths of Indigenous people in police or prison custody or in any other place of detention between 1 January 1980 and 31 May 1989.

The Indigenous community had a great deal of faith in the ability of the RCIADIC to deliver them justice. Statements such as the one below by Alice Dixon, the mother of Kingsley Richard Dixon who died in Adelaide Gaol in 1987, reveal the hope and expectations generated by the establishment of the RCIADIC:

I hope the Royal Commission will open the wider Australian community's eyes to what is happening to the Aboriginal people under the white man's system that the Aboriginal has had to adapt to without fully understanding.¹⁵

Similarly, Adrian Howe, a criminologist, wrote:

Whatever the outcome – however much of a whitewash it turns out to be – the Muirhead Royal Commission on [sic] Aboriginal Deaths in Custody will be a landmark event in the history of white criminal injustice to Australian Aborigines. ... By exposing grossly discriminatory police practices and sentencing processes, the commission will provide irrefutable evidence for those who still need it of the racism in the Australian criminal justice and penal systems.¹⁶

The Commonwealth government took the initiative in establishing the RCIADIC, with the promised cooperation of the State and Northern Territory governments. Letters Patent were issued by the Governor-General, the Governors of five States

¹⁴ Interview with NIML14 (Face-to-face interview, 9 May 2003).

¹⁵ Alice Dixon, 'Interview' (1989) 2(36) *Aboriginal Law Bulletin* 10, 10.

¹⁶ Adrian Howe, 'Aboriginal Women in Custody: A Footnote to the Royal Commission' (1988) 30 *Aboriginal Law Bulletin* 5, 5.

and the Administrator of the Northern Territory; the Western Australian Governor issued Commissions in accordance with its legislative framework.¹⁷

The Commonwealth government had not undertaken any preliminary work prior to establishing the RCIADIC in order to determine what parameters, if any, should be placed on its investigation. Indeed, the RCIADIC was appointed without the government having a complete understanding of how many deaths needed investigation and what challenges might arise. When referring to the initial establishment of the RCIADIC, one lawyer engaged by the RCIADIC recalled that:

There was a huge clamour at this stage at the start of the royal commission for it to get established immediately. ... tremendous pressure to get cases underway, which we were trying to resist, but like all royal commissions, you don't resist; in the end you just have to get started.¹⁸

A well respected and prominent Federal Court justice, James Muirhead, was appointed as the national commissioner. Only one commissioner was initially appointed because it was assumed that there would only be approximately 44 deaths to investigate.¹⁹ There were in fact 124 deaths during the relevant time period; however, of those, 25 fell outside the RCIADIC's Letter's Patent.²⁰ After realising the large number of deaths that needed investigating, five other commissioners were appointed between May 1988 and June 1989 to conduct inquiries in the six Australian States and the Northern Territory.²¹ Two of the five

¹⁷ For the sake of simplicity I refer to the Commissions issued in Western Australia as Letters Patent in the rest of this thesis.

¹⁸ Interview with NIML13 (Face-to-face interview, 27 May 2003).

¹⁹ Chris Cunneen, above n 1, 2.

²⁰ The reasons why the 25 deaths were excluded are presented later in this chapter. New deaths that needed investigating were identified from Coroners' Court files and by word of mouth. In some remote areas there had been no coroner's hearing and therefore no such files existed.

²¹ No deaths had occurred in the Australian Capital Territory during the relevant period. On 6 May 1988, three additional commissioners were appointed as follows:

- Elliott Frank Johnston was appointed to conduct inquiries in Western Australia, South Australia and the Northern Territory.
- John Halden Wootten was appointed to conduct inquiries in New South Wales, Victoria and Tasmania.
- Lewis Francis Wyvill was appointed to conduct inquiries in Queensland.

Subsequently two others were appointed: Daniel John O'Dea was appointed on 27 October 1988 to assist with the inquiries in Western Australia since there were so many deaths in that State.

new commissioners appointed were retired judges at the time of their appointment, one was a President of the Western Australian Industrial Relations Commission, one was a Queen's Counsel and one, Commissioner Dodson, was not legally trained and was Indigenous. Commissioner Johnston replaced Muirhead (who had retired) as the national commissioner on 28 April 1989.

The five legally trained men who were appointed as commissioners may have appeared alike in terms of their professional qualifications, but they were in fact quite different and their experience and ideological alliances varied dramatically.

Commissioner Muirhead had, prior to being appointed as a judge of the Federal Court of Australia, been a justice of the Northern Territory Supreme Court and the founding Director of the Australian Institute of Criminology. Whilst serving as a judge in the Northern Territory, Muirhead had presided over the infamous trial of Lindy Chamberlain. His experience in Papua New Guinea as a relieving judge earlier in his career may to some extent explain his compassionate attitude towards Indigenous Australians.

His successor, Commissioner Johnston, was a retired South Australian Supreme Court justice. Johnston was well known for his allegiance to the Communist Party, which he denounced upon being appointed as a judge. Johnston had worked extensively with Indigenous people as a barrister and had been a dedicated advocate for their rights. He was instrumental in the establishment of the Aboriginal Legal Service in South Australia. Johnston was considered a 'gentleman in the old world sense of that word' because he believed strongly in striving for conciliation and ensuring that consensus was achieved.²²

Commissioner Wootten, on the other hand, was an opinionated advocate who would passionately fight for what he believed in. Like Johnston, he was remembered as someone who had been for a long time dedicated to furthering the

Patrick Lionel Dodson was appointed on 28 June 1989 to inquire into 'underlying issues' associated with deaths in custody of Aboriginal and Torres Strait Islanders in Western Australia: *National Report*, above n 8, vol 5, 157-160. Consideration had been given to appointing a female commissioner but ultimately the five new commissioners who were appointed were all male.

²² Interview with NIML20 (Telephone interview, 17 September 2003).

rights of Indigenous people. Prior to being appointed as a commissioner, he had held the position of Founding Dean of the University of New South Wales Law School and had served as a New South Wales Supreme Court justice from 1973 to 1983. His involvement with the Indigenous legal rights movement included establishing the first Aboriginal Legal Service in Australia in 1970.

In contrast, Commissioners Wyvill and O’Dea, although well respected by their fellow legal professionals within their own States, were not known for having supported or furthered the Indigenous rights movement. Wyvill was practicing as a Queen’s Counsel in Queensland at the time he was appointed. Although he was considered conservative by many of his colleagues, he had been involved in ‘good causes’ such as advancing civil liberties and respect for the environment.²³ O’Dea had served as a Stipendiary Magistrate from 1967-75, as Chairman of the Supplementary Worker’s Compensation Board from 1978-1980 and as President of the Western Australian Industrial Relations Commission from 1980 until his appointment to the RCIADIC.²⁴ Like Wyvill, his colleagues considered him as someone who tended to err on the conservative side.

Commissioner Dodson was the only commissioner who was not legally trained and who was Indigenous. He was appointed in 1989, 20 months after the RCIADIC had commenced. Dodson was born in the Kimberley region, but was raised in Katherine, Northern Territory and educated in Victoria. After he left school he trained for and became Australia’s first ordained Indigenous Catholic priest, but left the Church in 1981 and started working for the Central Land Council in Alice Springs. While serving as a priest, he studied law at Monash University but never finished the degree. He was (and still is) a well-known and respected Indigenous leader who has actively pursued recognition of Indigenous rights in Australia.

²³ Interview with NIML14 (Face-to-face interview, 9 May 2003).

²⁴ William J Draper (ed), *Who’s Who in Australia* (XXVth ed, 1985); Full Bench Western Australian Industrial Relations Commission, ‘Speeches of Farewell to His Honour the President D.J. O’Dea’ (Speech delivered at the Special Sitting of the Full Bench before the Western Australian Industrial Relations Commission, Perth, 31 October 1988). Note that Commissioner O’Dea’s appointment as president earned him the status of a judge and the title of ‘The Honourable’ according to the *Industrial Relations Act 1979* (WA) s9.

The first office to be established was in Canberra because the RCIADIC was a national inquiry and the national capital city was where all the files were initially housed. The first public hearing was held in Canberra when the names of 124 Indigenous people who had died in custody during the relevant time were read into the record.²⁵ As one might imagine, the reading of all the names was symbolically powerful. Other administrative personnel, such as the RCIADIC national secretary, were appointed to the office in Canberra. Shortly after, offices were established in Adelaide and Sydney for the investigations into the deaths of Kingsley Richard Dixon and Edward James Murray, respectively. As other commissioners and staff joined the inquiry, ‘permanent’ offices in Brisbane, Perth, Broome, Melbourne, Darwin and Alice Springs were established.²⁶

People were recruited for a number of roles, such as research, field and executive officers, at different times in each office. At its peak, the RCIADIC employed approximately 130 people across the various offices.²⁷ When it came to selecting legal personnel, criminal defence experience and past representation of Indigenous litigants were the main criteria used. People who fitted these criteria were well known in the legal professions in each jurisdiction, and they were primarily recruited to these positions through mutual contacts. Many people were from the State Aboriginal Legal Service or Legal Aid offices. Although this involved mobilising personal networks, the process ensured that people with an interest in advancing the rights of Indigenous people were appointed. On the other hand, while they may have had an interest in Indigenous rights, one of the non-Indigenous lawyers interviewed acknowledged that most of the lawyers appointed were non-Indigenous, had come from upper and middle class families, and had been educated in private well-established schools.

Some offices found it difficult to fill positions because of the controversial nature of the inquiry. One lawyer recalled that ‘you didn’t advertise. No one was ever

²⁵ The exact number that fell within the Letters Patent was at that time unknown.

²⁶ As mentioned in Chapter 3, Hobart had an Aboriginal Issues Unit (AIU) office which was used temporarily by Commission Wootten and his staff when they travelled to Tasmania for the death hearing.

²⁷ This information was obtained from Whimp, above n 1 and from people I interviewed.

going to apply for a job.’²⁸ People with legal qualifications were in some jurisdictions dissuaded from applying for jobs by colleagues with apparently prejudicial views of Indigenous people. This was particularly the case in Western Australia. Some prospective applicants were told that being associated with such a cause would harm their careers. Some lawyers were also reluctant to leave private practice for very long. Many of the commissioners and lawyers appointed had been assured that the inquiry would only take between 6 months and a year to complete. The Commonwealth government clearly had not realised the enormity of the task at hand.²⁹ Additionally, the government had given such reassurances because they were genuinely hopeful that the concerns of the families and friends of the deceased would be appeased by the Bicentenary year. The government’s hopes had been so fervent that they had imposed an unrealistic completion date for the RCIADIC, a date which had to be regularly revised and extended. This created a sense of uncertainty amongst the RCIADIC staff:

We essentially closed up about twice or three times ... We would be standing there having drinks on the Friday without knowing whether or not we’d have our period extended.³⁰

The commissioners and many of the lawyers who were appointed in the first eighteen months of the inquiry were still there two and a half years later.

A Criminology Research Unit (CRU) was established in Canberra in January 1988 to provide further information to the commissioners about the imprisonment and deaths of Indigenous people in custody.³¹ A prominent criminologist, David Biles, was recruited by Commissioner Muirhead and appointed to head the CRU. Biles had established relationships with correctional administrators and police commissioners around the country after having previously held the position of Director with the Australian Institute of Criminology. The CRU was initially set

²⁸ Interview with NIFL28 (Face-to-face interview, 23 June 2003).

²⁹ Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Underlying Issues in Western Australia, Vol 1-2* (1991) vol 1, 1 (abbreviated as *Regional Report of Inquiry into Underlying Issues in Western Australia* in repeated citations).

³⁰ Interview with NIFL27 (Face-to-face interview, 7 May 2003).

³¹ As well as from interview data, this information was obtained from: *National Report*, above n 8, vol 5, 250.

up as the general RCIADIC research unit, but it was later changed to reflect the fact that it had a criminological focus. Other research to do with social, cultural or legal matters was left up to the regional offices and the AIUs.³² The CRU produced 22 research reports about criminal offending patterns, incarceration and deaths in custody of Aboriginal and Torres Strait Islander people.³³

The inquiry eventually considered 99 deaths that occurred between 1 January 1980 and 31 May 1989. These dates were arbitrarily selected by the sanctioning governments.³⁴ Three of the deceased were born in the Torres Strait Islands.³⁵ Eleven were female and 88 were male. Although the original terms of reference contained in the Letters Patent were framed in a way that limited the inquiry to investigating the deaths per se, they were later extended to include a consideration of the underlying social, cultural and legal issues that may have had a bearing on the deaths. The Letters Patent and the terms of reference are dealt with in more detail below.

C *Setting up the AIUs*

Gary Foley, a prominent Indigenous activist, approached Commissioner Muirhead early in the RCIADIC's life to discuss his concerns about there being 'a serious weakness in the structure of the commission [because] there seemed to be no avenue for direct input from the Indigenous community'.³⁶ In March 1989, almost a year and a half after the RCIADIC was established, the commissioners

³² To preserve judicial independence commissioners, counsel assisting and instructing solicitors were appointed and funded by the Attorney-General's Department of each jurisdiction (as opposed to the secretariat). The research areas (ie the CRU and the AIUs) formed part of the secretariat as did the administrative support staff, but apart from technically answering to the national secretary, they did not *in theory* have a direct organisational relationship to the commissioners or counsel. *In practice*, however, both the CRU and the AIUs reported to the commissioners.

³³ The reports have been published in David Biles and David McDonald (eds), *Deaths in Custody Australia, 1980-1989: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (1992).

³⁴ Whimp, above n 1.

³⁵ Nikira Mau, Patrine Misi, and Misel Waigana.

³⁶ Interview with IMNL12 (Face-to-face interview, 26 May 2003). See also *National Report*, above n 8, vol 5, 248. Other accounts give the impression that the AIUs were established following the initiative of other key players within the RCIADIC (eg Whimp, above n 1; John Halden Wootten, 'Interviews' (1989) 2(36) *Aboriginal Law Bulletin* 8). I have elected, however, to rely on the information provided by interviewees who would be considered authoritative sources on the topic and on the account given in the *National Report*.

resolved to establish AIUs in each of the six States and the Northern Territory in order to address this concern and to supplement the work of the RCIADIC in respect of the underlying issues.³⁷ The role of the AIUs was described in the *National Report* as being:

to ensure that each Commissioner hears and understands the views of Aboriginals and Aboriginal Communities and Organizations in his region about the reasons why so many Aboriginals are in custody and die in custody and their views as to how the situation can be changed.

The job of the Units is to identify what Aboriginals see as the issues and the solutions, to ensure that those perceptions are conveyed to and understood by the Commissioner and in appropriate cases to encourage Aboriginal Communities, Organizations or individuals to prepare their own submission(s).

To help ensure that the views of Aboriginals are understood and get through to each Commissioner, an Aboriginal person is being appointed to head each Unit and will have a very high degree of independence and responsibility.

The Head of each Unit will have the task of planning and organizing the process of consultation with Aboriginals, Aboriginal Communities and Organizations referred to; and will also have a responsibility, in appropriate cases, for the task of organizing such research work as is necessary in relation to the Aboriginal viewpoints (taking into account the constraints referred to below, already available research material and the work of other Commission staff).

A Unit will have to work within the constraints of the available time and funds and the Commission's Terms of Reference. It will co-operate with other staff and the Commissioner as part of a team to make the best use of the Commission's resources and the best possible contribution to the Commission's work; likewise the Unit is entitled to the same co-operation from other staff and the Commissioner. While the Head of the Unit will be accountable to the Commissioner for the work of the Unit, he or she will be accorded and expected to accept professional responsibility for it, with a corresponding degree of independence. In particular the basic principle will be that the work undertaken by

³⁷ *National Report*, above n 8, vol 5, 248; Whimp, above n 1.

the Unit must reflect the concerns of Aboriginal people, not those of the Commissioner, of Commission staff or of the Aboriginal Issues Units.³⁸

The AIUs were established as semi-independent research departments, with the expectation that they organise meetings and interviews with Indigenous people and organisations, and then report their findings to each regional commissioner. The *National Report* noted that

[t]he AIUs worked under the same constraints of time, task, and geography that came to typify the workload of the Commission throughout the country, but, given the demographic factors that characterize the Aboriginal and Torres Strait Islander population, their task was particularly onerous.³⁹

The positions that needed to be filled were publicly and widely advertised, although the commissioners selected the heads of the AIUs based on the advice of a local representative Indigenous committee or Aboriginal Legal Service and after an interview process. Establishing the AIUs and appointing people to head the AIUs was easier in some jurisdictions than in others. The Queensland AIU had a particularly tumultuous beginning when the first appointed head, a highly regarded Indigenous female activist and academic, was dismissed for having differing views from the Queensland commissioner about what research should be conducted by the AIU. There were also problems in South Australia when certain members of the Indigenous community opposed the original person appointed. Similarly, an initial choice in New South Wales was later abandoned when the Aboriginal Advisory Committee declined to accept the person as Indigenous.

Over the life of the AIUs, there were four female heads appointed (including the one who was dismissed in Queensland) and six male heads (including replacements). The funding given to the AIUs was much more limited than that given to the national and regional RCIADIC offices.⁴⁰ Many who worked for the

³⁸ *National Report*, above n 8, vol 5, 248-249.

³⁹ *Ibid* vol 5, 248.

⁴⁰ Once established, the AIUs developed work-plans in conjunction with the regional commissioner, which included requests for additional funding. According to one person, additional funding was, particularly in the case of the Northern Territory AIU, promptly provided.

AIUs were aware that RCIADIC staff were being paid generous salaries far beyond their own remuneration.

Although some Indigenous people in the communities were sceptical about the existence and operation of the AIUs, the RCIADIC believed that their relative independence ‘guaranteed the exposure, if not the acceptance, of issues raised by Aboriginal people at the highest level’.⁴¹ The AIUs were therefore conceived by the RCIADIC as being the most efficient and persuasive forum for the voice of Indigenous people. One person who was interviewed commented, however, that he ‘saw the lack of qualified Indigenous researchers at that point in time as a significant handicap’ to their operation.⁴² Ultimately, the AIUs were stronger in some places than in others and were in existence for differing periods of time. Most were disbanded about six months prior to the closure of the regional offices.

D *Political Milieu*

When the RCIADIC was established, the federal, New South Wales, South Australian, Victorian and Western Australian governments were all Labor governments. The Northern Territory, Queensland and Tasmanian governments, on the other hand, were respectively headed by Country Liberal, National and Liberal parties. Although five out of the eight jurisdictions were controlled by the Labor party, a party considered to espouse a less conservative and more reformist ideology than the Liberal and National parties,⁴³ most State governments were nevertheless opposed to the inquiry.⁴⁴ For example, the day after the RCIADIC was announced, *The Age* newspaper reported that the Queensland Minister for Community Services (with responsibility for Indigenous Affairs), Bob Katter, had the night before said that ‘the royal commission would be a waste of time and an insult to the Aboriginal people’.⁴⁵ Duncan Graham, a Western Australian journalist who wrote an award-winning book about the RCIADIC, notes that he

⁴¹ Whimp, above n 1, 89.

⁴² Interview with IMNL12 (Face-to-face interview, 26 May 2003).

⁴³ Randal G Stewart and Ian Ward, *Politics One* (2nd ed, 1996).

⁴⁴ The people I interviewed who had worked in the Northern Territory found both the government and Police Commissioner quite cooperative.

⁴⁵ Garran, above n 12, 1.

could find no record of an Indigenous agreement to this claim.⁴⁶ According to many of those interviewed, State government opposition was motivated by concerns about the amount of time and money the RCIADIC would require. In addition, most State police and prison departments vigorously opposed the scrutiny to which their practices and procedures were being subjected. As a result, many failed to cooperate with the RCIADIC's requests for evidence and testimony, and these failures, particularly in Queensland and Western Australia, significantly hampered the progress of the RCIADIC as well as its ability to perform rigorous investigations into some of the deaths.⁴⁷ Having to subpoena police and prison officers to appear as witnesses also increased the costs of the RCIADIC.⁴⁸ Since responsibility for police and prison misconduct rests with State governments, the Commonwealth had no power to force compliance and assist with ensuring that the inquiry was completed in a timely manner.⁴⁹

The federal, South Australian, Western Australian, Victorian and Northern Territory governments did not change political make-up during the life of the RCIADIC. Interestingly, both the federal and South Australian governments were under the control of the same party leaders during the entire time that the RCIADIC was in operation. This may explain the continued support given to the South Australian office by the State government. As explained in more detail further below, there were no challenges (legal or otherwise) initiated by the South Australian government or its agencies during the RCIADIC which is in stark contrast to the opposition displayed by the Western Australian, Queensland and New South Wales governments.

⁴⁶ Graham, above n 1, 148.

⁴⁷ Ibid 159-160. A clear example of how the police did not fully cooperate with the investigations in Queensland is contained in: Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Charlie Kulla Kulla* (1991) (abbreviated as *Report of the Inquiry into the Death of Charlie Kulla Kulla* in repeated citations). In the *Report of the Inquiry into the death of Charlie Kulla Kulla*, Commissioner Wyvill describes how police, court and hospital records went missing, witnesses gave conflicting accounts of the events surrounding the death, and the sergeant in charge of the police station in which Charlie Kulla Kulla had been held was a reluctant and unreliable witness.

⁴⁸ Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia, Vol 1-2* (1991) (abbreviated as *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* in repeated citations).

⁴⁹ Whimp, above n 1. Although after the *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 case it is arguable that the Commonwealth government could have legislated to force compliance based on the external affairs power and United Nations racial equality treaties but it did not do so in case it would provoke conflict with the State governments.

The Western Australian government was particularly hostile towards the RCIADIC, although it cooperated in establishing the RCIADIC and in providing funding for the Western Australian office. Had the opposition party won office in the 1988 election, its leader's promise to suspend the RCIADIC may have been realised. Although Labor won the election and did not suspend the RCIADIC, they continued to thwart the RCIADIC's capacity to conduct the inquiry.⁵⁰ After his resignation and in an interview on the Australian Broadcasting Corporation (ABC) Radio, Muirhead confided that:

The situation in Western Australia has been particularly difficult because I can only say that we are not receiving the degree of cooperation in that State which the commission is receiving elsewhere.

The validity of the terms of reference are under challenge in the Federal Court. ... I just find it rather startling when I'm told that a government which presents me with a commission and terms of reference then finances groups who wish to challenge the validity of the Government's terms of reference ... it must be a unique situation. ...

I always prayed that the commission would never become political. Once it became political it intrudes upon the efficacy of our work and I think ultimately possibly the value of our work.⁵¹

It appears that the police and prison officers unions held quite a lot of sway with the government in Western Australia, and knew how to manipulate the media for maximum public support. According to one person who was interviewed, their attitude was that there was nothing wrong with the custodial system and that deaths were occurring because the people wanted to die.

Queensland was in an interesting position because the Fitzgerald inquiry, which had been established on 26 May 1987, was conducting its investigation into police

⁵⁰ Graham, above n 1.

⁵¹ This quote has been taken from *ibid* 158-159. since it has not been possible to obtain the original transcript of the interview.

corruption at the same time as the RCIADIC. The need for access to police records by both inquiries created some problems for the Queensland RCIADIC office, although many of the people I interviewed noted that the two inquiries worked well together. In fact, one person commented that the inquiry into police misconduct helped rather than hindered the investigation:

I mean up until that stage they [the police] could do what they wanted to and they were beyond challenge and would have thought, 'we'll just pull down the shutters' but Fitzgerald said that there were going to be big changes and they better get with the program. I think that helped.⁵²

Following the change in government in Queensland in December 1989, the Queensland office received 'utmost cooperation' instead of 'frustration and hindrance'.⁵³

Each government was given leave to appear at the hearings and provided funding for the legal representation of police and correctional departments. The Western Australian government's financial support of the legal challenges initiated by its State police and prison officers unions purportedly amounted to A\$250000 (Australian dollars).⁵⁴ Graham notes that this was an extraordinary action to be taken by the government, which could only be explained by the political influence exerted over the government by the police and prison officers unions.⁵⁵

The political context within which the RCIADIC was operating therefore hindered, rather than assisted, its endeavours in many States. Unfortunately, as Graham notes:

⁵² Interview with NIML31 (Face-to-face interview, 19 September 2003).

⁵³ Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in Queensland* (1991) 3 (abbreviated as *Regional Report of Inquiry in Queensland* in repeated citations).

⁵⁴ Graham, above n 1.

⁵⁵ Also possible is that the Western Australian Labor State government was pressured by the federal Labor government to set up the inquiry when it never really wanted a full investigation.

It was the slow progress of the commission and the cost which ... regularly aroused the concern of politicians, including the federal Labor government, and the police. Sadly there was little public analysis of these events.⁵⁶

II THE LETTERS PATENT, TERMS OF REFERENCE AND CHALLENGES MOUNTED

A *The Letters Patent and Terms of Reference*

The RCIADIC was established under a variety of legislative and prerogative powers in each corresponding jurisdiction. Specifically, the executive branches of government, the Governor General and the Governors of the various jurisdictions relied upon the following powers and Acts to issue Letters Patent:

- The Commonwealth government relied upon the *Royal Commissions Act 1902* (Cth) to establish the RCIADIC and grant it its powers.
- The New South Wales government relied upon the prerogative powers of the Governor to set up the RCIADIC, which then attained its investigative powers from the *Royal Commissions Act 1923* (NSW).
- The Northern Territory government specifically enacted the *Commission of Inquiry (Deaths in Custody) Act 1989* (NT) to establish the RCIADIC and specify its investigative powers.
- The Queensland government relied upon the prerogative powers of the Governor to set up the RCIADIC, which then attained its investigative powers from the *Commissions of Inquiry Act 1950* (Qld).
- The South Australian government relied upon the prerogative powers of the Governor to set up the RCIADIC, which then attained its investigative powers from the *Royal Commissions Act 1917* (SA).
- The Tasmanian government relied upon the prerogative powers of the Governor to set up the RCIADIC, which then attained its investigative powers from the *Evidence Act 1958* (Tas).
- The Victorian government relied upon the prerogative powers of the Governor and the *Constitution Act 1975* (Vic) to set up the RCIADIC,

⁵⁶ Graham, above n 1, 160.

which then attained its investigative powers from the *Evidence Act 1958* (Vic).⁵⁷

- The Western Australian government relied on both the prerogative powers of the Governor and the powers set out under the *Royal Commissions Act 1968* (WA) to set up the RCIADIC.

Once each State and the Northern Territory had released their own Letters Patent, the Commonwealth government issued consolidated Letters Patent for each of the newly appointed State commissioners.

The general investigative powers that are granted to royal commissions by the various statutes (and which were in fact granted to the RCIADIC) include coercive powers of inquiry.⁵⁸ This authorises the sanctioning of any person that does not comply with a summons to give evidence, or to produce documents or other evidence. Therefore, the RCIADIC had extensive powers to acquire information for its investigation. Its investigation was, however, confined by the Letters Patent and the manner in which the terms of reference were interpreted. When the RCIADIC was first established, the terms of reference required the Commissioner Muirhead to:

[I]nquire into and report upon:

- (i) the deaths in Australia since 1 January 1980 of Aboriginals and Torres Strait Islanders whilst in police custody, in prison or in any other place of detention; and
- (ii) any subsequent action taken in respect of those deaths.⁵⁹

On 6 May 1988 the original terms of reference were further clarified as follows:

[To investigate] the deaths in Australia since 1 January 1980 of Aboriginals and Torres Strait Islanders whilst in police custody, in prison or in any other place of

⁵⁷ Section 88B of the *Constitution Act 1975* (Vic) sets out the power of the Governor in Council to issue a Commission to a person or persons to make an inquiry into the matters as specified. Although the Act specifies the use of a Commission, I have relied on the wording of the *National Report* in stating that the Governor of Victoria issued Letters Patent.

⁵⁸ For a detailed explanation of the power see: Ransley, above n 3, ch 5. The exact manner in which this power is granted and by whom it can be enforced varies between jurisdictions.

⁵⁹ *National Report*, above n 8, vol 5, 157.

detention, but not including such a death occurring in a hospital, mental institution, infirmary or medical treatment centre unless injuries suffered while in police custody, in prison or in any other place of detention caused or contributed to that death ...⁶⁰

Commissioner Muirhead had from the outset ‘announced that he saw his job as being not merely to understand how each person died but to know why that person died’.⁶¹ This view was emphasised in the *Interim Report* that he released on 21 December 1988. Muirhead had started to hear evidence during the earlier death hearings about topics that would have subsequently been classified as ‘underlying issues’ prior to his terms of reference being explicitly extended to include such an inquiry.⁶² It was therefore understood that the original terms of reference inherently included such an inquiry. In recognition of this fact and to put the matter beyond doubt, the Letters Patent were officially extended to allow an investigation into ‘the social, cultural and legal factors which, in his judgement appeared to have a bearing on the deaths’.⁶³ These new extended powers enabled Commissioner Muirhead, as the national commissioner (and later the other five commissioners) to look at:

not only how people died, but why they died. [T]o examine ... underlying causes. [To ask] why do Aboriginal people who form about 1.5% of the Australian population, have twenty times the risk of dying in police custody and ten times the risk of dying in prisons? Why are so many arrested and put in cells and prisons? Are they treated fairly by law? Why are so many Aboriginals unemployed, poorly housed, poorly educated? Why is their health poor? Why is their life expectancy shorter than other Australians? These are ... ‘underlying issues’. The Commissioners are empowered in reporting to Governments to consider ‘social, cultural and legal factors’ which contribute to the deaths.⁶⁴

Commissioners Johnston, Wootten and Wyvill were, as mentioned above, appointed on 6 May 1988 and Commissioner O’Dea was appointed on 27 October

⁶⁰ Ibid vol 5, 158.

⁶¹ Ibid vol 1, 2.

⁶² Ibid vol 5, 254.

⁶³ Ibid vol 5, 158. This extension occurred on 6 May 1988, at the same time as the government further clarified which deaths would be considered to be within the terms of reference.

⁶⁴ Ibid vol 1, 103.

1988. Their Letters Patent, however, did not explicitly confer on them the extended powers to investigate underlying issues. Their power to engage in such an investigation was only clarified and confirmed later as a result of a challenge brought by the Queensland government against Commissioner Wyvill's authority to consider a submission tendered by the National Aboriginal and Islander Legal Services Secretariat (NAILSS) during the hearing of 'the young man who died at Wujal Wujal'.⁶⁵ The outcome of the challenge is discussed in more detail below. Of immediate interest, however, is the fact that the resulting interpretation concluded that the regional commissioners were able to investigate underlying issues to the extent to which they related to the particular deaths investigated. Any observations made in relation to underlying issues were to appear in their respective regional reports. The *National Report* notes, however, that 'the commitments of the Commissioners were such that it was not possible to provide an investigation of underlying issues in all States and Territories that was necessarily of consistent depth or breadth'.⁶⁶ Indeed, whilst acknowledging the importance of understanding the environment in which the deceased had lived, Commissioner O'Dea concedes in his regional report that due to the number of deaths he investigated and the geographical size of the State, many aspects of his inquiries were mainly centred on the surrounding circumstances of the deaths rather than underlying issues.⁶⁷ He also admits that he placed a great deal of reliance on the work of Commissioner Dodson and the Western Australian AIU 'to address the underlying issues involved in the deaths'.⁶⁸ Commissioner Wyvill's regional report also focuses primarily on describing the deaths in custody and the adequacy of the subsequent post-death investigations, dedicating only one chapter to 'briefly identify[ing] certain historical and social connections in the overview of the characteristics of those whose deaths ... [he] investigated'.⁶⁹

⁶⁵ *Regional Report of Inquiry in Queensland*, above n 53, 2-3. Note that the deceased's name was suppressed by the RCIADIC.

⁶⁶ *National Report*, above n 8, vol 1, xlvii.

⁶⁷ *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 15.

⁶⁸ *Ibid* vol 1, 15, 19.

⁶⁹ *Regional Report of Inquiry in Queensland*, above n 53, 38.

Despite the expansion in the Letters Patent, it was only after further controversy that matters pertaining to the social, legal and cultural reasons for the deaths became an important aspect of the RCIADIC's work. Graham believes that Commissioner Muirhead's resignation in April 1989 and the release of the RCIADIC's findings about four of the deaths prompted renewed calls from the police and prison officers unions and from Indigenous activists to change the direction of the RCIADIC investigation.⁷⁰ Commissioner Muirhead presided over the investigations and hearings into the deaths of Kingsley Richard Dixon, John Clarence Highfold, Charlie Sydney Michael and Edward James Murray before he retired, and he released the reports pertaining to the deaths on 25 January 1989. None of the investigations resulted in a finding of foul play against police and prison officers, and the reports consequently did not recommend any disciplinary action against the officers concerned, although the police investigations into the deaths of Edward James Murray and Charlie Sydney Michael were deemed inadequate. The police and prison officers unions used these reports to strengthen their arguments against the RCIADIC and to illustrate that the RCIADIC should be widening its focus to underlying issues rather than simply maintaining an investigation into deaths per se. Indigenous activists, on the other hand, called for more thorough investigations into the deaths.

The RCIADIC began to suffer mounting criticism from all quarters. At the same time as police and prison officers unions and Indigenous leaders were calling for a change in the focus of the inquiry, internal disputes began to arise. Early findings of the CRU that Indigenous people in custody were less likely to die than non-Indigenous detainees did not sit well with many of the RCIADIC staff and Indigenous leaders.⁷¹ As a result of this finding, the CRU proposed that the 99 deaths be researched within the context of all deaths in custody, Indigenous and non-Indigenous.⁷² The CRU, therefore, was seen to be espousing the view that

⁷⁰ Graham, above n 1.

⁷¹ Australian Broadcasting Corporation, 'Black Deaths Royal Commission', *Four Corners*, 1989.

⁷² The following research papers prepared by the CRU reflect the fact that the CRU wanted to pursue a comprehensive research agenda: David Biles, David McDonald and Jillian Fleming, 'Research Paper No. 7 - Australian Deaths in Custody, 1980-88: An Analysis of Aboriginal and Non-Aboriginal Deaths in Prison and Police Custody' in David Biles and David McDonald (eds) *Deaths in Custody Australia, 1980-1989: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (1992) 213; David Biles, David McDonald and Jillian Fleming, 'Research Paper No. 10 - Australian Deaths in Police Custody 1980-88: An

the RCIADIC place greater emphasis on custodial care in general rather than on the question of how Indigeneity affects mortality in custody. This view conflicted with the wishes of many Indigenous activists and their supporters, including many of the legal staff employed by the RCIADIC. Until this point, the driving force behind the establishment of the RCIADIC was ‘a sense of mistreatment of Aboriginals [in custody] than ... a generalised concern with custodial conditions’.⁷³ This internal dispute almost resulted in the CRU being disbanded, although this did not happen. Instead, a compromise was reached whereby Indigenous people were given a greater involvement in the research conducted by the establishment of the AIUs, and more emphasis was placed on investigating underlying issues and focusing on the broader aspects of the terms of reference.

B *Legal Challenges Mounted*

There were a number of formal legal challenges instituted by governments and police and prison officers unions regarding the power of the RCIADIC to investigate certain matters. One of the more common types of challenge concerned whether or not a particular death fell within the terms of reference. These challenges related both to whether or not the deceased was Indigenous and to whether or not they had died in custody or a place of detention. The commissioners in each jurisdiction made a number of determinations about whether or not certain deaths fell within the jurisdiction of the RCIADIC. Of an initial 124 deaths identified, 25 deaths were found to be outside the RCIADIC’s Letters Patent: 15 because the death did not occur in, or did not occur as a result of, time spent in custody; 7 because the deceased were non-Indigenous; and 2 because the deaths were not within the time period specified in the terms of reference.⁷⁴

Analysis of Aboriginal and Non-Aboriginal Deaths’ in David Biles and David McDonald (eds) *Deaths in Custody Australia, 1980-1989: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (1992) 213; David Biles, David McDonald and Jillian Fleming, ‘Research Paper No. 11 - Australian Deaths in Prisons 1980-88: An Analysis of Aboriginal and Non-Aboriginal Deaths’ in David Biles and David McDonald (eds) *Deaths in Custody Australia, 1980-1989: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (1992) 213.

⁷³ Harding, above n 11, 111.

⁷⁴ For more information about these deaths, refer to the table and discussion presented on pages 195 and 196 of the *National Report*, above n 8, vol 5. See also the discussion regarding Paul Pryor

In three of the 99 cases which the commissioners found fell within the terms of reference, applications were filed in the Federal Court challenging the legality of the RCIADIC's power to inquire into the deaths. Two of the applications were filed against Commissioner Wyvill by the State of Queensland, one challenging the deceased's Indigeneity and the other questioning whether the deceased was in a place of detention when she died.⁷⁵ The application challenging Wyvill's ruling that Darren Steven Wouters was Indigenous succeeded in the first instance in the Federal Court, but the Full Federal Court overturned this decision on appeal. In the case of Karen Lee O'Rourke, the application filed by the State of Queensland was eventually discontinued after the change in government in December 1989.⁷⁶ The third application was filed against Commissioner Wootten by the legal representatives of the individual police officers involved in the death of David John Gundy. They claimed that since the death had occurred in the deceased's home, it had not occurred in custody. The Federal Court at first instance granted the applicants an injunction, but this was later successfully appealed by the de facto wife of the deceased and the NAILSS. A further application for leave to appeal to the High Court was heard but dismissed.⁷⁷

Another type of legal challenge related to the RCIADIC's powers of investigation. These challenges questioned whether or not the commissioners had the authority to investigate underlying issues, to exercise coercive powers when gathering evidence, and to be appointed as commissioners under the Letters Patent. One such objection arose in the hearing into the death of 'the young man who died in Wujal Wujal'. The State of Queensland, in that case, challenged Commissioner Wyvill's authority to receive in evidence a submission from the NAILSS which

in: Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) 52 (abbreviated as *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* in repeated citations).

⁷⁵ The application challenging the deceased's Indigeneity was in relation to the death of Darren Steven Wouters and the one challenging whether or not the deceased was in a place of detention was in relation to Karen Lee O'Rourke. See both Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Darren Steven Wouters* (1991) and *National Report*, above n 8, vol 5, 236.

⁷⁶ A Notice of Discontinuance was filed in the Federal Court on 17 January 1990: *National Report*, above n 8, vol 5, 236.

⁷⁷ See *ibid* vol 5, 234-235 and *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 74, 52.

related to underlying issues. The government claimed that only the national commissioner had, according to the Letters Patent, the power to investigate underlying issues.⁷⁸ Wyvill ruled against the Queensland government, stating:

The error in this reasoning is that the paragraph relates to the National Commissioner's reporting authority and not to his inquisitorial power. There are no corresponding words in those parts of the Letters Patent that relate to his power to inquire. The powers of inquiry conferred originally on Commissioner Muirhead and now on Commissioner Johnston are expressed in essentially the same terms as the powers of inquiry conferred on me by my Letters Patent. Insofar as a death is within our Terms of Reference the scope of inquiry is expressed in exactly the same words. The power (and the duty) conferred on me to inquire into deaths that are within jurisdiction are broad. It is not restricted so as to exclude the social, cultural and legal factors that appear to have a bearing on those deaths.⁷⁹

An application filed in the Federal Court by the State of Queensland subsequent to this ruling was later discontinued in January 1990 when Labor came into power.

Whether or not the commissioners possessed coercive powers pursuant to Commonwealth and State royal commission statutory schemes came before the Federal Court in relation to the hearing into the death of Wayne John Dooler in Western Australia. The Western Australian Police Officers Union and two individual police officers sought injunctive relief against Commissioner O'Dea to restrict him from proceeding with the case and from exercising coercive powers. The Western Australian government funded the legal challenge. The applicants also sought a Writ of Prohibition against O'Dea to prohibit him from continuing with the investigation into any other deaths. The applicants eventually abandoned and discontinued both matters on 26 May 1989.⁸⁰

Commissioner Wyvill, although appointed as the Queensland commissioner, agreed to investigate the death of Robert Joseph Walker, who died in Fremantle

⁷⁸ *Regional Report of Inquiry in Queensland*, above n 53, 2-3 and also *National Report*, above n 8, vol 5, 236.

⁷⁹ *Regional Report of Inquiry in Queensland*, above n 53, 2-3.

⁸⁰ *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 25.

Prison, Western Australia. Seven police officers and the police and prison officers unions challenged the validity of Wyvill's appointment by the Commonwealth and State governments to investigate Robert Joseph Walker's death. This application was dismissed by the Full Court of the Federal Court. Special leave to appeal to the High Court was subsequently sought but denied.⁸¹

Finally, a legal challenge claiming legal professional privilege against subpoenaed documents and a legal challenge seeking an order that hearings be conducted in private and not be published were initiated in Western Australia against Commissioners Wyvill and Johnston, respectively. The challenge relating to privilege, which arose in the Robert Joseph Walker hearing, was initiated in the Supreme Court of Western Australia but was later transferred to the Federal Court. Ultimately, the applicants elected not to pursue this matter.⁸² The challenge against Johnston arose during the hearing into the death of John Peter Pat. The Western Australian Police Union of Workers sought to restrain the publication of the hearing because a civil defamation action initiated by the police officers involved with the death of John Peter Pat was pending against the ABC. Their application to the Federal Court failed, as did their attempt to appeal the decision.⁸³

⁸¹ A detailed account of this legal challenge can be found at *ibid* vol 1, 25-29.

⁸² *Ibid*.

⁸³ A more detailed account of this legal challenge can be found at *ibid* vol 1, 30-32.

III CONDUCTING INVESTIGATIONS INTO THE DEATHS AND UNDERLYING ISSUES

A *Investigating the Deaths*

The investigation into the deaths began in an ad hoc manner. Not only was the RCIADIC (and the Commonwealth government) unaware of how many deaths needed investigating in the early stages of the inquiry, but there was also little guidance from the government regarding the procedures to be used for the investigations.

The government started the royal commission without really thinking about how they were going to go about doing it and so they left it to the royal commission to decide that – most royal commissions are left to their own devices to carry out the inquiry.⁸⁴

The right of the RCIADIC to regulate its own investigative procedure was reflected in each State and Northern Territory Act, as well as having been recognised by the High Court.⁸⁵ Once all the commissioners had been appointed, they met on a regular basis to discuss ‘issues pertinent to the work of the Royal Commission’ and also to assist the national commissioner with his responsibilities.⁸⁶ Although all the commissioners agreed to the adoption of general guidelines, ultimately the manner in which the deaths were investigated depended very much on each individual commissioner. The discretion of the commissioners was influenced by the circumstances of each death.⁸⁷ Commissioners learned from their experiences of the first few investigations that were conducted and changed future processes accordingly.

According to the information obtained from the people I interviewed, the general process used by the various commissioners to investigate the deaths was much the

⁸⁴ Interview with NIML44 (Face-to-face interview, 6 May 2003).

⁸⁵ See the decision of *R v Collins; Ex parte ACTU – Solo Enterprises Pty Ltd* (1975-76) 8 ALR 691, 699.

⁸⁶ *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 14.

⁸⁷ *National Report*, above n 8, vol 5, 241.

same as the processes described by Hallett in his 1982 book *Royal Commission and Boards of Inquiry*.⁸⁸ Hallett notes:

Inquisitorial inquiries are invariably conducted along the lines of a court proceeding. Evidence is lead by counsel assisting and various ‘interests’ are represented by legal counsel. The inquiry often develops into an adversary type hearing with multi-parties ...⁸⁹

This was essentially the form in which the RCIADIC conducted the death hearings. The investigation of the 99 deaths was performed in a quasi-judicial manner, which included the use of formal hearings and the examination of files maintained by agents of the State.⁹⁰ The RCIADIC had to ‘investigate the investigations that had already taken place’ and also investigate any new deaths that occurred after its establishment.⁹¹ The length of each investigation varied. John Peter Pat’s investigation was the longest, with the hearing lasting almost two months.⁹² One of the lawyers described the process as follows:

Now what that involved really was getting hold of every scrap of paper that was in existence on each particular death, going through that in a very detailed way, then going through a process of interviewing any persons still alive or contactable who had anything to do with any of the deaths, taking pretty long and detailed statements and getting them signed by the people and presenting it all basically in a brief of evidence to counsel assisting who would then basically present the matters in the open hearings that were held.⁹³

The files examined contained details of each deceased’s birth, adoption, schooling, medical history, and involvement with the criminal justice system.

⁸⁸ Hallett, above n 3.

⁸⁹ Ibid 155-156.

⁹⁰ For a more detailed discussion of the methodology used by the RCIADIC when investigating the deaths see *National Report*, above n 8, vol 5, 240-244.

⁹¹ Interview with NIFL27 (Face-to-face interview, 7 May 2003).

⁹² In the *National Report* the John Peter Pat hearing is noted as having lasted for 54 days, although there is a question mark against this figure: *National Report*, above n 8, vol 5, 192. In the actual death report, the hearing is noted as having lasted 52 days: *Report of the Inquiry into the Death of John Peter Pat*, above n 5, 23. In the Western Australian regional report, Commissioner O’Dea notes that the hearing took three months: *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 13.

⁹³ Interview with NIML20 (Telephone interview, 17 September 2003).

They were an important resource, although the RCIADIC also acknowledged their limitations. More specifically, the *National Report* noted that '[n]ot infrequently the files contain false or misleading information; all too often the files disclose not merely the recorded life history of the Aboriginal person but also the prejudices, ignorance and paternalism of those making the record'.⁹⁴ Similarly, Commissioner Wootten noted in his regional report that:

one has to be wary of taking these materials, compiled almost entirely by white public servants, at their face value. In using them it was necessary constantly to bear in mind that they reflect the viewpoints, interests and attitudes of bureaucrats living in particular contexts and charged with carrying out particular functions on behalf of the white community. Often official records and reports tell more about the person who wrote them, and that person's attitude to the Aboriginal subject, than they do about the Aboriginal.⁹⁵

To gather evidence, the commissioners also conducted interviews and received submissions from family members, governments, government agencies, Indigenous organisations and community members. Copies of witness statements were circulated amongst all interested parties. Public hearings for each death investigated were held in either the hometown of the deceased, the town in which the death occurred, or in a capital city.⁹⁶ The use of local courtrooms for the hearings in rural or regional towns was avoided because of the negative connotations courts hold for Indigenous people.⁹⁷ Instead, the hearings were held in places such as schools or community halls. The RCIADIC was also conscious of the need to 'reduce the necessary formalities of the hearings and to counter the intimidatory nature of some of the cross-examination of some of the Aboriginal witnesses'.⁹⁸ Prior to the RCIADIC arriving in a town to conduct a hearing,

⁹⁴ *National Report*, above n 8, vol 1, 4-5.

⁹⁵ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 74, 12.

⁹⁶ It seems that Commissioner Wootten would hold the hearings in the hometown of the deceased unless there was a good reason to do otherwise (for example the family requested that the hearing be held in another location). The general rule with the other commissioners was to hold the hearings in the town in which the death had occurred: *Ibid* 37; *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 15; *National Report*, above n 8, vol 5, 243.

⁹⁷ As well as from interview data this information was obtained from: *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 74, 38.

⁹⁸ *National Report*, above n 8, vol 5, 243.

Indigenous field officers and a number of lawyers would visit the local community to explain the process of the hearings and the work of the RCIADIC.

In investigating the deaths, one of the questions that the commissioners were attempting to answer was whether any police or prison officer could be blamed for the death. In doing so, the commissioners were bound by their terms of reference and the Commonwealth, State and Territory Acts that regulated their powers of investigation. Commissioner Muirhead in the *Report of the Inquiry into the Death of Kinsley Richard Dixon* noted that ‘it is clear that the general standard of proof to be applied in reaching findings of fact is the civil onus, the balance of probabilities’.⁹⁹ This means that they could not make any determinations regarding criminal fault. Muirhead then went on to stipulate that the RCIADIC had no obligation to reach any conclusions in relation to the deaths:

A feature of this Commission is that it is inquiring into deaths which occurred in the main in lockups and prisons – often in lonely cells. I do not consider there is any onus upon Counsel acting on instructions of the deceased persons’ relatives to prove anything, in the sense that the onus of proof is referred to in courts of law. In reaching my findings as to essential events, such findings must be based on the totality of the material before me. I used the word ‘material’ as opposed to ‘evidence’ deliberately as some of that material would not in legal proceedings qualify as evidence. This does not mean that the evidentiary value of that material can be ignored – questions of credibility and veracity are inevitably vital matters. Nor does it mean that I am required to make a finding of some sort or the other merely because such a finding is important, perhaps vital. It is probable that there will be situations in which the material or competing material permits no finding; the requirement to report to Government does not justify guesswork, inferred or otherwise. In some cases Commissioners may find it necessary to observe that they can make no findings. I may at times refer to ‘possibilities’ or ‘reasonable possibilities’ but when situations are referred to in such terms they remain but possibilities which would not be found persuasive in the fact finding processes in ordering legal proceedings.¹⁰⁰

⁹⁹ Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Kinsley Richard Dixon* (1989) 4.

¹⁰⁰ *Ibid* 6.

This was the view that was adopted by the other commissioners in subsequent investigations. In fact, Commissioner Johnston noted that his Letters Patent allowed him, in the *National Report*, to make recommendations ‘as to the bringing of charges or the drawing of matters to the attention of prosecuting or other authorities’.¹⁰¹ He did not do so, however, because he acknowledged that other commissioners had already made such recommendations (this is discussed below in more detail) and because he believed it would be inappropriate to come to any such conclusion about investigations which he did not conduct.

In a number of jurisdictions, the commissioners made various attempts to shorten the length of the hearings. This was necessitated in Western Australia by the number of deaths needing investigation. In New South Wales, Queensland, Victoria and Tasmania, some deaths received more attention than others due to time limitations.¹⁰² Hearings were abridged by either focusing more attention on the available files and witness statements, or by sending the counsel assisting to the coronial inquest to observe its conduct.¹⁰³ In both cases the RCIADIC hearing would then be truncated. As one might expect, this approach could only be implemented in cases where there was little suspicion surrounding the circumstances of the death.

Leave to appear at each hearing was given to the NAILSS, the CDBR, the Police Federation of Australia and New Zealand and other interested parties.¹⁰⁴ Indeed, in Western Australia, leave was given to the government department in question, police or prison officers unions and the individual police or prison officers involved in the death. In most cases, each of these parties had individual legal representation so that in any one hearing there were a number of Queen’s Counsel, junior barristers and solicitors appearing for the parties who had been given leave and only one counsel and maybe one solicitor appearing for the

¹⁰¹ *National Report*, above n 8, vol 1, 106.

¹⁰² A number of interviewees stressed the fact that all deaths were thoroughly investigated. See also the reassurance given in the *National Report*: Ibid vol 1, 59.

¹⁰³ This information was obtained not only from the people I interviewed but also from: *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 17.

¹⁰⁴ Interested parties included the family of the deceased, Northern Territory and State governments, Northern Territory and State police and prison officers unions/representatives and other individuals associated with the deaths: *National Report*, above n 8, vol 5, 242, 244.

RCIADIC. Other States and the Northern Territory did not have as many opponents to the RCIADIC.

Individual death reports were prepared for all the deaths investigated, although Commissioner Wyvill wrote a combined report for Richard Frank Hyde, David Mark Koowootha, and Perry Daniel Nobel. The reports were described as being 'life story documents' about each deceased, although some were more detailed than others.¹⁰⁵ Only two commissioners (Commissioner Wootten¹⁰⁶ and Commissioner Wyvill in the case of Charlie Kulla Kulla¹⁰⁷) made strong recommendations that the conduct of certain police officers be further investigated by disciplinary and prosecutorial authorities. Many of the people I interviewed commented that Commissioner Wootten's reports were the most detailed and most skilfully written. The role of each commissioner was to write the report and submit it to the national commissioner who then presented it to the Commonwealth and State or Northern Territory governments. Once that was done, the RCIADIC lost control over the reports.

¹⁰⁵ Interview with NIML14 (Face-to-face interview, 9 May 2003).

¹⁰⁶ Commissioner Wootten recommended that the reports of Shane Kenneth Atkinson, Lloyd James Boney, Arthur Moffatt and Mark Anthony Quayle be forwarded to the Commissioner of Police to determine whether any disciplinary action should be initiated against any of the police officers involved with the deaths. In the cases of David John Gundy, Paul Lawrence Kearney and Bruce Thomas Leslie, Commissioner Wootten recommended that the report be forwarded to the Commissioner of Police and other appropriate authorities to determine whether any disciplinary or prosecutorial actions should be initiated against the police officers involved with the deaths: Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Arthur Moffatt* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Bruce Thomas Leslie* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of David John Gundy* (1991); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Lloyd James Boney* (1991); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Mark Anthony Quayle* (1991); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Paul Lawrence Kearney* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Shane Kenneth Atkinson* (1991).

¹⁰⁷ Commissioner Wyvill recommended that the report be sent to the Commissioner of Police to determine whether any disciplinary action should be commenced against any police officer involved with the death: *Report of the Inquiry into the Death of Charlie Kulla Kulla*, above n 47.

B *Investigating the Underlying Issues*

The focus of this part of the investigation was to determine *why* the various deaths had occurred.¹⁰⁸ When asking this question, the RCIADIC was authorised to consider a variety of matters relating to the social, cultural and legal conditions experienced by Indigenous people. It was because of this second phase of the investigation that Patrick Dodson was appointed as a commissioner to investigate the underlying issues that related to the deaths in Western Australia.¹⁰⁹

Dodson was appointed at a time when the RCIADIC was enduring much criticism and dissent. Not only was there pressure from most State governments for the RCIADIC to end, but the Western Australian government was also demanding that the focus of the investigation be shifted from one that was predominantly concerned with who was responsible for the deaths to one that considered broader questions about what it meant to live in Australia as an Indigenous person. Once Commissioner Muirhead resigned, there was a need for another commissioner to be appointed to assist with the heavy workload in Western Australia.¹¹⁰ In order to appease the concerns of the Western Australian government, Commissioners Johnston and O’Dea, and the RCIADIC national secretary, John Gavin, suggested the appointment of Dodson as Muirhead’s replacement. This suggestion, which the Western Australian government accepted, was made on the basis that Dodson would not investigate deaths but would instead focus solely on underlying issues in Western Australia. Upon his appointment, Dodson had the difficult task of acquiring the confidence and trust of police and prison officers in that State to be able to properly investigate the underlying issues. He successfully gained their trust by convening a number of meetings with the unions and explaining that the focus of his investigation was to have an understanding of the broader sociological and historical reasons why Indigenous people came into contact with the criminal justice system rather than determining who was to blame for the deaths.

¹⁰⁸ *National Report*, above n 8, vol 5, 254-255.

¹⁰⁹ *Ibid* vol 5, 255.

¹¹⁰ *Ibid*.

While the other regional commissioners primarily focused on the deaths, they also conducted hearings and research into underlying issues. The investigation of the underlying issues was done in a way that used a social science approach. Research was conducted within the RCIADIC, public meetings were held, and submissions were received from individuals and organisations to understand the way Indigenous people lived and to fully appreciate the way colonisation had affected and continued to affect Indigenous Australians.¹¹¹ Public hearings were held with members of the community, police and prison officers, health and education workers and a number of other government departments. Some of these hearings were conducted in an adversarial manner while others were conducted more informally. The underlying issues hearings were held either at the end of a death hearing or independently of any individual death inquiries. In October 1989, and again in February 1990, a discussion paper was distributed to approximately 2000 Indigenous and non-Indigenous people and organisations and to Commonwealth and State governments, inviting submissions and comments on the topic of underlying issues.¹¹² Over two hundred submissions were received as a result of the invitation.¹¹³ After the receipt of the submissions, more detailed questions were sent to various State and Commonwealth government departments to gain further information about what had been highlighted in the submissions. In some cases, meetings were then held with senior officers to clarify matters even further.¹¹⁴ Research reports were also prepared by experts such as anthropologists, historians and sociologists on various topics connected with the social, legal and cultural aspects of the lives of the deceased. Published research and government files and records also informed this aspect of the investigations.

The CRU conducted statistical research which informed the analysis of underlying issues contained in the *National Report*. In 1988 the CRU established the National Police Custody Survey to determine how many Indigenous and non-Indigenous people were taken into custody during the month of August. No such data previously existed in relation to police custody.

¹¹¹ Ibid vol 5, 244-250.

¹¹² Ibid vol 5, 246-247.

¹¹³ *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 20.

¹¹⁴ *National Report*, above n 8, vol 5, 247.

In Western Australia both Commissioners O’Dea and Dodson had the power to investigate underlying issues. It was therefore important in that State for the two commissioners to regularly consult in order to avoid duplication.¹¹⁵

The manner and extent to which underlying issues were investigated in each State and the Northern Territory depended largely on the interests and expertise in the area of social science research of each individual commissioner. Most of the death reports contained a section relating to ‘underlying’ or ‘overview’ issues. One of the lawyers noted that if underlying issues had not been introduced, the separate sections on underlying or overview issues would not have been included in the death reports:

There was never any thought given at the outset that we’re going to be looking into health, education, employment and housing. That would only be background information, especially in the ones that we were dealing with in North Queensland, to see whether there was anything you needed that would have affected their mental health.¹¹⁶

Much of this material was compiled for inclusion in the regional reports and ultimately informed the *National Report*.

C Tasks Assigned to the AIUs

The only instructions one of the commissioners could recall being given to the AIUs (apart from what was set out in the terms of reference) was that they act with professional independence and that they report what Indigenous people had said during their consultations, not what they thought the RCIADIC wanted to hear. In practice, the way that the AIUs carried out the tasks assigned to them varied greatly. Their primary purpose was to collect information about underlying issues and to provide a vehicle for Indigenous people to voice their concerns to the RCIADIC and to become informed about the work of the RCIADIC.

¹¹⁵ *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 14.

¹¹⁶ Interview with NIML2 (Face-to-face interview, 11 March 2004).

Consequently, the AIUs acted as a link between the RCIADIC and Indigenous communities. In this regard the AIUs would organise meetings between RCIADIC staff and individuals and organisations within the various communities.

Whether or not an AIU went as far as conducting independent research work depended on both the commissioner and the head of the AIU appointed in a particular jurisdiction. In the Northern Territory, the head of the AIU, Marcia Langton, was an established and well-respected academic who had the support of the national commissioner to conduct the research she considered appropriate. In other States, either the heads of the AIUs did not have sufficient research experience to steer the investigation in the direction they thought appropriate or the commissioner did not support such an initiative. Accordingly, only some of the AIUs produced reports, although Volume 5 of the *National Report* lists all the AIUs as having produced such a report.¹¹⁷ Only the Northern Territory AIU's report was published (with the *National Report*). Reasons given by the people interviewed as to why this occurred included the fact that the Northern Territory report was well-written; Western Australia had its own underlying issues report and the report of the Western Australian AIU did not therefore need publishing; the head of the Northern Territory AIU was an influential person who was able to get what she asked for; and the RCIADIC ran out of time before reports of the AIUs were either finished or had been edited to a suitable standard for inclusion. The *National Report* contained the following explanation:

[B]ecause of the very great importance of this topic [alcohol abuse] and because it was given great attention by the Northern Territory Aboriginal Issues Unit, headed by Marcia Langton, and by the Aboriginal people with whom the Unit consulted, I have included the report of the Unit entitled 'Too Much Sorry Business' as an appendix to this report.¹¹⁸

The manner in which the AIUs liaised with communities included the preparation of discussion papers inviting submissions and engagement in community and prisoner meetings. The AIU in Western Australia worked closely with the

¹¹⁷ For a list of the reports noted in the *National Report* see: *National Report*, above n 8, vol 5, 553.

¹¹⁸ *Ibid* vol 1, 28.

Aboriginal Advisory Working Group, which had been purposefully established to assist the AIU with identifying important matters that needed consideration.¹¹⁹ The work of the Western Australian AIU was accessible to Commissioner O’Dea’s office to assist him with his investigation into the deaths and their associated underlying issues. One person I interviewed noted that

the unit, being made up of activists in the main, was more interested in the broader issue rather than in the narrower individual circumstances of someone’s life.¹²⁰

The Western Australian AIU also had close links with the office in Broome since its work was very much aligned with the underlying issues research work that was being conducted by Commissioner Dodson’s office. Like the other AIUs, however, the Western Australian AIU operated at a grassroots level, whereas Dodson’s office was more official. Therefore, despite a close working relationship with Commissioner Dodson’s office, their work was kept separate.

IV WRITING THE AIU, *NATIONAL* AND REGIONAL REPORTS AND RECOMMENDATIONS

A *Indigenous AIU Texts*

1 *Overview*

Following is a description of how the Indigenous texts that I was able to access were written and how the AIUs conducted their consultations with the communities. Because most of the Indigenous texts I analyse have never been published it is necessary to describe their focus and how they were prepared. It is also important to bring to light what Indigenous people said to the AIUs about the RCIADIC.

¹¹⁹ *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 21.

¹²⁰ Interview with IMNL34 (Face-to-face interview, 16 July 2004).

Although the Northern Territory AIU final report was published with the *National Report*, a brief summary of this report is included in this section for the sake of completeness. Marcia Langton, the person who headed the Northern Territory AIU, was a very influential and politically active Indigenous woman. Her report, however, has not been interpreted as solely reflecting the views of Indigenous women because both male and female views were canvassed in the compilation of the report. Having said that, many of those interviewed thought that Langton provided the RCIADIC with a powerful Indigenous female perspective. The impact of her influence is considered in more detail in Chapter 7 when the reasons for the RCIADIC focusing on Indigenous women in the way that it did are presented.

In their reports the AIUs focused on the underlying issues surrounding the deaths in custody. For this reason there was no analysis of the actual deaths in custody; rather, the reports contained Indigenous views about how Indigenous people were treated by the criminal justice system and other government and non-government agencies, and why they were overrepresented in police and prison custody. As the Northern Territory AIU noted, '[t]he role of the Aboriginal Issues Unit was to report Aboriginal views with as little distortion as possible'.¹²¹

According to the Indigenous people I interviewed and who had worked in the New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia offices, both males and females participated in the community consultations in relatively equal numbers. The Northern Territory AIU report also contained quoted material from both Indigenous men and women. Consequently the views expressed in the AIU reports appear to have a gender balance. Having said that, a memorandum of a visit to the Yirrkala community in the Northern Territory by a female Indigenous consultant hired by the Northern Territory AIU contained the following comment:

I was disappointed at not being able to obtain more detailed responses from women in the community, despite quite a few being present at the discussions. Generally when it was a mixed group, the women spoke very little, and tended to let the men

¹²¹ *National Report*, above n 8, vol 5, 283.

do most of the talking. However, when I did have the opportunity I spoke to women on their own, but their responses were generally not all that different from those of the men in the community, except of course their serious concern about the levels of alcohol consumption within the community, by both men and women, and the petrol sniffing happening within the teenage population, mostly amongst men.¹²²

Based on this remark, the data collected by the AIUs (and possibly even by other RCIADIC staff) may have been biased toward hearing men's views, not because women were not present during consultations, but because women did not have the opportunity to speak or chose not to speak when men were present.¹²³

According to AIU staff who I interviewed and the Indigenous texts, most of the AIUs consulted with non-Indigenous government staff. They did this in order to obtain a more balanced perspective, although their mandate was primarily to obtain Indigenous views and perspectives on why so many people were dying in custody.

The pages of the some of the texts were not numbered and it was therefore necessary to assign numbers to the pages of these texts. The first page numbered in each of these texts was the one appearing immediately after the index or list of contents.

¹²² Aboriginal Issues Unit Northern Territory, 'Meeting at Yirrkala Community and Outstations' (Royal Commission into Aboriginal Deaths in Custody, undated) 5.

¹²³ The possible presence of this bias and its effect on the RCIADIC's ability to explore the problems confronting Indigenous women is examined in Chapter 7.

2 *Northern Territory AIU Final and Draft Reports, Webula Talk on Grog Report, and Transcripts and Notes of Interviews and Meetings*

At 237 pages, the Northern Territory AIU final report, titled *Too Much Sorry Business*, was the largest of the reports. The report included a large number of quotes from people who were consulted by the AIU. Staff from the Northern Territory AIU visited 30 communities and generated 101 records of consultations.¹²⁴ The availability of individuals working for Indigenous organisations that were consulted was a ‘crucial factor’ in the coverage the AIU was able to achieve.¹²⁵ The AIU had not intended its report to be an academic report, but rather a report written to represent the views of Indigenous people.¹²⁶ It had been instructed by the commissioners ‘not to prejudice the consultations by preparing a list of topics ...’.¹²⁷ The AIU admitted in the report, however, that leading questions had to be asked at times in order to ensure the responses were not simply a recounting of life stories.

The report contained five chapters.¹²⁸ The material contained in those chapters was described in the report as follows:

This Submission, *Too Much Sorry Business*, attempts to explain the problems of Aboriginal custody and deaths in custody in the Northern Territory in the context of high Aboriginal adult mortality rates, alcohol and other substance abuse, the conflict between Aboriginal Law and Australian Law, prison system and non-custodial options. The concluding Chapter, *Kids and the Future*, warns of the consequences if the causes of high Aboriginal mortality and custody rates are not addressed by governments. Our children and their children will face these same problems to an even greater extent than those who have gone before them.¹²⁹

¹²⁴ *National Report*, above n 8, vol 5, 297.

¹²⁵ *Ibid* vol 5, 298.

¹²⁶ *Ibid* vol 5, 295.

¹²⁷ *Ibid* vol 5, 298.

¹²⁸ Since I describe the Indigenous texts and the official reports of the RCIADIC throughout this thesis as historical documents and the analysis is a reflective one, I use the past tense when referring to their content. However, I have retained the tense contained in the texts and reports when quoting directly.

¹²⁹ *National Report*, above n 8, vol 5, 283.

Two sections of the report were removed prior to publication by Commissioner Johnston. One appeared in a section of the report relating to ‘Aboriginal Views on Improper Police Behaviour’¹³⁰ and the other was titled ‘Appendix 4: Complaints Against Police’.¹³¹ The draft report contained the full version of these sections and will therefore be used in Chapter 5 to describe what was said about Indigenous women and their treatment by police.

The *Webula Talk on Grog* report was 77 pages long. It was prepared after a workshop on ‘Alcohol Policy and Contributing Issues’ held in Katherine on 10 and 11 August 1989.¹³² The workshop coincided with the hearing of the death of ‘the man who died at Katherine on 21 November 1984’.¹³³ The cause of death of the deceased was found to be alcohol withdrawal syndrome and it was therefore considered prudent to hold a workshop on alcohol consumption in the same town where the deceased had died.

The transcripts of interviews and meetings conducted by the Northern Territory AIU, as well as other working papers that were able to be accessed, indicated that the participants discussed problems relating to educational opportunities, alcohol dependency and its effect on families, family violence and the need for more women’s shelters, police-community relations, and the increased delinquency of juveniles.

The *Webula Talk on Grog* report and the transcriptions of interviews and meeting and other working papers were all incorporated into the *Too Much Sorry Business* report. Nevertheless, these documents have been analysed for the purposes of this chapter to better understand how problems relating to Indigenous women were considered by the Northern Territory AIU. They are referred to in their own right in the next chapter whenever they contained information that was not entirely reflected in the *Too Much Sorry Business* report.

¹³⁰ Ibid vol 5, 415.

¹³¹ Ibid vol 5, 512.

¹³² Aboriginal Issues Unit Northern Territory, ‘Webula Talk on Grog’ (Royal Commission into Aboriginal Deaths in Custody, 1989) 1.

¹³³ The name of the deceased was suppressed by order of commissioner.

3 *New South Wales AIU Field Trip: Walgett Report*

The New South Wales *AIU Field Trip: Walgett* report (the Walgett report) was 22 pages long. In a covering letter written by a RCIADIC staff member to a RCIADIC consultant enclosing the report, it is noted that abridged versions of the report were to be distributed to the community. The report examined the following topics: alcohol consumption, particularly in relation to discriminatory treatment by hoteliers and juvenile drinking; the high unemployment rate of Indigenous people in Walgett and the tendency for Indigenous people to only be given menial jobs; the need for professionally trained alcohol and drug health workers to be employed in the town and the racist attitudes of some hospital staff; the lack of appropriate housing and the inability of Indigenous people to rent houses because of racist attitudes on the part of landlords and real estate agents; the poor relationship that had developed between police and the Indigenous community; and the lack of facilities available for young people who lived in Walgett.

4 *Queensland Discussion Paper No 1 and Aboriginal Issues Unit Report to Commissioner Wyvill*

The Queensland reports that were accessed comprised a discussion paper, titled *Discussion Paper No 1*, and the AIU's final report, titled *Aboriginal Issues Unit Report to Commissioner Wyvill*. The discussion paper was

[p]roduced by the Queensland Aboriginal Issues Unit (AIU) of the Royal Commission to stimulate discussion and contributions from Aboriginal and Torres Strait Islanders on underlying issues which the Commission might consider.¹³⁴

The discussion paper was 46 pages long and explained the manner in which the RCIADIC was established, the focus of the RCIADIC's investigation, and the intended meaning of 'underlying issues'. The purpose of the discussion paper was to 'inform people and to encourage some feedback on community views of

¹³⁴ Aboriginal Issues Unit Queensland, 'Discussion Paper No. 1' (Royal Commission into Aboriginal Deaths in Custody, 1990) i.

the underlying issues'.¹³⁵ The discussion paper was sent to approximately 250 Indigenous organisations and bodies around Queensland and the Torres Strait Islands which in turn had the responsibility of disseminating copies to members of the community.¹³⁶ After the release of the discussion paper, AIU staff travelled to various regions in Queensland to hold community meetings about the matters raised in the discussion paper and to encourage submissions to be made. Submissions could be made in writing, on video or audiotape, or by telephone. The paper noted that:

It should be stressed that the Aboriginal Issues Unit does not substitute for the Commission and that submissions from Aboriginals or Torres Strait Islanders on underlying issues will be handled by the Commission with advice from the AIU.¹³⁷

The key topics raised in the discussion paper appeared under the following headings: 'Prejudice and Racism'; 'Ingrained Practices – Laws'; 'Ingrained Practices - Procedure for Arrest'; 'Ingrained Practices - Bail, Parole and Probations'; 'Aboriginal Perceptions [about their lives]'; 'Police Relations'; 'The Prison System'; 'Health – General'; 'Health – Alcohol and Drug Abuse'; 'Health - Stress and Mental Health'; 'Education'; 'Housing'; 'Employment'; 'The Lack of an Economic Base'; 'Self-Determination – The role of Aboriginal Organisations'; 'Self-Determination - Aboriginal lands'; 'Self-Determination - Managing Aboriginal Communities'; 'Youth and Child Welfare'; and 'Aboriginal Heritage and Identity'.

At the end of each section questions were raised to prompt responses to be included in the submissions. Only one question was gender-specific; this question, raised under the heading of 'Housing', asked '[w]hat accommodation facilities should there be for homeless people, Aboriginals on parole, youth, alcohol and drug dependents and *women* (emphasis added) or children under abuse?'.¹³⁸ The paper contained other questions which related to alcohol or drug

¹³⁵ Ibid 3.

¹³⁶ Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill' (Royal Commission into Aboriginal Deaths in Custody, 1990) 4, 5.

¹³⁷ Aboriginal Issues Unit Queensland, 'Discussion Paper No. 1', above n 134, 3.

¹³⁸ Ibid 29.

abuse but which were not gender-specific. They focused on the causes of substance abuse, whether there should be an alcohol ban in communities, the effects of decriminalising drunkenness, and the appropriateness of sobering up or rehabilitation centres. One question asked whether Indigenous people who were detained on alcohol-related charges were more likely to be unable to cope in a watchhouse if they had previously been involved in a personal or family dispute.

The Queensland AIU prepared its final report based upon the responses and consultations generated by the discussion paper. The Queensland AIU noted in its final report that the unit conducted community hearings with Aboriginal and Torres Strait Islander people in more than 90 locations.¹³⁹ The report contained a proviso that the AIU was 'not able to meet or interview people from every town and city throughout the state' and that it 'targeted those areas where there is a known large population of Aboriginal and Torres Strait Islander people'.¹⁴⁰ Only approximately 10 percent of the adult Aboriginal and Torres Strait Islander population were consulted in the end.¹⁴¹ The final report was 120 pages long. All members of the AIU contributed to the writing of the report.¹⁴² Although the mandate of the AIU was for the staff to elicit the views and opinions of Aboriginal and Torres Strait Islander people and organisations without influencing their responses, the AIU noted in its report that

it has always been a difficult if not impossible requirement because we are also, as Aboriginal and Torres Strait Islander people, members of the Aboriginal and Torres Strait Islander community. Therefore, we feel entitled to offer views and believe that, because our views have been expanded and developed from the intensity of constant meetings and discussions with informants and fellow workers, they are a valuable insight which should be recognised and welcomed as a contribution from the Aboriginal and Torres Strait Islander community.¹⁴³

¹³⁹ Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill', above n 136, 1.

¹⁴⁰ Ibid 4.

¹⁴¹ Ibid 5. The reasons why only such a small proportion of the adult Indigenous population was prepared for the consultations and therefore attended the meetings were outlined in the report and are briefly discussed below.

¹⁴² Ibid 1.

¹⁴³ Ibid 3-4.

The first section of the final report outlined the processes utilised and limitations experienced by the AIU in canvassing community views. The AIU noted that those that attended the community hearings were initially expecting to be advised about the RCIADIC's work rather than having to provide information about underlying issues. This resulted in meetings that

generally developed into discussions about what their communities' immediate day to day concerns were. While this was valuable, the task of expanding on the Commission's understanding of Underlying Issues was not as effective as it perhaps was hoped it would be through this process of consultation with communities.¹⁴⁴

The reasons that were given as to why members of the community were not prepared for meetings included the fact that Indigenous organisations had not received copies of the discussion paper and had therefore been unable to distribute it to their members; Indigenous organisations did not have the time nor the resources to distribute copies; and the Queensland AIU had not had continuity in its leadership and there had been a delay in appointing project officers which hampered the AIU's progress and its ability to elicit a greater number of views. There were two other constraints identified in the report which helped explain why the responses received during the consultations were not as comprehensive as the AIU had hoped. One was that the meetings were often brief, preventing the AIU from fully exploring the concerns raised. The other was that the people consulted by the AIU did not possess the necessary professional expertise to fully consider the complexity of many of the problems experienced by Indigenous people. In relation to this second limitation the Queensland AIU noted in its report that '[n]evetheless, those views are not to be undervalued and may well cast some commonsense light on situations that are all too often camouflaged by technical jargon'.¹⁴⁵

The concerns raised during the consultations were attributed to particular communities. The underlying issues that were reported related to education,

¹⁴⁴ Ibid 5.

¹⁴⁵ Ibid 8.

health, employment and developing an economic base, culture and heritage, housing, community relations, relations with police, imprisonment practices, law and justice generally, youth welfare and political empowerment. At the end of the report there was a section on specific complaints made and concerns raised by individuals or communities to the Queensland AIU.¹⁴⁶ Most of these complaints and concerns involved circumstances of suspicion. Examples included questions about why Indigenous people were not employed with local industries or health services, questions about why Indigenous suspects had been shot upon arrest, a request for an investigation into the deaths of certain people who had been unable to receive proper medical attention, and a request for an investigation into the activities of a taxi driver who did not have a meter in his car and who fraudulently charged passengers the wrong fare. The final section of the report contained 18 recommendations made by the AIU in relation to the underlying issues discussed in the report.

5 *South Australian* Aborigines and the Media Report

The report on *Aborigines and the Media* written by the South Australian AIU was only 4 pages long (not including the attachments). The report contained two attachments to support its claims: a one-page memorandum from the Australian Journalists' Association outlining its policy on filming or recording Indigenous traditional ceremonies or sacred sites and respecting traditional customs; and a paper prepared by Patricia Boylan, a non-Indigenous journalist employed by the ABC, regarding the ABC's policies on the reporting of Indigenous affairs on ABC Radio and the employment of Indigenous people within the ABC. Despite positive changes to the employment and reporting practices of the media, the South Australian AIU noted in its report that racist terminology and reporting styles were still used. The AIU recommended that legislation should be enacted to regulate such practices and that Indigenous people should be adequately represented on boards that oversee the media. The 22-page report written by Boylan focused mainly on the ways in which media reports stereotype Indigenous people and on the lack of cultural awareness training given to non-Indigenous

¹⁴⁶ Ibid 98.

reporters. According to Boylan, the main reason for the little progress made in employing more Indigenous journalists and in making broadcasts more inclusive of Indigenous stories and perspectives was overt and covert racism.

The South Australian AIU *Aborigines and the Media* report has not been included in the description provided in Chapter 5 since it did not focus particularly on problems confronting Indigenous women, but was instead a general report about the lack of Indigenous inclusiveness in the Australian media.

6 *Western Australian Progress Report and Interim Report*

The Western Australian *Progress Report* and *Interim Report* were 50 and 179 pages long respectively. In the *Progress Report* the Western Australian AIU mainly described the procedures that the AIU would use to conduct its research. The AIU stated that it was ‘to provide advice and act as a “sounding board” and provide an Aboriginal perspective on issues and concerns confronting the Royal Commission’.¹⁴⁷ The AIU proposed that its work would seek to achieve two major objectives: to collect data from community consultations and to keep the community informed of the RCIADIC’s work (including that of the AIU). There was evidence in the report that there was some dissention within the RCIADIC regarding how the community would be kept informed. Specifically the report stated:

Unfortunately there were differences of opinions about the ‘style and content’ of the information to be included in the Newsletter. ... It is my belief that the Royal Commission would welcome Aboriginal support to the findings and recommendations which will ultimately be presented to government. It was envisaged that the proposals of the Newsletter and the Radio Programs running concurrent with the Hearings, Conferences and the AIU activities would help ensure there was an informed awareness within the Aboriginal community of the Royal Commission’s progress. The lack of an Information Strategy means that we can not be sure, or have had the ability to influence Aboriginal reaction. I do know that were [sic] we made commitments to people, especially prisoners, their view of

¹⁴⁷ Aboriginal Issues Unit Western Australia, 'Progress Report' (Royal Commission into Aboriginal Deaths in Custody, 1990) 3.

the Royal Commission, particularly those that made the commitments is diminished.¹⁴⁸

The content of the report focused on treatment of Indigenous people by the police, Indigenous perceptions of court processes, problems with the State's Aboriginal Legal Service, treatment of Indigenous prisoners, criminalisation of Indigenous youth and problems with the education system. Each topic contained strategies for improvement.

The *Interim Report* contained a more detailed summary of the problems raised at community hearings. In a manner similar to that of the Queensland AIU in its final report, an effort was made to attribute problems raised to the particular communities that participated in the consultations. Each section contained suggestions for change. The first sections of the report related to police, courts, prisons and Legal Aid. A common theme which emerged under a number of topic areas was the existence of institutional racism. The Western Australian AIU noted in its *Interim Report* that many of the communities experienced racist and discriminatory practices from school teachers, employers, landlords or housing agents, and police, prison and court officers. Such racism and discrimination caused Indigenous people to experience a lack of access to appropriate employment, education and housing.

The inability to pay fines and a perception amongst some offenders that being sentenced to prison was 'an opportunity for rest and recreation' were concerns raised by the participants regarding the imprisonment of Indigenous offenders.¹⁴⁹ Concerns were also raised that there were not enough visitors to prisons and that prisoners were unable to attend funeral services or, if allowed to attend, prisoners had to attend with handcuffs. Resource deficiencies existing within the Aboriginal Legal Service (also referred to in the report as 'Legal Aid') such as inadequate facilities and poor management were identified. The prevalence of juvenile offending and the lack of proper parenting were problems raised by

¹⁴⁸ Ibid 10.

¹⁴⁹ Aboriginal Issues Unit Western Australia, 'Interim Report' (Royal Commission into Aboriginal Deaths in Custody, 1990) 56.

communities in relations to Indigenous youth. The main problems raised about health related to the need for better access to adequate health services and ‘the lack of Aboriginal involvement in the delivery of health care services’.¹⁵⁰ Both these factors contributed to the difficulties Indigenous people faced in trying to build trusting relationships with doctors and other health workers.

The need for more local council support for Indigenous communities was highlighted as a concern. More employment opportunities were needed as well as the election of Indigenous members to the local council. Connected to this was the problem of land acquisition. The concerns of the communities varied in this respect but they all ‘agreed that land was a continuing concern for all Aboriginals’.¹⁵¹ An interesting problem identified by the Western Australian AIU related to the negative stereotyping of Aboriginal people in the media. Indigenous people thought that ‘the media was a powerful force for reinforcement of racist views within society’ over which they had little control.¹⁵²

As one might expect, alcohol abuse was identified as a major problem for all of the Indigenous communities that participated in the hearings. The problem of alcohol abuse is discussed in more in the next chapter; however, it is worth noting at this point that the main causes of drinking identified by the various communities were

[b]oredom, lack of employment, rejection by white society, the need to escape problems and stress, lack of education, the practice of ‘booking-up’, easily [sic] access to alcoholic outlets, a lack of self respect, self confidence and self esteem, encouragement by some bar staff and taxi drivers (particularly of young drinkers), peer pressure, and the lack of recreational facilities and entertainment.¹⁵³

Like many of the problems that were identified, the concerns raised in relation to alcohol abuse were quite complex. Integrated strategies were required to achieve some level of resolution for the problem.

¹⁵⁰ Ibid 131.

¹⁵¹ Ibid 148.

¹⁵² Ibid 163.

¹⁵³ Ibid 123.

B *Regional Reports and the National Report*

In addition to writing the death reports, Commissioners O’Dea, Wootten and Wyvill were required, according to the Letters Patent, to prepare ‘a report of any other findings of ... [their] inquiry and such recommendations (if any) as ... [they] consider[ed] appropriate’.¹⁵⁴ Similarly, Commissioner Dodson was required to ‘furnish ... a report of the results of ... [his] inquiry’ into underlying issues associated with the deaths.¹⁵⁵ There was no reference to the making of recommendations in Dodson’s terms of reference.

Ultimately, none of the regional reports contained any recommendations for the following reason:

It has been agreed between Commissioners that except in purely local matters recommendations will be reserved for the National Report. This will avoid the pre-empting of recommendations by Regional Reports and allow for the collation by the National Commissioner of the experience of Commissioners across Australia.¹⁵⁶

Commissioner Wootten prepared a single volume report for all three of his jurisdictions (New South Wales, Victoria and Tasmania). Just as Wootten’s death reports were hailed as the most interesting to read and containing the most comprehensive content, his regional report was described by one person as being ‘by far the best. in my opinion, of all the reports’.¹⁵⁷ Commissioner Wootten described his report as being

in no sense an attempt to make a comprehensive coverage of issues relating to Aboriginals in the three States. It is essentially ... a report that brings together the

¹⁵⁴ *National Report*, above n 8, vol 5, 174.

¹⁵⁵ *Ibid* vol 5, 171.

¹⁵⁶ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 74, 11. Other regional reports also contained similar statements.

¹⁵⁷ Interview with NIML44 (Face-to-face interview, 6 May 2003). Other people who were interviewed agreed with this sentiment. According to interview data, Commissioner Wootten drafted his own regional report, whereas other commissioners used research and legal staff to assist with the composition.

views I have formed as a Commissioner as a result of conducting the inquiries into the 18 deaths in the three States. The scope of the issues referred to is somewhat wider than in any of the reports relating to particular deaths, because it reflects the overview which I have developed through the experience of all 18 inquiries. This report draws not only on the evidence relating to particular deaths but on the general knowledge I have acquired in the course of the inquiries, and on the work of the Commission's Aboriginal Issues Units in New South Wales and Victoria and a related inquiry in Tasmania. It also seeks to provide a general context to the individual inquiries by looking at some of the general circumstances of the Aboriginal communities from which the individuals who died came, including current legal, cultural and social circumstances of those communities, their history, and their relations with the general community in those States and its institutions.¹⁵⁸

Commissioner Wyvill also prepared a single volume report, which he described as providing more than just a summary of the important findings of his investigations into the deaths. He said it was in fact

an attempt to draw on the totality of the information gained and my experience as a Royal Commissioner and to set out and examine the systemic deficiencies that are demonstrated by the comparison of what was revealed by my inquiries into each of the deaths and a review of the great volume of information that came to light in the course of my inquiries.¹⁵⁹

Commissioners O'Dea and Dodson each prepared a two-volume report. O'Dea noted:

The Report contains an account of the activities of the Royal Commission in this State which gave rise to investigations of thirty-two Aboriginal deaths in custody. I have drawn on that collective experience and general information which has come to me from reports, consultations and various sources and I present a description of the adverse impact of the criminal justice system on many Aboriginal people and examine changes which appear to be necessary if the incidence of deaths in

¹⁵⁸ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 74, 10.

¹⁵⁹ *Regional Report of Inquiry in Queensland*, above n 53, 5.

custody is to be reduced. Each aspect which has been analysed contains the views which I have formulated. In that sense it is a report of my 'other findings'.¹⁶⁰

Finally, Dodson's report contained his findings following his 'investigation concerning the underlying issues that ... [gave] rise to the disproportionate levels of custodies for Aboriginal people in Western Australia and the deaths in custody'.¹⁶¹ Draft South Australian and Northern Territory regional reports were prepared but were not published. The material contained in those drafts in the end informed the *National Report*.

According to Commissioner Johnston's Letters Patent, he was, as the national commissioner, required to furnish a report with recommendations on any underlying issues associated with the deaths in Australia.¹⁶² Although the preparation of the *National Report* was the responsibility of Commissioner Johnston, early in the report he stated:

These views form the main thrust of the report, and they are views which all five Commissioners have come to share as a result of their inquiries. While the terms of this report are the responsibility of the National Commissioner, most of the recommendations have unanimous support. There are, of course, specific areas or matters which particular Commissioners were unable to sufficiently inquiry into to reach a final view. Commissioner Dodson whose Commission required that he look only at underlying issues is in close agreement with the report and recommendations.¹⁶³

As an indication of their support, all the commissioners signed the preface to the *National Report*, which contained the above statement.

From information collected during the investigation into the deaths and underlying issues, and from the historical, sociological and anthropological reports that had been prepared, the commissioners constructed a picture that told

¹⁶⁰ *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 48, vol 1, 3.

¹⁶¹ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 29, vol 1, 2.

¹⁶² *National Report*, above n 8, vol 5, 166-167.

¹⁶³ *Ibid* vol 1, xx.

the story of the life of each deceased person investigated. The *National Report*, consisting of five volumes, was tabled on 15 April 1991 and made 339 recommendations. The inquiry ended up costing in total approximately A\$30 million (Australian dollars).¹⁶⁴

The RCIADIC concluded that the deaths were not the result of any system defect per se. Indeed, '[a]s reported in the individual case reports which have been released, [the] Commissioners did not find that the deaths were the product of deliberate violence or brutality by police or prison officers'.¹⁶⁵ It also concluded that Indigenous people did not die at a greater rate than non-Indigenous people in custody when the proportion of Indigenous people in custody was taken into account. Instead, the RCIADIC concluded that for each one of the 99 deaths investigated the deceased's Indigeneity 'played a significant and in most cases dominant role in their being in custody and dying in custody'.¹⁶⁶ The predominant finding was that Indigenous people were vastly over-represented in custody. The RCIADIC surmised that it was because of the over-representation of Indigenous people in police and prison custody that so many deaths had occurred.

The *National Report* was divided into two parts. The first part, which comprised Volumes 1 and 2, described the circumstances of the deaths investigated, how Indigenous people are overrepresented in custody and the underlying issues that explain why there are so many Indigenous people in custody. The second part, which comprised Volumes 3 and 4, discussed ways in which the incarceration of Indigenous people and the risks of dying in custody could be reduced, as well as how their lives in general could be improved. This part provided strategies for achieving change.

¹⁶⁴ Most scholars claim that the inquiry cost around A\$30 million (Australian dollars); for example see Ron Brunton, *Black Suffering, White Guilt? Aboriginal Disadvantage and the Royal Commission into Deaths in Custody* (1993); Cowlshaw, above n 1; Harris, above n 1; Christine Stafford, 'Colonialism, Indigenous Peoples, and the Criminal Justice Systems of Australia and Canada: Some Comparisons' in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (1995) 217. However, Robert Millikin claims it was A\$40 million (Australian dollars): Robert Millikin, 'Forty Million Dollars Later: What's Changed?' (1991) 10(11) *Australian Society* 7.

¹⁶⁵ *National Report*, above n 8, vol 1, 3.

¹⁶⁶ *Ibid* vol 1, 1.

The preparation of the *National Report* was managed from the Adelaide office and began in earnest around the middle of 1990. Towards the end of 1990, once the regional offices were closed, a number of people from those offices were recruited to work on the *National Report*. Commissioners,¹⁶⁷ assistants to commissioners, heads of AIUs, lawyers, research officers and other administrative staff all moved to Adelaide for varying periods of time to work on the compilation of the report. This phase of the RCIADIC was extremely chaotic and staff were working around the clock to complete the report before the government imposed deadline. The national counsel assisting, Geoff Eames, prepared an outline of the various topics that would be included in the report and then allocated each topic to an expert in that area. Material that had been collated by all the offices during the inquiry, as well as the individual death reports, regional reports, reports of the AIUs and CRU, and other submissions were all used to prepare draft papers about the various topics, which were then given to Commissioner Johnston for review.¹⁶⁸ If there was not enough information about a particular topic, further research was commissioned. Initially, each draft was given to the regional commissioners and heads of AIUs for comment and approval, but as the submission date drew nearer and time became of the essence, this no longer happened. A minority (20%) believed that the views expressed in the *National Report* were of those in power. Marcia Langton and the associate to the national commissioner, Kathy Whimp, were cited as having had a powerful influence on the final product.

One of the commissioners noted that while the *National Report* is the document most people refer to when looking at the work of the RCIADIC, ‘from our point of view that was almost an accidental tack on to the real job’;¹⁶⁹ the real job being to investigate the deaths. Many who worked on the *National Report* agreed that the tone of the report was conciliatory and intended to

¹⁶⁷ At this point in time, once the regional offices no longer existed, the four regional commissioners were in fact no longer officially commissioners.

¹⁶⁸ It should be noted that some of the regional reports were not yet finished by the time work had started on the *National Report*.

¹⁶⁹ Interview with NIML14 (Face-to-face interview, 9 May 2003).

unite everybody in doing something about Aboriginal issues ... [The] report was directed to the Liberal Party backbencher and it succeeded by the fact that every party and every government in Australia adopted the report. That was quite a staggering achievement.¹⁷⁰

C *Recommendations*

The 339 recommendations made by the RCIADIC focused primarily upon the adequacy of police and coronial investigations into deaths in custody; self-determination and empowerment; providing adequate social, educational, vocational and legal services for Indigenous youth; cultural diversity and the need for culturally sensitive practices to be incorporated in the dominant criminal and legal justice systems; redressing inequality and the over-representation of Indigenous people in the criminal justice system; managing alcohol and substance abuse; improving police relation with and treatment of Indigenous people; improving custodial care; conforming with international obligations; addressing land needs; and the continued recognition of the importance of reconciliation.

The author of each chapter in the *National Report* initially drafted the recommendations that related to that chapter. Again, what was or was not included as a recommendation depended firstly on the person who drafted it and secondly (and probably more importantly) on the interests of the commissioners.

Although input from the regional commissioners waned in relation to the compilation of the *National Report* as the deadline drew nearer, no such compromise was made in relation to the recommendations. All of the commissioners met in Adelaide towards the end of 1990 and in the early months of 1991 to discuss and debate each recommendation.

It was really difficult to get the five commissioners to agree on what should go into the *National Report*. So in the end they just decided to get them focused on the

¹⁷⁰ Interview with NIML14 (Face-to-face interview, 9 May 2003).

recommendations because that was the one thing that they had to be happy with, that is what they had to try and sign off on.¹⁷¹

This process was a lengthy one, with some relatively minor details being discussed for a number of hours. The national commissioner's desire for concurrence meant that contested recommendations would not be adopted. Two non-Indigenous people who I interviewed thought that the final recommendations adopted reflected the conservatism of some of the commissioners.¹⁷²

CONCLUSION

The RCIADIC was a far-reaching inquiry that was initially established to only investigate deaths in custody, but that was later extended to inquire into why so many Indigenous people were in custody. It was radical for its time, considering it appointed an Indigenous commissioner and employed Indigenous staff to acquire Indigenous knowledge and views. There were many impediments to the RCIADIC's investigations: a lack of time, a lack of resources, legal challenges to the RCIADIC's authority to conduct certain investigations and political pressure to make certain findings. Despite these obstacles the RCIADIC managed to produce numerous reports of substance, which are still used today as a benchmark for Indigenous policy reform.

There is a major puzzle with the RCIADIC, however: how it considered the specific circumstances of Indigenous women in the criminal justice system and why it did so, in the way that it did. It is to these questions that I now turn.

¹⁷¹ Interview with NIML39 (Face-to-face interview, 9 May 2003).

¹⁷² As we will see in Chapter 7 and 8, many others said that the conservatism of the commissioners influenced whether or not an intersectional approach was taken and what was ultimately contained in other RCIADIC reports.

CHAPTER 5: INDIGENOUS WOMEN AND INDIGENOUS VOICES

INTRODUCTION

This chapter analyses the content of the texts of the Aboriginal Issues Units (AIUs) insofar as they related to the problems confronting Indigenous women when dealing with the criminal justice system. My analysis is supplemented by the responses of the Indigenous people I interviewed who worked for the AIUs.

Until now, a content analysis of the Indigenous texts has not been conducted, primarily because access to the texts is not readily available. It is ironic that the Indigenous voices which were encouraged to surface during the RCIADIC have been almost entirely lost or silenced. One immediate question that comes to mind is whether information in the Indigenous texts *did* contain information about Indigenous women which was lost, suppressed or overlooked by the RCIADIC. This question can be addressed by comparing the Indigenous texts with what was contained in the official reports.¹

The emergent themes identified in this chapter were expressly mentioned in the Indigenous texts as particularly affecting Indigenous women. It is important to emphasise here that scholars such as Jackie Huggins, Sharon Payne and Melissa Lucashenko have argued that the concerns of Australian Indigenous women are not isolated from the lives of their families.² Thus, problems identified specifically *by* Indigenous women and which were noted in the texts as such are also set out in this chapter, despite the fact that such problems might be considered relevant to not only Indigenous women, but also Indigenous men and

¹ Having said that, the RCIADIC did have many topics to explore, and it is therefore possible that although the Indigenous texts identified certain problems that concerned Indigenous women, the RCIADIC was unable to include such problems in the official reports due to the enormity of the task. Such considerations are explored in more detail in Chapters 7 and 8.

² Jackie Huggins, 'A Contemporary View of Aboriginal Women's Relationship to the White Women's Movement' in Norma Grieve and Ailsa Burns (eds) *Australian Women: Contemporary Feminist Thought* (1994) 70; Melissa Lucashenko, 'Violence against Indigenous Women: Public and Private Dimensions' in Sandy Cook and Judith Bessant (eds) *Women's Encounters with Violence: Australian Experiences* (1997) 147, 157; Sharon Payne, 'Aboriginal Women and the Law' in Chris Cunneen (ed) *Aboriginal Perspectives on Criminal Justice* (1992) 31.

children. Such criteria were difficult to apply when reading the texts. Problems identified were often described in general terms and were not attributed to a particular person or group of people. The concerns raised in relation to any particular problem were also often very complex, and consequently difficult to categorise. As much as possible, however, the content analysis of the Indigenous texts was conducted according to the two parameters set out above. If the problems did not clearly pertain to Indigenous women or were not identified as having been raised by Indigenous women, they are not mentioned below.

My analysis also draws on my interviews with 20 Indigenous people. All of the heads of the AIUs, aside from Ruby Hammond (South Australia) and Rob Riley (Western Australia), were interviewed.³ Interviews were also conducted with the Western Australian AIU head appointed after the departure of Rob Riley, and with a close relative of Ruby Hammond, as well as various staff of the South Australian AIU in order to gather information about the work of the two units and about the views held by the Indigenous communities in the two jurisdictions. Other RCIADIC staff also contributed information about the two units. Statements identifying the source of interview data have been included throughout this chapter, in order to differentiate interview data collected for this thesis and interview data collected by the AIUs.

I EMERGING THEMES

A *Alcohol Abuse Generally*

The Northern Territory final report and *Webula Talk on Grog* report, the Western Australian *Interim Report*, the Queensland discussion paper and final report, and the New South Wales Walgett report each contained substantial references to the problems associated with alcohol abuse.⁴ Additionally all of the Northern Territory AIU interview transcripts (aside from one) and working papers referred

³ Ruby Hammond was the head of the South Australian Aboriginal Issues Unit (AIU) and Rob Riley was one of the heads of the Western Australian AIU. They are now deceased. Ruby Hammond passed away in 1993 and Rob Riley passed away in 1996.

⁴ Substance abuse was also often referred to in conjunction with the discussion on alcohol abuse; however, the main focus in most of the reports was on alcohol consumption.

to alcohol consumption as being a factor which contributed significantly to community problems.⁵ The reasons offered for this excessive alcohol consumption varied, but all of the documents acknowledged that alcohol abuse was a problem. The Northern Territory and Queensland AIUs noted in their final reports that alcohol consumption was a symptom of many other problems that existed in Indigenous communities such as boredom, racism and unemployment, as well as being the cause of those problems in some circumstances.⁶ It was pointed out by the Northern Territory AIU in its final report that

[m]any Aboriginal societies in the Northern Territory have never been dispossessed and yet the grog problem is crippling these same Aboriginal people. ... [B]ecause alcohol is a powerful addictive chemical substance it is more causal than symptomatic. Once Aboriginal people are in the grip of alcohol they find it difficult or impossible to escape.⁷

The Northern Territory AIU final report noted that some Indigenous people in other jurisdictions were more reluctant to openly discuss the problem of alcohol abuse than Indigenous people in the Northern Territory because they thought it simply perpetuated the racist myth that all Indigenous people were drunks. Indeed the AIU said that

[t]here are those black and white, who have called for the closing of the Royal Commission before its term of appointment ends arguing that the alcohol factor is well known and requires no further comment.⁸

This reluctance to discuss the topic of alcohol abuse, stemming from the desire to protect Indigenous people from further unfavourable stereotyping, was mentioned by some of the non-Indigenous people I interviewed as having affected their focus

⁵ Only the interview with Phillip Bush did not focus on the problem of alcohol abuse. This interview was very short, however, and only discussed the lack of employment opportunities created by the council. The information provided by Bush only comprised 2 paragraphs.

⁶ Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill' (Royal Commission into Aboriginal Deaths in Custody, 1990) 26; Australia, Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody: National Report, Vol 1-5* (1991) vol 5, 285 (abbreviated as *National Report* in repeated citations).

⁷ *National Report*, above n 6, vol 5, 302.

⁸ *Ibid.*

when investigating underlying issues.⁹ The call to focus on other matters was also evident in a 1989 interview with Alan Campbell, the brother of Peter Leonard Campbell who died in Long Bay Gaol, New South Wales. When asked what he hoped the RCIADIC would achieve, Alan Campbell replied:

What I am hoping for is for criminal charges to be recommended against the various officers. What I don't want to be brought down is what is happening down in the community. What the Royal Commission is coming out with, we black fellas know all about that. We've lived in it, we know. That's not news to us, that's old. The new news that we want is justice.¹⁰

Aside from causing violence within communities, alcohol abuse caused other problems which directly affected Indigenous women. The Northern Territory AIU final report and interview transcripts of meetings with Indigenous women, and the Western Australian *Interim Report* each contained references to the fact that the purchase of alcohol used money that could be spent on the family.¹¹ Indeed, one of the recommendations made by the Northern Territory AIU was that '[t]here should be an amendment to the Social Security Act to prevent cheques from being mailed to and cashed by alcohol outlets'.¹²

The Northern Territory AIU noted that fewer Indigenous women than Indigenous men abused alcohol.¹³ Despite this, the AIU claimed that communities had identified a need for special rehabilitation or treatment facilities to be made available for women who wanted help.¹⁴ The New South Wales, Northern Territory, Queensland and Western Australian AIUs each acknowledged that there was a need for more sobering up shelters and rehabilitation centres in general to be established.¹⁵ Location and lack of appropriately trained staff were the main

⁹ This is discussed further in Chapters 6 and 7

¹⁰ Alan Campbell, 'Interview' (1989) 2(36) *Aboriginal Law Bulletin* 11, 11.

¹¹ See in particular: Aboriginal Issues Unit Western Australia, 'Interim Report' (Royal Commission into Aboriginal Deaths in Custody, 1990) 123; *National Report*, above n 6, vol 5, 306.

¹² See recommendation 1.1 of the Northern Territory AIU final report: *National Report*, above n 6, vol 5, 497.

¹³ *Ibid* vol 5, 322.

¹⁴ *Ibid* vol 5, 338.

¹⁵ Aboriginal Issues Unit New South Wales, 'AIU Field Trip: Walgett' (Royal Commission into Aboriginal Deaths in Custody, 1989) 10; Aboriginal Issues Unit Queensland, 'The Aboriginal

reasons given as to why the current offerings of sobering up shelters and rehabilitation centres were inadequate. The Queensland AIU also noted in its final report that the care of intoxicated persons should be removed from police and should instead involve care agencies and families.¹⁶ According to the Queensland final report the family of the intoxicated person should participate in the rehabilitation process. Indigenous women were noted in the Northern Territory AIU final report as often being the instigators and enforcers of programs to reduce the availability of alcohol and to minimise unwelcomed consequences once consumed.¹⁷ For example, Indigenous women in Minjilang locked up guns when there was alcohol being consumed.¹⁸

Indigenous women in the Northern Territory expressed the view that alcohol abuse was the cause of family breakdown and that this resulted in young people being inadequately cared for. Their concern for their children and grandchildren was evident in the Northern Territory AIU final report and in the AIU transcripts of interviews with Indigenous women.¹⁹ One of the strategies suggested by these Indigenous women for improving conditions for young people was to make education more readily available and more culturally appropriate.²⁰ The women also thought that teaching the children traditional values and life skills was important.²¹ The Western Australian AIU noted in its *Interim Report* that '[s]ome participants suggested that all Aboriginal people should stop talking about the problem [of alcohol abuse] and do something about it. They wanted the family within Aboriginal society maintained and strengthened'.²² There was no

Issues Unit Report to Commissioner Wyvill', above n 6, 28; Aboriginal Issues Unit Western Australia, 'Interim Report', above n 11, 123; *National Report*, above n 6, vol 5, 411.

¹⁶ Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill', above n 6, 28.

¹⁷ *National Report*, above n 6, vol 5, 324, 383.

¹⁸ The ways in which excessive alcohol consumption impacted on the safety of the women are considered in more detail in Part B below.

¹⁹ This view was reflected throughout the Northern Territory AIU final report; an example is: *National Report*, above n 6, vol 5, 390.

²⁰ *Ibid* vol 5, 336.

²¹ This was referred to throughout the transcript of the meeting with the women from the Laynhapuy Women's Resource Centre and by the women in the meeting with the Julalikari Council in various contexts: Aboriginal Issues Unit Northern Territory, 'Discussion with Aboriginal Women from Laynhapuy Women's Resource Centre and with Sally Wagg (Co-Ordinator)' (Royal Commission into Aboriginal Deaths in Custody, undated); Aboriginal Issues Unit Northern Territory, 'Meeting with Julalikari Council' (Royal Commission into Aboriginal Deaths in Custody, 1989).

²² Aboriginal Issues Unit Western Australia, 'Interim Report', above n 11, 123.

indication of which participants raised this desire to maintain family unity. The report also noted that there needed to be more care for non-drinkers.²³

B *Alcohol Abuse and its Effect on Violence Within Communities*

The enormity of the problem of violence was recognised by the AIUs during the RCIADIC investigations. Violence, particularly within the context of alcohol and substance abuse, was referred to in the Northern Territory and Queensland final reports and the Western Australian *Interim Report*. The Northern Territory AIU observed in its final report that '[t]he introduction of alcohol and other substance abuse has dramatically changed the style and intensity of violence.'²⁴ According to the Queensland report, '[v]iolence is constantly mentioned simultaneously with alcohol abuse commentary.'²⁵ Similarly, according to the Western Australian AIU *Interim Report*, '[i]t was agreed by most participants that alcohol was the main cause of domestic disputes.'²⁶

The Indigenous people I interviewed and who were associated with the New South Wales, Queensland, Western Australia and South Australia AIUs commented that the problem of family violence was not as openly discussed in the late 1980s and early 1990s as it is now. This may help to explain how family violence was considered by the RCIADIC, as we will see in Chapter 7.

Women and children were noted in the Northern Territory and Queensland final reports and the Western Australian *Interim Report* as being the main victims of the violence, although reference was also made to the fact that women were violent at times.²⁷ However, the predominant concern in all three reports was women and children as victims of the violence. For example, the Northern

²³ Ibid 21.

²⁴ *National Report*, above n 6, vol 5, 310.

²⁵ Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill', above n 6, 27.

²⁶ Aboriginal Issues Unit Western Australia, 'Interim Report', above n 11, 123.

²⁷ For example the Queensland AIU noted that although women were the main targets of violence by young intoxicated men, female offending was on the rise: Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill', above n 6, 27. Women were noted in the Northern Territory AIU final report as mainly fighting according to traditional rules: *National Report*, above n 6, vol 5, 311.

Territory AIU emphasised the fact that although ‘no Aboriginal women have died in custody in the Northern Territory during the 1989 to 1990 period,²⁸ more women have been killed in alcohol-related murders than there have been deaths in custody’.²⁹ There was no real consensus about how to deal with the problem aside from recommending that there needed to be more shelters for women and children. In Maningrida in the Northern Territory, women’s shelters became full over the nights following the arrival, once a fortnight, of the supply barge. Alternatively, many non-drinkers ‘hide in their home or go bush ...’ for a few nights to avoid any violence.³⁰ One informant to the Northern Territory AIU compared the lack of women’s shelters to the availability of sobering up shelters for alcohol abusers: ‘That [sobering up] shelter is looking after the guy’s habit. He has his habit taken care of. He’s fed, he’s sheltered.’³¹ Despite this view, the use of sobering up shelters was considered important for those who were intoxicated and not violent.³² Without rehabilitation, detoxification and counselling services, however, the sobering up shelters were considered ‘detention centres with little or no role to play in helping the alcohol problem’.³³

The Queensland AIU identified loss of culture and self-esteem as reasons why Indigenous men drank and become violent.³⁴ There was no mention of why women, who had also lost their culture, did not react in the same way. As mentioned more below, the retention of cultural traditions, particularly traditional law, was considered important for controlling the incidence of crime in communities. Where traditional law existed, however, it failed to address the escalation of violence in communities:

²⁸ It is unclear whether or not the reference to ‘1989’ is a typographical error which should have read ‘1980’ in reference to the period the RCIADIC was investigating in relation to the deaths.

²⁹ *National Report*, above n 6, vol 5, 285. There were actually no female deaths investigated by the RCIADIC in the Northern Territory.

³⁰ *Ibid* vol 5, 327.

³¹ *Ibid* vol 5, 410.

³² For example the Queensland AIU stated in its report that ‘[o]nly violently aggressive drunks should require police restraint and protective custody’: Aboriginal Issues Unit Queensland, ‘The Aboriginal Issues Unit Report to Commissioner Wyvill’, above n 6, 29.

³³ *National Report*, above n 6, vol 5, 410. Indeed recommendations 4.5 and 4.7 of the Northern Territory AIU final report recognised the need for counselling and education programs to made available in rehabilitation facilities and compulsory for offenders with an alcohol problem: at vol 5, 502.

³⁴ This was particularly the case in Mornington Island and Mt Isa: Aboriginal Issues Unit Queensland, ‘The Aboriginal Issues Unit Report to Commissioner Wyvill’, above n 6, 43, 71.

It is clear too that the appalling level of domestic violence against Aboriginal women is not being addressed by Aboriginal Law. Many women are hesitant to speak about it, but the daily parade of women with bandaged heads and broken arms, especially in towns and larger communities where there is access to alcohol, is plain for all to see.³⁵

The fact that traditional law was unable to control family violence placed Indigenous women in a difficult situation. More often than not Indigenous women were reluctant to involve police in family disputes, despite acknowledging that police involvement was necessary to stop the violence. The women feared their family member would be harmed during an arrest or while they were in custody. They preferred dealing with problems of family violence at a community level, although at the same time, they recognised that this was impossible. As one woman who spoke to the AIU in the Northern Territory commented:

[T]hey don't want police to interfere, they believe that our way is better, our custom, that our law should be, they should carry on our custom, it's better than having to involve police. Oh yeah, there's a lot of rapes that happen there that people hush up about it but the more obvious ones they can't shut up.³⁶

The Indigenous people I interviewed who had either worked with or had some other involvement with the South Australian AIU also raised this dilemma as an important consideration for Indigenous women in South Australia.

One Indigenous person I interviewed said that women around the country had often been blamed for the death of a male in custody by other family members. This was because they were considered 'either bad mothers or bad wives or members of the family and that that had contributed to the person meeting up with the criminal justice system and going into prison or the lock up and meeting their deaths'.³⁷ Non-Indigenous people within the community had also threatened the remaining family members of the deceased, who were often female, because of

³⁵ *National Report*, above n 6, vol 5, 373.

³⁶ *Ibid* vol 5, 384.

³⁷ Interview with IFNL16 (Face-to-face interview, 1 July 2003).

their pursuit for justice in trying to find out how the family member had died.³⁸ Support groups were organised by the National Committee to Defend Black Rights (CDBR) at the time of the RCIADIC inquiry to protect the women from physical harm and to offer them emotional support. Although complaints were made to non-Indigenous RCIADIC staff, no action was taken on their behalf.

C Problems Pertaining to Police and the Custodial Experience

The reports that contained the most information about the improper treatment of Indigenous women by police were the Northern Territory AIU draft and final reports. The allegations related to sexual and physical assaults and to not being fed while in police custody. Certain sections of the final report, which contained information about police behaviour, were suppressed by Commissioner Johnston. The police union had brought an application to have the entire Northern Territory AIU report suppressed, but the eventual order was that only the sections relating to accusations of sexual abuse against Indigenous women would be suppressed. The reason given for the suppression order by one person I interviewed was that the police officers had not been granted natural justice because they had not had the opportunity to respond to such accusations.

The complaints reported by the AIU in its draft report which were later deleted from the final report included:

Cops walking about with flies undone with doodles out and showing them off. Women were shamed. People who are picked up regularly by cops, sexually used and left in mulga. (Alice Springs man) ...

One night she had fit and had to be taken to Congress. Everyone knew about it. [Name deleted] tried complaining to police and was harassed for a long time. The woman wouldn't pursue charges. She was too afraid. The woman is black and blue.

³⁸ The person who gave me this information did not indicate who these non-Indigenous people were but other people I interviewed told of how the police often harassed both families of the deceased and staff of the RCIADIC during the investigations. See also the interview with Alice Dixon, the mother of Kingsley Richard Dixon which was published in the *Aboriginal Law Bulletin*: Alice Dixon, 'Interview' (1989) 2(36) *Aboriginal Law Bulletin* 10.

[Police are] rude to women ... they are loverboys ... take them out bush ... do naughty things to them and make them walk back.³⁹

The Northern Territory AIU final report contained more general information about the fact that the AIU had been privy to information about police brutality against Indigenous women and children.⁴⁰ The report noted that the violence was 'perpetrated not only by non-Aboriginal police officers, but also by Aboriginal police aides'.⁴¹ The Northern Territory AIU noted in the draft report that Indigenous women were too frightened to complain about sexual abuse by police. Although the AIU was unable to obtain any precise evidence about the allegations, it decided that it was important to raise the allegations in its draft submission to Commissioner Johnston 'because Aboriginal people want the issue raised so that if a problem does exist it can be dealt with'.⁴²

The Queensland AIU also reported the occurrence of sexual exploitation of Indigenous women, particularly by community police. Its final report noted that 'some women taken into custody complained of having being forced to undergo sexual intercourse with the community police to avoid being charged and imprisoned on other offences'.⁴³

There was also evidence that the police treated Indigenous women poorly in Western Australian. The *Progress Report* contained the comment that 'Narrogin female participants were concerned that male police officers had a bad attitude

³⁹ Aboriginal Issues Unit Northern Territory, 'Draft #1: Too Much Sorry Business: The Submission of the Northern Territory Aboriginal Issues Unit of the Royal Commission into Aboriginal Deaths in Custody to Commissioner Elliott Johnston, Q.C.' (Royal Commission into Aboriginal Deaths in Custody, 1990) 141. The quotes are exactly as they appear in the report including the square brackets and their contents. The meaning of some words such as 'mulga' and 'congress' is unclear and not explained in the report.

⁴⁰ *National Report*, above n 6, vol 5, 422-424.

⁴¹ *Ibid* vol 5, 422.

⁴² Aboriginal Issues Unit Northern Territory, 'Draft #1: Too Much Sorry Business', above n 39, 141.

⁴³ Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill', above n 6, 56. Community police are distinguished from State police. The *National Report* describes community policing as 'policing [where it] is carried out by members of the Aboriginal community, and, in particular, by members of the local Aboriginal councils': *National Report*, above n 6, vol 4, 90.

towards Aboriginal females'.⁴⁴ Similarly, the Western Australian *Interim Report* said that female prisoners were subjected to sexual harassment and threatened with body searches by male police officers while detained in the local lock-up.⁴⁵ There was no mention, however, of other types of sexual assaults, nor were there any 'suggestions for change' that were required for treatment of Indigenous women by the police.

One Indigenous person I interviewed indicated that the main area of concern for Indigenous women in Tasmania was the way they were treated by police. Police in Tasmania had an active disdain of women who were Indigenous or who identified as Indigenous but who did not look Indigenous. The women in this later group were often referred to as 'sluts'.⁴⁶ The police particularly targeted these women because they thought that by still identifying as Indigenous these women had not embraced assimilation policies.

The Queensland AIU noted in its final report that Indigenous female prisoners often complained of being denied basic human rights, such as being advised of the results of blood analyses.⁴⁷ Prisoners and the Indigenous chaplain were noted as being concerned that the community was inadequately supporting female spouses while a partner was in prison.⁴⁸ For example, there was an absence of support to enable families to visit their family members in prison.

The Northern Territory draft report contained quotes from Indigenous women complaining about the mistreatment of their family members by police: the concerns raised by Indigenous women were not only for their own safety but also for the safety of their children and partners when coming into contact with police officers.⁴⁹ They also expressed concern about not being able to prevent such

⁴⁴ Aboriginal Issues Unit Western Australia, 'Progress Report' (Royal Commission into Aboriginal Deaths in Custody, 1990) 21.

⁴⁵ Aboriginal Issues Unit Western Australia, 'Interim Report', above n 11, 5.

⁴⁶ Interview with IMNL46 (Telephone interview, 20 October 2004).

⁴⁷ Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill', above n 6, 65.

⁴⁸ *Ibid* 66.

⁴⁹ Aboriginal Issues Unit Northern Territory, 'Draft #1: Too Much Sorry Business', above n 39, 249. This information appeared in Appendix 4 of the draft report which was suppressed from publication in the final report.

behaviour by the police other than not reporting the behaviour of their family member to police in the event of family violence. The problem of the extent to which and the manner in which police should become involved in cases of family violence was highlighted in the New South Wales Walgett report. This report contained information obtained from the police Aboriginal liaison officer that police in Walgett did not arrest offenders during instances of family violence, but instead removed the offender from the scene by taking them to the house of another family member or friend.⁵⁰ The liaison officer reported that if police attempted to arrest the offender, other family members objected to the police involvement and would more than likely end up also being arrested. The concerns of the family members about the manner in which offenders would be treated in police custody therefore ultimately impinged upon their own safety.

One instance of cultural insensitivity caused by the employment of Indigenous police officers, described in the Northern Territory AIU final report, related to a complaint made by three Indigenous girls who had been pack-raped in the Tennant Creek area.

A male Aboriginal Police Officer was sent to interview the mothers of these girls who were allegedly pack-raped. This is a most compromising topic for an Aboriginal woman and an Aboriginal man to talk about; if not impossible if the policeman is affiliated or related to any of the women. It came as no surprise that he could not elucidate anything from the women which could have amounted to laying charges against several youths whose names were given by the girls and which had been passed on to the police.⁵¹

Although there were calls for the employment of more Indigenous police officers, this story highlights the problems that can arise when Western cultural practices are unthinkingly implemented in traditional cultures.

⁵⁰ Aboriginal Issues Unit New South Wales, 'AIU Field Trip: Walgett', above n 15, 19.

⁵¹ *National Report*, above n 6, vol 5, 444-445.

D *Legal Representation*

The need for victims to be able to access legal representation was only raised in the Northern Territory. In its report, the Northern Territory AIU criticised the fact that the Aboriginal Legal Aid Service in the Northern Territory was not permitted to represent the local community and Indigenous victims in addition to representing its actual client. This meant that

[a] serial killer (and it has been alleged to the Aboriginal Issues Unit there has been such a case recently in an Aboriginal community in the Northern Territory) could be represented in the Australian legal system by a competent lawyer and receive a light sentence, especially if previous incidents did not come before the Australian courts. The community and community interests under present arrangements are not represented. Such community interests would include for instance concern for other children at risk in child abuse cases, other women at risk in sexual assault, domestic violence and rape cases, and the community at large in some manslaughter and murder cases. The lack of representation is because the Aboriginal legal aid service would be doing a disservice to its client if it were to arrange for this representation, and breaching legal ethics, if it were to represent any other party in the case at the same time.⁵²

The unit made a recommendation that separate legal representation be provided to victims of serious crime to ensure community interests were represented.⁵³ The recommendation did not, however, specifically refer to the problems experienced by Indigenous women, even though the information preceding the recommendation mainly dealt with women and children as victims.

E *The Incorporation of Customary Law*

The use of customary law practices for punishing offenders and for maintaining community cultural traditions and values was acknowledged as important by the

⁵² Ibid vol 5, 359.

⁵³ See recommendation 2.3: Ibid.

Northern Territory, Queensland and Western Australian AIUs.⁵⁴ Significantly, the Northern Territory AIU specifically referred to the existence of 'women's Law' in its final report. Although the AIU noted in its report that '[n]one of [the] ... ceremonial alternatives to jail as rehabilitative measures discussed ... referred to females', it was also acknowledged that that did not mean that women's law was not important.⁵⁵ '[Y]oung girls need their Law as much as young men to make them responsible women, towards their children, husbands, family, country and Dreaming.'⁵⁶ There was also reference to the fact that customary law was not addressing the increasing levels of family violence.⁵⁷ A woman who was interviewed by the Northern Territory AIU thought that the involvement of police was the only answer for victims of family violence.

Although customary law was highlighted as being an important tool for social control, it was also noted as the cause of 'youthful escapades or escapes on the part of young women to avoid traditional betrothals and marriages ...'.⁵⁸ Although this was not a problem which had been raised during the AIU's consultations - because their 'consultations were not designed so as to make it easy for Aboriginal women to make such comments ... given [the AIU's] ... terms of reference' - it was something that had been observed.⁵⁹

An interesting conflict between the use of Indigenous aides and customary law was identified by the Western Australian AIU in its *Interim Report* when it reported that '[t]here was concern that aides were breaking Aboriginal law by arresting their own mothers-in-law'.⁶⁰

⁵⁴ See for example: Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill', above n 6, 41; Aboriginal Issues Unit Western Australia, 'Interim Report', above n 11, 66; *National Report*, above n 6, vol 5, 495.

⁵⁵ *National Report*, above n 6, vol 5, 372.

⁵⁶ *Ibid.*

⁵⁷ *Ibid* vol 5, 373.

⁵⁸ *Ibid* vol 5, 368.

⁵⁹ *Ibid* vol 5, 368-369.

⁶⁰ Aboriginal Issues Unit Western Australia, 'Interim Report', above n 11, 7.

F *Recruitment of Indigenous Women in the Criminal Justice System*

The need for more Indigenous women to be recruited to various service positions was highlighted in the Northern Territory AIU final report and in the Western Australian AIU *Interim Report*,⁶¹ both of which argued that more Indigenous female police officers, police aides, recreational officers, community correctional officers and health workers were needed. The Western Australian AIU noted that community members believed that juvenile offenders would trust and confide in female officers more than male officers, who were often violent.⁶² The Northern Territory AIU also noted that female police aides would assist with the 'violence of the policing problem'.⁶³

G *Motherhood and Birthing Facilities*

In its final report, the Queensland AIU referred to the difficulties faced by new young mothers when dealing with institutions such as hospitals:

[T]he new mother felt fearful and alienated inside the institutional atmosphere of the hospital. Pressure to give up the child was put on them at their moment of greatest vulnerability, especially if it meant they could quickly escape from the intrusion and control of the hospital authorities. The young mother was seen as frightened of the prospect of having to care for the child without support. Later they would suffer great regret and want to recover the child, but would run foul of the authorities.⁶⁴

This was compounded by the fact that in some communities there were no hospitals with birthing facilities nearby. Women had to leave the community to give birth which 'added to the destruction of identity' of the child.⁶⁵ Some women avoided reporting their pregnancy to local medical staff until they knew

⁶¹ See for example: Ibid 9, 131; *National Report*, above n 6, vol 5, 404, 434-436, 442.

⁶² Aboriginal Issues Unit Western Australia, 'Interim Report', above n 11, 6.

⁶³ *National Report*, above n 6, vol 5, 442.

⁶⁴ Aboriginal Issues Unit Queensland, 'The Aboriginal Issues Unit Report to Commissioner Wyvill', above n 6, 81.

⁶⁵ Ibid 25.

that it would be too late for them to be transported safely to a district hospital. This jeopardised their health and the health of their baby.

The fact that mothers were not supported by their partners in raising children was specified in the Western Australian *Interim Report*.⁶⁶ Most of the reports connected this problem to the prevalence of alcohol abuse.

CONCLUSION

It is a significant loss to the historical record that not all of the AIU reports could be accessed from the National Archives of Australia (NAA) office. Despite this, sufficient information about the work and focus of the AIUs was obtained from the reports that could be accessed and from interviews with people who worked for or were associated with the AIUs during the RCIADIC.

Two areas were discussed in the Indigenous texts, which I have not addressed here. One is youth welfare and the second is housing. Because my focus is on women, I have not presented the problems related to children. For housing, the Western Australian AIU stated in its *Interim Report* that '[p]articipants were unanimous in nominating housing as the major issue for Aboriginal people'.⁶⁷ Although housing may have been of particular concern to Indigenous women, the way it was discussed in the AIU reports did not give this impression.⁶⁸

The major themes that did come forward and that related specifically to the concerns of Indigenous women included family violence and alcohol abuse, violent treatment by the police, legal representation, women's customary law, motherhood and employment in the criminal justice system. We turn next to consider whether any of these themes found their way into the official reports of the RCIADIC.

⁶⁶ Aboriginal Issues Unit Western Australia, 'Interim Report', above n 11, 59.

⁶⁷ Ibid 113.

⁶⁸ Housing is included as a separate topic concerning Indigenous women in Chapter 6, as part of the analysis of the non-Indigenous reports, because the *National Report* specifically identified it as such.

CHAPTER 6: INDIGENOUS WOMEN AND NON-INDIGENOUS VOICES

INTRODUCTION

Many of the problems uncovered and considered in the official reports of the RCIADIC were experienced by both Indigenous men and Indigenous women. Indigenous Australians are noted in the RCIADIC reports as ‘being absorbed by a situation of hopelessness and despair’.¹ The problems identified by the RCIADIC included being subjected to hostile treatment by police, being over-represented in the criminal justice system, receiving inadequate custodial care, suffering poor health, receiving inappropriate or inadequate education, having to live in inadequate housing and being separated from families, poor employment opportunities, deficient investigations into deaths in custody, and the loss of land rights. All of these problems were in some way related to the racism, oppression and disadvantage caused by colonisation, and were, to a greater or lesser degree, acknowledged within the official reports of the RCIADIC.

The official reports did not give equal weight to each of these problems: decisions were made regarding what was important and worthy of further discussion, and consequently some matters were emphasised over others. This disproportionate treatment was a consequence of the particular ideology informing the RCIADIC’s analysis, the procedural constraints it was under, and the decisions it made. These influencing factors are identified and discussed in Chapters 7 and 8. This chapter analyses how the RCIADIC considered those problems that were, at the time, of particular concern to Indigenous women.

This chapter is based upon a thematic content analysis of the death, *Interim, National* and regional reports of the RCIADIC. I begin by analysing the death

¹ Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Underlying Issues in Western Australia, Vol 1-2* (1991) vol 1, 382 (abbreviated as *Regional Report of Inquiry into Underlying Issues in Western Australia* in repeated citations).

reports of the 11 females² investigated and conducting a more schematic analysis of the 88 men. This focus is important for several reasons. First, the deaths of Indigenous people in custody formed the original impetus and focus of the RCIADIC. Second, matters such as offending patterns involving family violence or sexual abuse and familial relationship problems that were reflected in the lives of the deceased males shed light on the particular concerns of Indigenous women. Then I turn to how women and gender relations were reflected in the discussion relating to the underlying issues in the *Interim*, *National* and regional reports and the recommendations of the RCIADIC.

It is important here to reiterate that the official reports were thorough and detailed in their research; they all forcefully condemned the racism, dispossession and oppression experienced by Indigenous people as a result of colonisation. My analysis centres on whether or not the RCIADIC took a race *and* gender approach in its investigation.

I THE DEATH REPORTS

A *Female Deaths Investigated*

1 *Introduction*

Adrian Howe notes in an article written in 1988 that

[t]he stereotypical Aboriginal prisoner – the Aborigine at greatest risk of being imprisoned – is a male aged between 20 and 29. It is Aboriginal males in this age group who are at greatest risk of death in custody and who are, consequently, the focus of the national inquiry. But while it is now well established that Aboriginal people are amongst the most imprisoned in the world, it is well to remember that some of these people are women. ... [Yet] [w]e know so little about them.³

² Note that the term ‘females’ is used in when discussing the death reports rather than ‘women’ because one of the females that died was 14 years of age and is not technically a woman.

³ Adrian Howe, 'Aboriginal Women in Custody: A Footnote to the Royal Commission' (1988) 30 *Aboriginal Law Bulletin* 5, 5.

The RCIADIC investigated the deaths of 11 Indigenous females.⁴ However, there was no separate analysis of these females as a group in the *Interim, National* or regional reports,⁵ i.e. the females were not considered *as females*. To be fair, nor was there an analysis of the males *as males*; however, some scholars, and the commissioners themselves, noted that the major focus of the inquiry was on the males that died.⁶ This lack of gender-specific (or more accurately female-specific) analysis occurred despite the fact that, at the time the RCIADIC was established, Indigenous women were over-represented in police and prison custody and their imprisonment rate had been increasing.⁷

⁴ The reports of the 11 females that died and from which the majority of the information presented in this part of the chapter has been obtained, are: Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Barbara Denise Yarrrie* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Barbara Ruth Tiers* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Christine Lesley Ann Jones* (1989); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Deidre Abigail Short* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Faith Barnes* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Fay Lena Yarrrie* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Joyce Thelma Egan* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Karen Lee O'Rourke* (1990); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Muriel Gwenda Catheryn Binks* (1991); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Nita Blankett* (1990) (abbreviated as *Report of the Inquiry into the Death of Nita Blankett* in repeated citations); Australia, Royal Commission into Aboriginal Deaths in Custody Australia, *Report of the Inquiry into the Death of the Woman Who Died at Ceduna on 16 February 1983* (1990) (abbreviated as *Report of the Inquiry into the Death of the Woman Who Died at Ceduna on 16 February 1983* in repeated citations).

⁵ These are the reports that were meant to focus on underlying issues and that could therefore do analyses of particular groups of the 99 that had died.

⁶ See for example: Judy Atkinson, 'A Nation Is Not Conquered' (1996) 3(80) *Aboriginal Law Bulletin* 4; Chilla Bulbeck, 'The Dark Figures: How Aboriginal Women Disappeared from the Findings of the Royal Commission into Aboriginal Deaths in Custody' (undated); Howe, above n 3; Sharon Payne, 'Aboriginal Women and the Law' in Chris Cunneen (ed) *Aboriginal Perspectives on Criminal Justice* (1992) 31. See also Commissioner Dodson where he says in his regional report that 'throughout research and investigation, it has become apparent that a major concern of this Commission has constantly returned to young Aboriginal men': *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 357.

⁷ See the article by Adrian Howe where the custodial figures for the mid to late 1980s for Indigenous women are summarised: Howe, above n 3. Kate Kerley and Chris Cunneen also point out that even though the National Police Custody Survey conducted by the RCIADIC found that Indigenous women were highly over-represented in police custody, 'the Commission offered little specifically gendered analysis of the situation': Kate Kerley and Chris Cunneen, 'Deaths in Custody in Australia: The Untold Story of Aboriginal and Torres Strait Islander Women' (1995) 8(2) *Canadian Journal of Women and the Law* 531, 534.

Two female specific analyses of the 11 female deaths in custody have been conducted subsequent to the RCIADIC.⁸ In 1995, Kate Kerley and Chris Cunneen analysed the 11 female deaths to document the different circumstances in which Indigenous and non-Indigenous women are incarcerated. From this information, they identified necessary policy reforms required to redress discriminatory and inequitable practices.⁹ In 2001, Lisa Collins and Jenny Mouzos conducted a gender-specific analysis of Australian deaths in custody which incorporated the data relating to the 11 female deaths investigated by the RCIADIC.¹⁰ My analysis is far more detailed than these earlier ones and is unique in that way. Such a gender-specific analysis is important because it enhances our understanding of how Indigenous women experienced the criminal justice system as offenders, and not only as victims. Had the RCIADIC conducted such a gender-specific analysis in its investigation, it may have acquired a better understanding of the lives of Indigenous people as a whole.¹¹

⁸ As outlined in Chapter 1 there are many articles that have critiqued the RCIADIC for not having considered the problem of family violence or other matters particularly pertaining to Indigenous women. However, none then go on to do an analysis of all of the 11 females that were investigated by the RCIADIC. Scholars such as Sharon Payne discuss some of the females that died but not all: Payne, above n 6. There have been studies and government reports commissioned since the RCIADIC which have looked at the offending patterns and incarceration needs of Indigenous women. See for example Aboriginal and Torres Strait Islander Commission, 'Social Justice Report 2002' (Human Rights and Equal Opportunity Commission, 2002); Holly Johnson, 'Drugs and Crime: A Study of Incarcerated Female Offenders' (Report No 63, Australian Institute of Criminology, 2004); Michael Mackay and Sonia Smallacombe, 'Aboriginal Women as Offenders and Victims: The Case of Victoria' (1996) 3(80) *Aboriginal Law Bulletin* 17; Queensland Department of Corrective Services, 'Consultation Paper: Options for Diversion of Indigenous Female Offenders from Secure Custody' (Queensland Department of Corrective Services, 2002). These studies and reports, however, are not based on the 11 female deaths in custody investigated by the RCIADIC.

⁹ Kerley and Cunneen, above n 7.

¹⁰ Lisa Collins and Jenny Mouzos, 'Australian Deaths in Custody and Custody-Related Police Operations, 2000' (2001) 217 *Australian Institute of Criminology - Trends & Issues in Crime and Criminal Justice* 1.

¹¹ As detailed in Chapter 2 many feminist and critical Indigenous scholars have made such claims within the context of other legal problems and cultures. See for example: Atkinson, 'A Nation Is Not Conquered', above n 6; Judy Atkinson, "'Stinkin Thinkin'" - Alcohol, Violence and Government Responses' (1991) 2(51) *Aboriginal Law Bulletin* 4; Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1 *Australian Feminist Law Journal* 27; Audrey Bolger, *Aboriginal Women and Violence: A Report for the Criminology Research Council and the Northern Territory Commissioner of Police* (1991); Howe, above n 3; Rosemary Hunter, 'Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice' (1996) 6 *The Australian Feminist Law Journal* 135; Melissa Lucashenko, 'Violence against Indigenous Women: Public and Private Dimensions' in Sandy Cook and Judith Bessant (eds) *Women's Encounters with Violence: Australian Experiences* (1997) 147.

What an analysis of the 11 females and 88 males gives us is what the RCIADIC could have considered, and in the end what it did (and did not) consider, in its final recommendations.

2 General Description of the Females Investigated

Table 6.1 provides details of the age, place of detention and death, and cause of death of each of the females that were investigated by the RCIADIC.¹² The details have been listed alphabetically according to the deceased's surname for easy reference.

Table 6.1: Indigenous Female Deaths Investigated by the RCIADIC

Name	Age	Place of Detention and Death	Cause of Death
Barnes, Faith	27	Kalgoorlie Police Station; died in Royal Perth Hospital, WA	severe head injury
Binks, Muriel Gwenda Catheryn	38	Innisfail Watchhouse; died in Townsville General Hospital, Qld	multiple organ failure (natural cause)
Blankett, Nita	40	Bandyup Training Centre; died enroute to St Andrews Medical Centre, Midland, WA	asthma (natural cause)
Egan, Joyce Thelma	58	Mt Gambier, Police Station, SA	drug overdose
Jones, Christine Lesley Ann	22	Midland Police Station, WA	hanging
O'Rourke, Karen Lee	14	Birrilee Children's Home; died in Rockampton Base Hospital, Qld	burns from a fire deceased had lit to escape
Short, Deidre Abigail	30	Lockhart River Watchhouse, Qld	coronary atherosclerosis (natural cause)
Tiers, Barbara Ruth	37	Rockhampton Watchhouse, Qld	haemorrhage resulting from advanced liver disease (natural cause)
Yarrie, Barbara Denise	27	Brisbane City Watchhouse; died in Royal Brisbane Hospital, Qld	profound hypoglycaemia (natural cause)
Yarrie, Fay Lena (the younger sister of Barbara Yarrie)	29	Brisbane City Watchhouse; died in Royal Brisbane Hospital, Qld	injuries sustained from assault by a fellow inmate
'The woman who died at Ceduna on 18 February 1983' ¹³	30 ¹⁴	Ceduna Police Station, SA	cardiac arrhythmia (natural cause)

¹² Although the *National* and regional reports contained a number of tables which list various details of the deceased, none solely concerned the 11 females that died and nor did any only focus on the details contained in Table 6.1.

¹³ The name of the deceased was suppressed by order of commissioner.

¹⁴ This woman's date of birth is uncertain and her age is therefore only approximate: *Report of the Inquiry into the Death of the Woman Who Died at Ceduna on 16 February 1983*, above n 4.

The average age of the females was 32, the youngest being 14 and the oldest 58. Six of the 11 died in Queensland, three in Western Australia and two in South Australia. Thus, while the majority of the females (55%) died in Queensland, there was no analysis of this phenomenon in the official reports of the RCIADIC. Indeed, there was no critical examination of female-specific patterns that emerged from the female deaths investigated. For example, Commissioner Wyvill noted in his regional report that there were seven ‘preventable’ deaths in Queensland and that five of those deaths were of females.¹⁵ There was no further discussion of the matter to determine whether Indigenous female detainees received a lesser standard of custodial care in Queensland than male detainees. On the other hand, the occurrence of eight self-inflicted male deaths in watchhouses around Queensland (particularly in northern remote regions) in less than a year prompted the RCIADIC to consider whether a ‘copy cat’ syndrome existed.¹⁶

Of the 11 females, nine were detained in police custody at the time of their death, one was in a children’s home¹⁷ and one was in prison for motor vehicle related offences. Six (55%) of the females died from poor health (or what the *National Report* termed ‘natural causes’) as opposed to external causes or from the harmful effects of alcohol or other drug abuse. Compared to this, only 31 of the 88 (35%) males investigated died from natural causes (see Appendix 5).

¹⁵ Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in Queensland* (1991) 27-36 (abbreviated as *Regional Report of Inquiry in Queensland* in repeated citations). The five females whose death was preventable were: Karen Lee O’Rourke – if she had been properly searched, the matches she was carrying would have been found; Fay Lena Yarrie – the watchhouse staff should have been observing the behaviour of the other inmates and should have separated the woman who assaulted the deceased based on her previous aggressive behaviour; Muriel Gwenda Catheryn Binks – the deceased was not given proper medical attention; Barbara Denise Yarrie – there had been an inadequate medical assessment and treatment upon arrest; Barbara Ruth Tiers – there had been an inadequate medical assessment and treatment upon arrest.

¹⁶ *Ibid* 19-20. See also Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Alistair Albert Riversleigh* (1989); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Perry Daniel Nobel, Richard Frank (Charlie) Hyde and David Mark Koowoatha* (1991).

¹⁷ Commissioner Wyvill ruled that this particular death was within the terms of reference due to the circumstances surrounding the deceased’s detention.

3 *Marital Status and Experiences of Abuse*

Eight of the 11 females¹⁸ had during their lives either been married or been involved in de facto relationships. These relationships were generally marked by violence, mainly because of the consumption of alcohol by one or both partners. Six of the 11 had between one and six children each.¹⁹

The death reports of 8 of the 11 females – Faith Barnes, Nita Blankett, Joyce Thelma Egan, Karen Lee O'Rourke, Barbara Ruth Tiers, Barbara Denise Yarrie, Fay Lena Yarrie, and 'the woman who died at Ceduna on 18 February 1983' - contained references to the deceased having been victims of physical or sexual abuse. In the cases of Nita, Joyce, Barbara (Yarrie) and Fay, the perpetrators were noted as their husbands or de facto partners. Nita's husband had also been convicted for incest in 1976. In the cases of Faith, Barbara (Tiers) and 'the woman who died at Ceduna on 18 February 1983', there was either no reference to the identity of their assailants or there was simply a reference to fact that they had been assaulted by members in the community. Karen had been raped by one of her mother's cousins when she was two. She had also been raped less than a month before she died by an Aboriginal man (with an accomplice) who was 14 years older.

Also of interest is the fact that six of the 11 females had been raised on missions away from their families, in foster care or in State welfare institutions.²⁰

¹⁸ Faith Barnes, Muriel Gwenda Catheryn Binks, Nita Blankett, Joyce Thelma Egan, Deidre Abigail Short, Barbara Denise Yarrie, Fay Lena Yarrie and 'the woman who died at Ceduna on 18 February 1983'.

¹⁹ The six females that are noted in the reports as having had children are: Muriel Gwenda Catheryn Binks (2); Nita Blankett (5); Joyce Thelma Egan (6); Christine Lesley Ann Jones (2); Deidre Abigail Short (1); and Fay Lena Yarrie (4).

²⁰ Nita Blankett was removed from her mother when she was five and raised on a mission; Christine Lesley Ann Jones was declared a neglected child and put in foster and mission care; Karen Lee O'Rourke was raised in foster homes; Barbara Ruth Tiers was separated from her family when she was 14 and was sent to Palm Island by authorities; Barbara Denise Yarrie and Fay Lena Yarrie were both removed from their families as children and raised in welfare institutions. The *National Report* notes that 43 of the 99 deceased persons had experienced some form of childhood separation from their natural families. This would mean that 37 (42%) of the male deceased had also been separated (as compared to 55% of the females): Australia, Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody: National Report, Vol 1-5* (1991) vol 1, 44 (abbreviated as *National Report* in repeated citations).

4 *Substance Abuse*

All the females were described in the death reports as having alcohol or drug abuse problems:

- Faith Barnes had ‘a severe alcohol problem’;
- Muriel Gwenda Catheryn Binks drank ‘heavily’ which contributed to the breakdown of her marriage;
- Nita Blankett drank ‘to excess’;
- Joyce Thelma Egan ‘commenced drinking heavily after the death of her first husband’, but later joined Alcoholics Anonymous. This did not stop her drinking;
- Christine Lesley Ann Jones was a ‘heavy user of alcohol’ who was often violent after drinking;
- Karen Lee O’Rourke, the youngest person investigated by the RCIADIC, was someone who was involved in ‘drug abuse’;
- Deidre Abigail Short ‘had a life which was dominated by alcohol’. She would spend almost half of her Community Development Employment Projects (CDEP) payment on alcohol;
- Barbara Ruth Tiers had a life that was controlled by alcohol from the age of 20. Since that age she was ‘rarely sober’. Barbara also drank methylated spirits;
- Barbara Denise Yarrie was ‘an itinerant alcoholic’ who started drinking at 15. She also drank methylated spirits;
- Fay Lena Yarrie was ‘drinking heavily’ by the age of 17. She also drank methylated spirits;
- ‘The woman who died at Ceduna on 18 February 1983’ was ‘a chronic alcoholic’ who had tried unsuccessfully to obtain treatment.

Indeed, except for Karen Lee O’Rourke, all the females had been arrested a number of times for alcohol related offences such as being drunk in a public place, drink driving, and disorderly conduct while under the influence of alcohol. All of the females, aside from Karen and ‘the woman who died at Ceduna on 18

February 1983', had been consuming substantial amounts of alcohol at the time of their arrest for their last offence. In the case of 'the woman that died at Ceduna', her last arrest related to unpaid fines for being convicted for drunkenness. Her report does not indicate whether she was under the influence of alcohol at the time of her last arrest, although she was arrested on the footpath near the Community Hotel at Ceduna.

One of the lawyers I interviewed made the following telling remark in relation to these women:

This would have to be probably a rash generalisation, bearing in mind my limited memory of it, but I think the women we dealt with were basically alcoholics and street kids, whereas a lot of the young men that died were 21 to 22. They had been drinking the night before, but it wasn't suggested that they were hopeless alcoholics. In fact, some of them may have been locked up for the first time at the time they committed suicide whereas the women that we dealt with ... they were used to incarceration.²¹

Attributing the males, but not the females, a 'victim' and therefore virtuous status was reflected in other topics which were covered in the official reports. The extent of this gendered prejudice and stereotyping is discussed in more detail below and an explanation for its presence is offered in Chapter 7.

5 *Offending History*

Of the 11 females, Kerley and Cunneen note in their paper:

None of the women was in custody at the time of her death for a serious offence ... None of the women was incarcerated at the time of death for violent offences or property offences. Indeed the reasons for incarceration can only be described as minor. In the majority of cases the 'crime' was victimless. In other jurisdictions, and indeed for other women in the same jurisdiction, the conduct in question might have been treated as a health issue rather than a criminal problem.²²

²¹ Interview with NIML2 (Face-to-face interview, 11 March 2004).

²² Kerley and Cunneen, above n 7, 547.

Indeed, at the time of their last arrest, five of the women were detained for drunkenness, three for unpaid fines, one for driving without a licence and while under the influence of alcohol, and one for indecent language. Karen Lee O'Rourke (the juvenile) was detained while arrangements were being made to return her to Sydney because she did not want to return to her most recent foster care placement.

Although none of the females had been convicted of a violent offence at the time of their death, a number of the females had previously engaged in various degrees of violent or aggressive behaviour. Namely:

- Faith Barnes had been convicted for unlawful assault;²³
- Nita Blankett had two convictions for assault, which were noted as being 'generally related to shouting and abusing members of the public and the police';²⁴
- Joyce Thelma Egan had been convicted for assaulting police. Joyce was described as having a deep fear of the police, which resulted in her behaving hysterically and erratically whenever she had to deal with them, (although Joyce was the one who often initiated the contact);
- Christine Lesley Ann Jones had no assault convictions, however, she was described in the report as having a capacity for violence following the consumption of alcohol. Prior to Christine's last arrest, she had violently assaulted her cousin by hitting her over the head with a beer bottle and jumping on her head (although this incident was not the cause of her last arrest);
- Deirdre Abigail Short had on several occasions been arrested for disorderly behaviour which involved fighting subsequent to the consumption of alcohol;
- Barbara Ruth Tiers had earlier in her life been hospitalised a number of times due to injuries sustained during drunken confrontations;

²³ There were no details in the death report about the circumstances of this arrest.

²⁴ *Report of the Inquiry into the Death of Nita Blankett*, above n 4, 8-9.

- Fay Lena Yarrie had been convicted for robbery with violence and assault occasioning bodily harm of a police officer.

Such behaviour was in all cases described as being related to their excessive consumption of alcohol.

The National Police Custody Survey conducted by the Criminology Research Unit (CRU) found that 'Aboriginal women made up nearly 50 per cent of all female custodies, although they comprise less than 1.5 per cent' of the population.²⁵ Additionally, they were the majority of women in custody in Queensland, Western Australia, South Australia and the Northern Territory.²⁶ The study confirmed that Indigenous women were vastly over-represented for offences of public drunkenness and disorderly conduct.

Kerley and Cunneen criticise the RCIADIC's lack of gender-specific analysis in this regard.²⁷ Despite their critique, the death reports of the females did consider the topics of decriminalising public drunkenness and avoiding the detention of people who are unable to pay fines, as well as the importance of assessing the condition of a detainee's health at the time of arrest. These topics were further considered in greater detail in the *National Report*. Therefore, it can be argued that the commissioners did discuss matters that were pertinent to the offending patterns of Indigenous women. In making their observations, however, the commissioners did not take a gender-specific focus and could not therefore have adequately responded to the circumstances of Indigenous female offenders. In particular, questions pertaining to why so many of the females abused alcohol and other substances, thereby attracting the attention of authorities, needed to be raised. Answers may have pointed to the prevalence of abuse experienced by

²⁵ David Biles, David McDonald and Jillian Fleming, 'Research Paper No. 13 - National Police Custody Survey, August 1988: National Report' in David Biles and David McDonald (eds) *Deaths in Custody Australia, 1980-1989: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (1992) 277, 283.

²⁶ Ibid 284.

²⁷ Kerley and Cunneen, above n 7, 534.

Indigenous women, as well as to concerns regarding their inability to properly provide for their children.²⁸

Overall, the tone of the death reports was sympathetic towards the difficult lives these females had endured, and the commissioners were as critical of any negligent treatment by custodial officers and inadequate police and coronial post-deaths investigations as they were of the treatment given to the males that had died. It is clear from the information presented above, however, there were certain characteristics and problems that were of particular relevance to the female deceased which were not explored by the commissioners.

B *Male Deaths Investigated*

1 *General Description of the Males Investigated*

This section of the chapter considers the particular characteristics of the deceased males which would have directly affected the women in their lives. Although Indigenous women had many other concerns in relation to the custodial experience and death of their family members – such as the level of health and employment opportunities of the deceased, and the degree to which family members were kept informed of the post-death police and coronial investigations - these ‘underlying issues’, and the extent to which they were considered from a gendered perspective, are explored in the next section of this chapter within the context of the discussion contained in the *Interim, National* and regional reports.

A summary of the age, place of detention and death, and cause of death of the 88 males whose deaths were investigated by the RCIADIC is contained in Appendix 5.²⁹ As with the females, the details have been listed alphabetically according to

²⁸ Kerley and Cunneen note in their paper that Indigenous women may resort to alcohol or substance abuse to escape violence: Ibid. Also Sharon Payne notes that ‘[o]ne of the most disempowering acts for Aboriginal women was the ‘assimilation’ policy which saw Aboriginal babies taken from their mothers: Sharon Payne, ‘Aboriginal Women and the Criminal Justice System’ (1990) 2(46) *Aboriginal Law Bulletin* 9, 9.

²⁹ The summary, in the form of a table, appears in an appendix because it is so big. The reports of the 88 males who died and from which the majority of the information presented in this part of the chapter has been obtained, appear in the Bibliography.

the deceased's surname for ease of reference. It is important to note that some reports were more detailed than others and that the information available from which conclusions can be drawn about the characteristics of the deceased was not always clear.

The average age of the males was 32 (the same as the average age of the females), the youngest being 16 and the oldest 62. Twenty-five of the 88 (29%) were under 25 years of age. The RCIADIC classified 29 of the deaths as a 'hanging'.³⁰ Other self-inflicted deaths included that of Paul Farmer and Peter Leonard Campbell who died by cutting their own throats; Malcolm Charles Smith who drove a paint brush handle through his eye; and 'the man who died in Geraldton' who had tightly wrapped a bandage around his neck. Thomas William Murray can also be classified as a self-inflicted death since he knowingly administered an excessive dose of doxepin tablets. The commissioners did not classify all of these deaths as suicide because they could not conclude in each case whether the deceased intended to kill himself.³¹

2 *Substance Abuse and Violence Towards Women and Children*

The deceased males had experienced much tragedy throughout their lives, including the death of children and partners. Forty-one of the 88 male deceased had during their life been married or had lived in a de-facto relationship.³² Many

³⁰ See the table on page 53 of *National Report*, above n 20, vol 1 where it stated that 30 of the deaths resulted from 'hanging'. One of these deaths was of a female. The males that were classified as having died from a hanging are: Shane Kenneth Atkinson, Lloyd James Boney, Patrick Thomas Booth, Stanley Brown, Edward Cameron, Glenn Allan Clark, Kingsley Richard Dixon, Gregory Michael Dunrobin, Michael Leslie James Gollan, Richard Frank (Charlie) Hyde, Jambajimba, Craig Douglas Karpany, David Mark Koowooha, Bernard Albert McGrath, Benjamin William Morrison, Edward James Murray, Perry Daniel Nobel, Mark Anthony Quayle, Mark Wayne Revell, Alistair Albert Riversleigh, Graham Trevor Walley, Edward Stanley West, Peter Wayne Williams, Hugh Wodulan, Darren Steven Wouters, The man who died in Brisbane Prison on 4 December 1980, The man who died in the Darwin Prison on 5 July 1985, The young man who died at Aurukun on 11 April 1987, The young man who died at Wujal Wujal on 29 March 1987.

³¹ See the discussion about the legal definition of the term 'suicide' in Commissioner Wyvill's regional report: *Regional Report of Inquiry in Queensland*, above n 15, 17.

³² This type of information is difficult to ascertain from the death reports and was therefore obtained from Table 2.5 of Volume 1 of the *National Report: National Report*, above n 20, vol 1, 41. Table 2.5 did not, however, separate the information according to sex. Therefore, the number of females that had been in a married or de facto relationship during their life was deducted from

had been involved in relationships that were marred by violence and aggression or had been raised in families which exhibited such characteristics. Just over 55% had been convicted of offences involving assaults of a physical or sexual nature during their life.³³ Almost a third were noted as having physically assaulted family members including partners, children and mothers. Two had been convicted of killing their partners (one was convicted of manslaughter and the other of murder). There were 14 who were convicted of a rape, sexual assault, attempted carnal knowledge or indecent assault of adults and minors. The victims of two of the 14 had been male. Some of the wives or de facto partners of the male deceased were also noted as having engaged in assaults against the deceased.

Most of the aggression exhibited by the males was associated with alcohol abuse. Similarly, most of their offending (whether public order, property or violent offending) was associated with alcohol or drug abuse. Although the commissioners' opinions regarding the severity of any alcohol or drug dependency of the deceased were not always conclusive, 78 of the 88 death reports described the male deceased as being a heavy drinker, alcoholic or drug abuser. A further three of the males were said to drink but not excessively or to the extent that they had an alcohol problem.

3 *Ways in Which the Commissioners Considered Violence and the Violent Tendencies of the Deceased Males*

One characteristic of certain of the males contrasted markedly with their violent offending behaviour: the fact that members of their family and community held them in high regard. For example, Edward Frederick Betts, a highly skilled

the total given in Table 2.5. The information concerning the females was obtained from the female death reports.

³³ Note that Judy Atkinson uses the statistics reported by the Criminology Research Unit (CRU) in Research Paper 11, to note that '53% of those that died in custody were in custody for acts of violence': Judy Atkinson, 'A Nation Is Not Conquered', above n 6, 5; David Biles, David McDonald and Jillian Fleming, 'Research Paper No. 11 - Australian Deaths in Prisons 1980-88: An Analysis of Aboriginal and Non-Aboriginal Deaths' in David Biles and David McDonald (eds) *Deaths in Custody Australia, 1980-1989: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (1992) 213, 224. In fact that data which was used by the CRU to come up with this figure included Indigenous people who had died in custody but were not investigated by the RCIADIC. The table that displays the results also does not break the figures down according to sex. The figure of 55% in this thesis was obtained from reading and analysing the death reports of the RCIADIC.

Australian Rules footballer, was noted as being ‘well regarded in the community and within his family’, although he was severely addicted to alcohol and his wife had obtained restraining orders against him for his violent behaviour.³⁴ Veda, his wife, is quoted in the report as saying:

Eddie would drink and that would upset the family and sometimes cause arguments. After those arguments we were often able to get Eddie to stop drinking for periods. It was generally a happy household and despite the arguments he cared for me and the family very much.³⁵

Stanley Brown, who drank heavily and was prone to violent assaults against his tribal law wife that required hospitalisation, was described in the report as being ‘highly respected in the Aboriginal community for his involvement in matters concerning traditional Aboriginal law’.³⁶

‘The man who died at Oodnadatta on 17 December 1983’ was a tribal man who used traditional law to punish others for breaches of customary law. He was described in his report as being ‘well respected within the Aboriginal community’.³⁷ The deceased’s last arrest was a consequence of his committing two assaults occasioning bodily harm and one common assault against an Indigenous woman and her child who was eight months at the time, and his wife, whom he had married under traditional law. He was a heavy drinker and often intoxicated when committing offences of assault.

Despite their numerous convictions for assault, often against their wives or other Indigenous women and children, there was no discussion of the importance of improving the safety of women and children in cases where traditional law is

³⁴ Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Edward Frederick Betts (S/8)* (1991) 2. Commissioner Johnston wrote the report into the death of Edward Frederick Bett’s investigation.

³⁵ *Ibid* 10.

³⁶ Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Stanley Brown* (1990) 2. Commissioner O’Dea wrote the report into the death of Stanley Brown

³⁷ Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of a Man Who Died at Oodnadatta on 17 December 1983 (SA/6)* (1991) 2. Commissioner Johnston wrote the report into the death of ‘the man who died in Oodnadatta on 17 December 1983’.

practiced (often under the influence of alcohol) in any of the reports. Many Indigenous women have subsequently expressed concern over the use of traditional law as an excuse for violent behaviour. For example, Alison Anderson, a Luritja woman, in a paper titled 'An Indigenous Woman's Perspective on the Removal of Traditional Marriage as a Defence Under Northern Territory Law', gives her view of legislative amendments introduced in the Northern Territory in 2003 to remove the defence of traditional marriage when an adult engages in sexual intercourse with a child under the age of 16.³⁸ She states that customary law needs to concede to the human rights of women and children.

Where there is a conflict between the individual human rights of the girl and the rights of a culture to traditional practices, international human rights law find that the rights of the girl prevail. ... I fully support the recognition and lawful practice of traditional marriage. However, I believe that protection of children's rights, including protection from sexual coercion and abuse, should be available equally to Indigenous and non-Indigenous children in the NT.³⁹

Although Anderson published her paper 13 years after the RCIADIC tabled its report, the RCIADIC was aware of matters such as the need to protect individual human rights at the time it conducted its inquiry. This is evidenced by the discussion of international treaty obligations in the *National Report*.⁴⁰

It is impossible to determine in relation to each of these cases whether the commissioners felt an obligation towards family members or the community to include positive remarks that had been made about the deceased in the reports. While the statements no doubt accurately reflected certain aspects of the personality of the deceased, it is difficult to ignore the fact that the men were also extremely violent. At the same time, there was no critical reflection upon this

³⁸ Alison Anderson, 'An Indigenous Woman's Perspective on the Removal of Traditional Marriage as a Defence under Northern Territory Law' (2004) 6(1) *Indigenous Law Bulletin* 30.

³⁹ Ibid 10. Other scholars that have espoused similar views include Judy Atkinson, 'Violence against Aboriginal Women: Reconstitution of Community Law - the Way Forward' (1990) 2(46) *Aboriginal Law Bulletin* 6; Jane Lloyd, 'Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Welcomes State and Territory Legislation That Will Protect Aboriginal Children from Abuse' (2004) 6(1) *Indigenous Law Bulletin* 28; Pat O'Malley, 'Indigenous Governance' (1996) 25(3) *Economy and Society* 310; Sharon Payne, 'Aboriginal Women and the Criminal Justice System', above n 28.

⁴⁰ *National Report*, above n 20, vol 5, ch 36.

fact, apart from connecting it to the excessive consumption of alcohol. This may have been deliberate on the part of the commissioners so as to avoid a perception of negative stereotyping of the deceased by non-Indigenous people. Indeed seven of the non-Indigenous people interviewed commented that they or the Indigenous women they had spoken to did not want to disparage the males they were investigating.

Although alcohol abuse was considered as an underlying issue in a number of reports and was recognised as contributing to the problem of violence in communities, the solutions offered tended to focus on the long-term goals of acquiring self-determination and empowerment rather than on the immediate safety of members of the communities. For example, the *Report of the Inquiry into the Death of Bernard Matthew Johnson* contained a discussion of ‘alcoholism and violence on Aboriginal communities’.⁴¹ Bernard Matthew Johnson lived on Palm Island and at the time of his death was in custody for the manslaughter of his second wife. He had previously pleaded guilty to the manslaughter of his first de facto wife. Both killings were very violent, involving repeated bashings to the body and head of the victims. In discussing the occurrence of violence on Palm Island, Commissioner Wootten emphasised that such behaviour was not considered normal or acceptable in Indigenous communities. He mentioned the fact that Indigenous women had formed support groups to discuss ways to cope with the violence but that Indigenous men had yet to fully address the cause of such behaviour. Wootten rejected using incarceration as a way to remedy the situation and instead suggested

re-invest[ing] Aboriginal society with opportunities to manifest independence and develop self-esteem. It may be long process, but it will not begin until Aboriginal people are listened to with the respect that is shown people in authority.⁴²

While such advice is valid, the discussion did not highlight the more immediate need for safety for Indigenous women and children.

⁴¹ Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Bernard Matthew Johnson* (1990) 35-37.

⁴² *Ibid* 37.

Evidence that the focus of the commissioners was on the disadvantage experienced by young Indigenous men, possibly at the expense of an analysis of the *targets* of men's violence, also appeared in the *Report of the Young Man Who Died at Wujal Wujal on 29 March 1987*. Wujal Wujal was described in the report as being a depressed Indigenous community with a serious alcohol abuse problem. Commissioner Wyvill acknowledged that

[w]ith the rise in alcohol abuse, families have had less money available for food, domestic violence has increased, as of course, have general disturbances involving drunken people.⁴³

The deceased, indeed, had indulged in binge drinking and had been arrested for assaulting members of the community and police officers. The following account of the way colonisation affected Indigenous males living in Wujal Wujal to a greater extent than Indigenous females is indicative of the fundamental view that emerged in the *National Report* about who is the most dispossessed:

In traditional society formal political and economic power was vested in older men to the exclusion of women. Young men were initiated into adulthood by a process which gave them access to knowledge, ceremony and status. By the turn of the century, with the first interaction with non-Aboriginal fishermen, timber getters and tin scratchers, the formal relations between elders and young males began to change for a variety of reasons. The imposition of mission life compounded that decline. The function of many of the male elders as role models has diminished accordingly.

For young men at Wujal Wujal, opportunities for gaining prestige and standing through developing prowess as skilled hunters, gatherers and fishermen have also been lost. Their present prospects for social advancement, defined in traditional terms, are now clearly dim.

⁴³ Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of the Young Man Who Died at Wujal Wujal on 29 March 1987* (1990) 12.

The preservation of the maternal role of child rearing, access to steady incomes (mainly family allowances), assumption of the control of household expenditure and increasing literacy skills, have provided women with greater status. The higher educational achievement of women has resulted, for example, in their being more active in the running of the Council.

This concomitant lack of status for men, particularly young men, contributes to the sense of powerlessness and the idleness they experience. The absence of prestige has contributed to a sense of anxiety and depression. For their emotional well-being, alternative processes of acquiring status and new meaningful roles within the community must be found.⁴⁴

The extreme dispossession experienced by Indigenous males was used in many of the RCIADIC's official reports to explain their violent behaviour. The empathy displayed by the RCIADIC towards Indigenous men as opposed to women is discussed in more detail below within the context of the other official reports. Reasons why such a position was adopted are explored in Chapter 7 of this thesis.

II THE *INTERIM*, *NATIONAL* AND REGIONAL REPORTS

A *Overview*

The particular problems confronting Indigenous women as both offenders and victims were matters that fell within the ambit of 'underlying issues'. The underlying issues, although briefly considered in the death reports, were left for further examination in the *Interim*, *National* and regional reports. Here I consider the extent to which these reports addressed the problems facing Indigenous women. In doing so, reference is also made to the manner in which certain topics were in fact 'gendered' by the RCIADIC's focus on Indigenous males.

The *National Report* and the regional reports of Commissioners Dodson and Wootten contained discrete sections which considered the position of Indigenous

⁴⁴ Ibid 39-40.

women.⁴⁵ However, while these reports took a gender-specific approach, the sections were far from substantial: the section in Dodson's report, titled 'Aboriginal women', considered the effects of colonisation and briefly, the existence of family violence, but was only seven pages long in a two-volume report containing 1010 pages; a similar section on 'Aboriginal men' was just over 17 pages long.⁴⁶ Commissioner Wootten's regional report, which was 438 pages long, contained within Chapter 18 a two-page section titled 'Treatment of Aboriginal Women'. This section related to police interaction with Indigenous women.⁴⁷

The *National Report* contained three discrete sections on Indigenous women: 'Women and CDEP' which was approximately one page long;⁴⁸ 'Treatment of Aboriginal Women by Police' which was two pages long;⁴⁹ and 'Aggression and Violence Against Women and Children' which was five pages long.⁵⁰ Each of these sections will be discussed in more detail below.

⁴⁵ Commissioner O'Dea's regional report examined the offending history of the deceased according to gender differences. These sections were however relatively brief (the largest being one page long). The report also briefly considered the use of police officers' wives when searching female prisoners. Again, this section was less than two pages long and focuses more on the amount paid to the wives rather than any equity issues in relation to Indigenous female prisoners: Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia, Vol 1-2* (1991) vol 1, 161, 164, 178, 189, 345 (abbreviated as *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* in repeated citations). Similarly the *National Report* presented a breakdown of the age of the deceased according to gender and the number of Indigenous males and females who were in police and prison custody on particular survey dates: *National Report*, above n 20, vol 1, 39, 194, 200. There was a section in the chapter on 'schooling' that considered 'gender issues and education' and in the chapter on employment that considered 'gender': *National Report*, above n 20, vol 2, 347, 394. These sections do not only pertain to women.

⁴⁶ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, 375-382. There was also a chapter on 'violence' but it did not only relate to Indigenous women. The material in that chapter will be considered in more detail below: *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 2, ch 19.

⁴⁷ Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) 280-281 (abbreviated as *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* in repeated citations). There was also a chapter on 'domestic violence' but it did not only relate to Indigenous women. The material in that chapter will be considered in more detail below: *Ibid* ch 19.

⁴⁸ *National Report*, above n 20, vol 4, 435.

⁴⁹ *Ibid* vol 2, 221-223.

⁵⁰ *Ibid* vol 2, 98-103.

The official reports also contained separate sections pertaining to Indigenous men and youth.⁵¹ Matters which were raised in those sections and which would have particularly affected Indigenous women are included in the discussion below. There was also a great deal of discussion throughout the reports about the role of parents in the upbringing of children, an issue of direct relevance to Indigenous women, who are often the main carers of children.⁵² Indigenous youth were, in fact, a major focus of the reports. However, the topic of Indigenous youth and the manner in which it affected Indigenous women as mothers is not included in the present analysis. To so include this topic would make this thesis much too long, and would substantially alter the focus from Indigenous women to include Indigenous youth, male and female. Similarly, the problem of alcohol abuse was extensively covered in all of the RCIADIC reports, particularly the *National Report*. Reference was often made to concerns raised by the Aboriginal Issues Units (AIUs) about this problem. Apart from its connection to family violence and a brief mention that the purchase of alcohol used money that could otherwise have been spent on food, the reports considered the problem as one that involved the entire community rather than as particularly concerning Indigenous women. Therefore, aside from the role that alcohol abuse played within the context of family violence, the problem of alcohol or drug usage is not discussed separately, below.

I begin with a description of the way in which the official reports considered the effect colonisation had on the traditional roles of Indigenous men and women. Although this is not an immediate ‘problem’ confronting Indigenous women, it

⁵¹ See for example: Ibid vol 2, 91 – This page began a section on ‘Young Men in Aboriginal Society – An Introduction’. This section was one page long; *National Report*, above n 20, vol 2 92 – on this page began a section on ‘The Role of Young Men in Aboriginal Society’. This section was 11 pages long (it included the five page section on ‘Aggression and Violence Against Women and Children’); *National Report*, above n 20, vol 2, ch 14 – this was a chapter titled ‘Young Aboriginal People and the Criminal Justice System’. This chapter was 46 pages long. It began with a sentence which stated ‘Aboriginal juveniles, particularly males, require very particular consideration in this Report’; *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 358 – on this page began a section on ‘Aboriginal men’. As mentioned above it was just over 17 pages long; *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 385 – on this page began a section on ‘Aboriginal youth, family life and the State’. It was over 24 pages long.

⁵² See: *National Report*, above n 20, vol 2, 60 which noted that according to the 1986 census the proportion of single parent Indigenous families that were headed by an Indigenous mother was 27.7% whereas those headed by an Indigenous father was 5.1% of the overall Indigenous family population.

demonstrates how the commissioners perceived the dispossession and marginalisation of Indigenous men and women differently. This perspective indeed informed other analyses conducted by the RCIADIC.⁵³

B *The Effect of Colonisation on the Status of Indigenous Women and Men*

The *National* and regional reports of Commissioners Dodson and Wootten contained the most comprehensive discussions regarding the ways in which colonisation affected Indigenous men and women. Commissioner Wyvill briefly mentioned the legacy of history on the lives of Indigenous people in Queensland and briefly considered the ways in which the loss of certain traditional customs and employment opportunities decreased the status, and consequently the self-esteem, of Indigenous males. There was no comparative analysis of the ways in which similar circumstances of marginalisation affected Indigenous females. Given that Commissioner Dodson focused on the underlying issues in Western Australia and that Commissioner O’Dea was solely responsible for the investigation into the deaths in Western Australia, it is not surprising that O’Dea’s regional report focused on matters such as custodial care and post-death investigations rather than on matters such as the effect of colonisation, which fell within the ambit of underlying issues. The *Interim Report* released by Commissioner Muirhead in 1988 provided an overview of the findings of the inquiries into the deaths and did not contain an historical account of colonisation.

By comparison, the Aboriginal Justice Inquiry of Manitoba (AJI) recognised that colonisation had affected Aboriginal women in different, and in many respects more devastating, ways than it had affected Aboriginal men. The AJI report noted that this was a result of the introduction of the residential school system and the sexist provisions of the Canadian *Indian Act*. This is markedly different to the way in which the official reports of the RCIADIC considered the effects of colonisation. The *National Report* and Commissioner Dodson’s regional report were the most comparable in their analyses. Generally, Indigenous men were

⁵³ The way dispossession affected Indigenous men to a greater extent than it affected Indigenous women was referred to throughout the official reports (particularly the *National Report*) and was used as an explanation of other phenomena. Exactly how this affected the extent to which the RCIADIC considered problems relating to Indigenous women is explored in Chapter 7.

portrayed as having suffered a greater loss of status as a result of colonisation than Indigenous women. This conclusion stemmed from research work conducted by non-Indigenous anthropology, history and sociology scholars, both male and female.

Cath Duff notes that Indigenous women have increasingly rejected the claim that Indigenous men suffered more from colonisation.⁵⁴ Larissa Behrendt, a highly acclaimed female Indigenous scholar, also notes that white male anthropologists have contributed to the myth that Indigenous men suffered more from colonisation than Indigenous women. Indigenous women were assumed by 'white male anthropologists ... to be subservient to Aboriginal men because it was assumed that women would hold a similar subordinate place in Australian society to the one they held in European society'.⁵⁵ As a result, anthropologists did not consult with Indigenous women in their field research, which led to their failure in identifying the sacred sites and the important cultural role of women in Indigenous society. Behrendt claims that by failing to document such history, many anthropologists failed to fully appreciate the effects of colonisation on Indigenous women.

The following passage from the *National Report* is indicative of the position taken by the RCIADIC when apportioning suffering on account of colonisation between Indigenous males and females:

For men, from the beginning of social adulthood, this process of achieving status was and is increasingly focused within the sphere of public life – that is, the area which invokes the whole society and the institutions and practices regarded as necessary to its social health and continuity. ... For women, on the other hand, although not even motherhood is an absolute or unquestioned position, the bearing or raising of children does provide a stable basis from which entry into adulthood and the negotiation of status may be undertaken. Moreover, the division of labour defined in relation to the domestic and public spheres is also related to gender roles. Precisely because of this, the impact of colonization has been different for men and for women. Despite the enormous changes effected, women's roles in the

⁵⁴ Cath Duff, 'Racism, Sexism and White Feminism' (1994) 5(1) *Polemic* 36, 37.

⁵⁵ Behrendt, above n 11, 29.

domestic sphere and their tasks – nurturing, providing food, ‘worrying for the ‘lations’ – have not substantially altered. The public sphere, and hence the context of men’s role and status, is precisely the area that has been most under attack in the transformation to a new order. The group most sociably vulnerable in these processes are young men.⁵⁶

Similarly, Commissioner Dodson, in his *Regional Report of Inquiry into Underlying Issues in Western Australia* noted that:

Whilst forced cultural change has had substantial impact on the traditional role of Aboriginal men, Aboriginal women even though they have been exposed to the same cultural forces have basically retained the role of gatherer and child carer.⁵⁷

The *National Report* accepted that the process of assimilation, which included the removal of children from their families sometimes from birth, deeply affected Indigenous women.⁵⁸ However, evidence that Indigenous women were now in a better position than Indigenous males appeared repeatedly throughout the *National Report* and Commissioner Dodson’s regional report. For example, the *National Report* viewed the acquisition of income through Social Security pensions by Indigenous mothers as a means of attaining status:

Mothering is the key to such access to resources. Perhaps more importantly this access has acted to transform the position of motherhood itself into a source of status. ... For welfare purposes it was enough that mothers care for their children. The relationships between status and access to income through unemployment benefits does not exist in the same way for men.⁵⁹

Instead, the receipt of unemployment benefits by an Indigenous male was portrayed as an indication that he could not fulfil his role in society. Although it was income, it was not associated with acquiring income in a noble manner. Commissioner Dodson’s report noted that dependency on the welfare system told Indigenous men that

⁵⁶ *National Report*, above n 20, vol 2, 90.

⁵⁷ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 376.

⁵⁸ See the discussion at: *National Report*, above n 20, vol 2, 510-519.

⁵⁹ *Ibid* 92-93.

non-Aboriginal society considered them of so little value, their contribution to life and work so negligible, that it would prefer to pay them not to work, in effect to sit and do nothing. In a broader sense the whole Aboriginal community was to experience that non-Aboriginal people would share from their culture, namely their 'hard-earned money', to keep Aboriginal men from competing or having any power over work or land.⁶⁰

Additionally, under the heading 'Gender Issues and Education', the *National Report* attributed loss of status and self-esteem to the lower educational achievements of Indigenous males. The report made reference to Commissioner Wyvill's description of life for males living in Wujal Wujal as well as other evidence to support the claim that '[d]ifferential educational outcomes for Aboriginal men and women are significant in so far as they interact with the higher incidence of young Aboriginal men dying in custody'.⁶¹

Commissioner Wootten tended, in his regional report, to take a more balanced approach when discussing the effects of colonisation. For example, while noting the devastating effect the invading Europeans had on the opportunities of Indigenous people living in New South Wales, Victoria and Tasmania to gain employment and provide for families, he also noted that

[w]omen continued to bear the brunt of the [New South Wales Aborigines Protection] Board's attempt to culturally indoctrinate Aboriginals, finding their marriages regulated, their homes inspected and tested, and their children always vulnerable.⁶²

The *National Report* to a certain extent adopted the findings of Wootten, acknowledging that during the period of assimilation, women's parenting and housekeeping practices were surveyed incessantly: 'Aboriginal women were expected to behave like the idealized advertising images as portrayed in

⁶⁰ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 364.

⁶¹ *National Report*, above n 20, vol 2, 348.

⁶² *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 211.

contemporary *Women's Weekly*. Aboriginal women were in an impossible position.'⁶³

There was no detailed discussion of the ways in which Indigenous men and women may have differently endured a loss of status in Wootten's regional report. Rather, the report focused on how things such as the removal of children from families and adults from traditional lands, and the lack of access to appropriate housing, education and employment, affected Indigenous people as a whole in the three jurisdictions Wootten investigated.⁶⁴ Wootten did not investigate any female deaths and it is therefore surprising that the focus of his regional report was not more skewed towards a male perspective.

According to Commissioner Dodson's report, Indigenous women fared better in post-colonial Australia than their male counterparts, even though he recognised that they were exploited for sexual services. The main impact of this exploitation was noted as being the birth of "illegitimate children" which severely impeded traditional processes'.⁶⁵ By this he meant that traditional practices, such as acquiring matrilineal or patrilineal group status, were dismantled by the birth of 'half-caste' children. In fact, the competition which ensued between Indigenous and non-Indigenous men for the affections of Indigenous women was referred to as one reason why Indigenous males might harm themselves in custody. The threat of losing a close relationship was noted as having a devastating effect on Indigenous men.⁶⁶ Although there is no doubt that this might happen, more focus was placed on the welfare of Indigenous males in custody than upon the welfare of the females who were sexually abused. There was no recognition of the devastating effect the sexual exploitation must have had upon the psyche of the Indigenous female, nor of their grief in frequently having their babies removed.

The *National Report* acknowledged that:

⁶³ *National Report*, above n 20, vol 2, 512.

⁶⁴ That is, New South Wales, Victoria and Tasmania.

⁶⁵ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 376.

⁶⁶ *Ibid* vol 1, 371.

This failure that the women suffered in having their children taken away must have had a terrible psychological impact on their relations with these children, if they ever saw them again. Those implementing the policy told Aboriginal mothers to blame themselves. Anxiety, depression, confusion and most of all, anger and despair resulted; if not in the mother or father, then in the children who were taken away.⁶⁷

No connection was drawn, however, between this trauma and the future grief of Indigenous women or the fact that they also suffered tremendous losses in self-esteem and status. Proof that such a connection exists is contained in the *Queensland Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*. This report makes it very clear that the devastating effects of colonisation were experienced by both Indigenous men and women and that such oppression and subjugation has resulted in the loss of self-esteem and cultural identity by both Indigenous men and women.⁶⁸

The *National Report* added a further dimension to the sexual exploitation of Indigenous females by revealing that police officers were often the perpetrators of the sexual exploits:

Many police officers had sexual relationships with Aboriginal women, and some even had "harems". ... The fact that some of these men biologically fathered the children they later seized for State institutions adds a cruel twist to the story.⁶⁹

As explained below, this sheds further light on why Indigenous females might have been (and might still be) reluctant to involve police in family disputes.

Commissioner Dodson recognised that in Western Australia Indigenous girls were separated from their families and older women to a greater extent than Indigenous

⁶⁷ *National Report*, above n 20, vol 2, 513.

⁶⁸ Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (2nd ed, 2000). Indeed, Canadian research has linked the criminal activities of Indigenous women to their victimisation by Indigenous men who are reacting to the effects of colonisation: Carol LaPrairie, 'Some Issues in Aboriginal Justice Research: The Case of Aboriginal Women in Canada' (1989) 1(1) *Women and Criminal Justice* 81

⁶⁹ *National Report*, above n 20, vol 2, 26.

boys. Indeed '[m]uch greater effort was put into socialising the young women into the ways of non-Aboriginal society'.⁷⁰ The *National Report* similarly acknowledged that '[t]he gender-power relations of colonialism meant that Aboriginal women were in demand by colonial men, but relationships between Aboriginal men and non-Aboriginal women were taboo'.⁷¹ The fact that this may have resulted in a loss of cultural knowledge by Indigenous women was not addressed. Instead Dodson later observed that 'Aboriginal women have been instrumental in withstanding the enforced cultural indoctrination, ironically, through their role as culture bearers'.⁷²

Although the official reports claimed that Indigenous women had been able to maintain their traditional roles of gatherer and child carer, there were also indications that this was indeed not the case. Commissioner Dodson's report highlighted the phenomenon of the 'granny syndrome', a situation in which Indigenous mothers left the parenting of their children to grandmothers. Dodson's report noted that transferring the care of children to the grandparents was not only a sign of immaturity, but also an indication that the parents were unable to properly care for the children due to alcohol dependency and the experience of institutionalisation.⁷³ Similarly, a report prepared by Paul Memmott and commissioned by Commissioner Wyvill, which was replicated in full in the appendix to the Queensland regional report, mentioned the fact that *senior* women ran most of the organisations on the communities.⁷⁴ This, however, was mentioned as a sign of strength rather than as a potential future problem for those women or as further evidence that younger men and women were finding it difficult to function in contemporary society. Indeed, the *Queensland Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* notes that grandparents had to adopt parenting roles 'with, and in the absence of, functioning family units'.⁷⁵

⁷⁰ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 370.

⁷¹ *National Report*, above n 20, vol 2, 43.

⁷² *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 376.

⁷³ *Ibid* vol 1, 329, 384.

⁷⁴ *Regional Report of Inquiry in Queensland*, above n 15, 271.

⁷⁵ Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, above n 68, 212.

C *Family Violence*

The problem of family violence was (and still is) recognised as being one of the most serious problems facing Indigenous women and children. The seriousness of the problem was evidenced in Commissioner Wootten's regional report by the following comment:

There has been little assessment of domestic violence in Aboriginal communities in south-eastern Australia, but it is clearly a serious problem. Aboriginals expressed concern to the Commission's Aboriginal Issues Unit about this matter in New South Wales in Bourke, Broken Hill, Wilcannia, Menindee, Dareton, Walgett, Moree, Tamworth, Gilgandra and Moruya, and concern was also expressed at the Dubbo and Wilcannia Community Conferences.⁷⁶

Similarly, Commissioner Dodson's underlying issues report stated:

From published and unpublished works, and from further evidence put before my Commission, I can only conclude that violence has increased among Aboriginal society, both in the amount of violence inflicted, and in how, and to whom, that violence is inflicted. What appears to be true, is that whereas in previous times, members of Aboriginal society often used what may be described as violence or physical force to enforce certain aspects of law and order, today physical force has, in many areas, where excess alcohol use occurs, become almost uncontrollable and mindlessly violent. This is especially so not only with regard to the violence directed toward women and children but also among men themselves.⁷⁷

We saw in the first part of this chapter, many of the deceased males investigated by the RCIADIC had been convicted for offences of physical or sexual abuse. Similarly, many of the females who had died had been victims of physical or sexual violence. The problem of family violence was therefore directly related to over 50% of the deaths investigated. Over half of the non-Indigenous people I interviewed (comprising people from all jurisdictions) recalled the problem of family violence being prominent during the inquiry, either because the deceased

⁷⁶ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 339.

⁷⁷ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 2, 763.

had been a perpetrator of the violence or because they recalled Indigenous women having raised it as a problem during consultations.

Apart from the *Interim Report*, all of the official reports contained references to the problem of family violence and its association with excessive alcohol consumption. The extent to which it was considered, however, varied greatly. The regional reports of Commissioners O’Dea and Wyvill only briefly mentioned the incidence of family violence within the context of the lives of the deceased they investigated.⁷⁸ Commissioner Wootten’s regional report, in a chapter titled ‘Domestic violence’, dedicated six and a half pages to the topic (in a report that was 438 pages long).⁷⁹ This chapter offered a detailed consideration of the widespread occurrence of family violence, which was noted as encompassing the extended family. Commissioner Dodson’s regional report also dedicated a chapter to the problem of ‘violence’ which was four pages long (in a volume which was 489 pages long).⁸⁰ This chapter focused on violence in general within Indigenous communities, which left little coverage of the specific topic of family violence and the protection of women and children.

The *National Report* considered the problem of ‘aggression and violence against women and children’ in a separate section in Volume 2 of the report.⁸¹ As mentioned earlier, the section was five pages long (out of a total of 569 pages in that volume) and covered the severity of the problem in various Indigenous communities, as well as the reasons why Indigenous men committed so many crimes of violence against women and children. The underlying premise contained in the discussion was that the men used violence to express the anger resulting from their loss of status and also as a way of reacquiring that status. Namely:

⁷⁸ See in particular: *Regional Report of Inquiry in Queensland*, above n 15, 265-267; *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 45, vol 1, 234.

⁷⁹ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, ch 19.

⁸⁰ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 2, ch 20. References to family violence were also briefly made in Chapter 6 of Commissioner Dodson’s regional report.

⁸¹ *National Report*, above n 20, vol 2, 98-103.

Behaviour of young men in relation to drinking, and the associated commission of street type offences and crimes against property resulting in going to prison, is perhaps not difficult to understand when seen as part of a search for status in the eyes of their peer group. What appears to be an increasing level of aggression and violence against women and children in some regions is perhaps less easily related to the question of status achievement. Nevertheless, there are indications from the data that similar connections between this type of behaviour and the development of masculine identity in some Aboriginal societies exist.⁸²

Other factors that the *National Report* identified as contributing to the severity of the problem of family violence include the use of fighting to resolve disputes and the excessive amount of alcohol consumed by Indigenous men. The connection with alcohol consumption was emphasised in the *National Report* in a number of places. The report explained, however, that

it is important to note in this respect that alcohol does not cause violence; rather, underlying social and economic problems create an environment in which alcohol consumption has a violent outcome or where consumption of alcohol allows for a normalization of violent behaviour.⁸³

Improving education and employment opportunities for Indigenous men was offered as a solution to the problem.⁸⁴

There was no detailed analysis in the *National Report* of the physical effects of the violence on women and children and of the need to ensure their safety. Oddly, women only entered the discussion by being identified as perpetrators of the violence.⁸⁵ Mention was made of the high incidence of homicide committed by Indigenous women and of the fact that in a study that used data collected during 1977-78, it was found that Indigenous women 'fought nearly as often as men'.⁸⁶ This seems to have influenced the discussion more than their role as victims and

⁸² Ibid vol 2, 98.

⁸³ Ibid. See also Chapter 15 of volume 2 of the *National Report* where there was a further discussion of the link between alcohol and violence: *National Report*, above n 20, vol 2, 297-334.

⁸⁴ *National Report*, above n 20, vol 1, 102.

⁸⁵ See the discussion beginning at page 100 of the *National Report* where it stated '[w]omen are by no means simply passive victims in this context ...': Ibid vol 2.

⁸⁶ Ibid.

there was little analysis of the fact that the women were more vulnerable to serious injury. Statistics cited in the report indicated that at the time, Indigenous women who were in prison had been convicted for homicide more than any other offence. This was not examined from a self-defence or provocation perspective, but was instead offered as support for the notion that Indigenous women can be just as violent as the men. Interestingly, women who were violent were generally less likely to be under the influence of alcohol, a fact the *National Report* used to support the notion that women fought not because of drunkenness but because of their role as supervisors of other people's fighting. From a feminist perspective, however, this would instead indicate that the women had been victims of continued abuse over a number of years and were acting according to a condition which has been termed 'battered woman syndrome' by some scholars.⁸⁷

In its discussion of family violence, the *National Report* relied heavily upon the Northern Territory AIU report, Audrey Bolger's Northern Territory *Aboriginal Women and Violence* report, and various articles and submissions made by Judy Atkinson, an Indigenous female scholar. One of the problems identified in Audrey Bolger's report, and which the *National Report* highlighted, was the lack of legal services offered for Indigenous women who were victims of violence. The primary role of the Aboriginal Legal Service (ALS) was noted as keeping offenders out of prison; these offenders were often male perpetrators of violence. This led to problems of conflict of interest, since the ALS could not then also protect the rights of female victims. Bolger claims that this may lead to courts being inadequately informed about principles of tribal law and how they affect Indigenous women.⁸⁸ The *National Report* used a process adopted in the Pitantjatarra Lands, whereby community members were separately represented by their own lawyer when the offender was represented by the ALS, as an example

⁸⁷ Many feminist scholars reject the notion that such women are suffering from a syndrome and others question the usefulness of such a characterisation to challenge gender biases in the law. However, feminist legal scholars agree that a history of abuse needs to inform the assessment of criminal responsibility in ways that transform the inherent gender biases present in Western law. For a discussion of how the syndrome inadequately reflects the complexity of the lives of Indigenous women see: Julie Stubbs and Julia Tolmie, 'Race, Gender and the Battered Woman Syndrome: An Australian Case Study' (1995) 8 *Canadian Journal of Women and the Law* 122. See also LaPrairie, above n 68, for a discussion of the relationship between the effects of colonisation on Canadian Native American males, domestic violence against Native American women, and subsequent criminal activity on the part of Native American women.

⁸⁸ Bolger, above n 11, 84-86.

of how to address this dilemma.⁸⁹ Recommendation 106 resulted from this discussion; however, it was phrased in a gender-neutral manner and made no reference to the special legal needs of female victims of violence.⁹⁰

The *National Report* eventually concluded that there needed to be more research conducted regarding the problem of family violence, particularly amongst Aboriginal people.

It is Aboriginal men, women and children who are suffering, and it is they who need to examine the reasons why violence is occurring and to determine how, in accordance with the principles of their own culture, it should be stopped. The fact of violence cannot be isolated from the broader anxiety of the young men's search for meaning and status.⁹¹

The recognition that solutions needed to adopt a 'whole of community' approach supports the views of other Indigenous scholars.⁹²

One of the main reasons given, particularly in the regional reports of Commissioners Dodson and Wootten, for the failure of Indigenous women to seek the protection of police in situations of family violence was their concern about the safety of the perpetrator if he were taken into custody.⁹³ Other scholars have made similar observations.⁹⁴ Some concern about community retaliation against women when a family member was incarcerated, was acknowledged. As Commissioner Dodson pointed out:

Aboriginal women can be placed in a precarious position when one considers the role attributed to them, sometimes by members of a partner's family, if the partner is taken into custody. They can be blamed and become victims of retaliation. The

⁸⁹ *National Report*, above n 20, vol 3, 90.

⁹⁰ *Ibid* vol 3, 91.

⁹¹ *Ibid* vol 2, 103.

⁹² See for example: Larissa Behrendt, 'Bigger Picture Must Be Considered in Tackling Aboriginal Violence', *Sydney Morning Herald* (Sydney), 26 August 2003, 13; Mick Dodson, 'Violence Dysfunction Aboriginality' (Paper presented at the National Press Club, Canberra, 11 June 2003), 7; Lucashenko, above n 11.

⁹³ The perpetrator is presumed to be male in this sentence since evidence indicates that in most cases the victims of family violence are women and children.

⁹⁴ Atkinson, 'Violence against Aboriginal Women', above n 39; Bolger, above n 11.

likelihood of death or injury in custody has cultural and social repercussions, which are more likely to dissuade Aboriginal women from seeking police intervention in a situation of domestic violence, even if that violence is directed at someone else in the relationship structure.⁹⁵

Additionally, there was little faith in the police that they would assist if and when a complaint of family violence was made. This lack of trust stemmed from the history of colonisation during which police rarely supported Indigenous women. In fact, as noted in a number of the reports, police instead sexually and physically abused Indigenous women. The decision of whether or not to press charges against a violent family member was often left up to the victim, who would more than likely choose not take any further action. Therefore, although Indigenous women were reluctant to involve police in situations of family violence for the reasons outlined above, they also had concerns about police inaction in these circumstances. Commissioner Wootten, for example, noted:

In one area there are complaints at least by Aboriginal women of insufficient police intervention. Domestic violence is a community-wide problem and police reluctance to involve themselves in domestic disputes has also been community-wide and indeed is a pattern observed in other countries as well.⁹⁶

The *National Report* referred to the night patrols used at Tennant Creek, Northern Territory, as an example of a program that could be used to combat family violence without having to involve police. The report stated that such programs could address the commonly expressed concern of Indigenous women and Elders that there was a lack of policing support to combat alcohol-inspired violence.⁹⁷ This discussion took place within the context of considering alternatives to arrest. The report went on to say '[c]learly part of the strength of such a self-policing mechanism is that it is not isolated from the community's everyday concerns'.⁹⁸ Interestingly, the *Interim Report* cited a Committee to Defend Black Rights

⁹⁵ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 381.

⁹⁶ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 339.

⁹⁷ *National Report*, above n 20, vol 3, 45.

⁹⁸ *Ibid.*

(CDBR)⁹⁹ suggestion that police no longer be responsible taking intoxicated persons to sobering up shelters. The CDBR was noted as proposing that the responsibility be borne by authorised civilians.¹⁰⁰ This proposal seemed to ignore the fact that it was women who were at risk of injury because women usually managed night patrol programs. Unless facilities are provided where intoxicated males can be taken, endeavours to divert drunken males from custody may simply place females in further risk of injury. Indeed Commissioner O’Dea noted in his regional report that: ‘In the report of my inquiry into the death of Wodulan, I commented that it was not in the community interest to have decriminalisation without the provision of sobering up facilities.’¹⁰¹

The importance of removing the victim from the situation was raised in Commissioner Wootten’s report. Not only was there recognition in his report that non-custodial sentencing orders may be inappropriate in certain circumstances where the safety of the victim was at stake, the report also recognised that at the time there were an insufficient number of community services available in New South Wales, Victoria and Tasmania to meet the needs of victims. Ironically, although Indigenous women were loath to involve police in matters of family violence, they were noted in the *National Report* as using police lockups themselves as shelters from the violence. They did this because they often had nowhere else to go in small communities, and if they left the community they lost family and kin support networks.¹⁰²

Recommendations which were made at a Statewide meeting of Aboriginal women in Dubbo, New South Wales, in June 1990, and which were highlighted in Commissioner Wootten’s regional report, included the need for ‘adequate recognition and resourcing of workers in the field’, the establishment of safe

⁹⁹ This is considered an Indigenous organisation although it attracted non-Indigenous members.

¹⁰⁰ Australia, Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody: Interim Report* (1988) 27 (abbreviated as *Interim Report* in repeated citations).

¹⁰¹ *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 45, vol 2, 835.

¹⁰² Recognition of the fact that Indigenous women spend time in police watchhouses to remove themselves from violent situations was noted in a chapter which dealt with housing and infrastructure in the *National Report: National Report*, above n 20, vol 2, 455-456. It was unclear whether women would get arrested or would simply ask to sleep in the watchhouse.

houses for women and children to be developed by Indigenous workers in consultation with women from communities, and employing Indigenous female police officers and counsellors to help women who are victims of family violence.¹⁰³ These important concerns were not dealt with in any great depth in the *National Report* or the recommendations.

D *Other Concerns of Indigenous Women*

Other themes arose in the official reports and interviews of non-Indigenous people. In general the point was made that Indigenous women experienced over two centuries of racial oppression, and that they suffered from racism, lack of education and employment opportunities, poor health and housing, and a lack of empowerment. Although these topics were raised, most were not considered in a gendered way. There were some areas, however, which have a more direct bearing on Indigenous women, including police treatment of women, offending patterns and women in prison. I turn to these now.

1 *Police Treatment of Indigenous Women*

One of the main problems affecting Indigenous women identified in the official reports was the inappropriate manner in which they were treated by police officers. Four of the non-Indigenous people I interviewed specifically referred to the maltreatment of Indigenous women by police as being a significant problem for Indigenous women at the time. One of them said:

We heard instances of people alleging that women had been assaulted in their cells. I even heard instances of women saying they had been raped. We never had any documented proof in respect of that and we were never in a position to really follow those sorts of things up because the information was to a certain extent amorphous. But people made those comments and they made them to the field officer and they made them to the commissioner.¹⁰⁴

¹⁰³ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 344.

¹⁰⁴ Interview with NIFL21 (Face-to-face interview, 29 May 2003).

The *National Report* and the regional reports of Commissioners Dodson and Wootten referred to this concern. As mentioned above, the *National Report* contained a separate section on the way police treated Indigenous women, set within the context of their high arrest rate. The *National Report* stated that physical and sexual abuse, and harassment were not the only ways police mistreated Indigenous women, because they also engaged in racist and sexist practices. For example treating darker women more brusquely and discourteously and detaining Indigenous women for public order offences at higher rates than non-Indigenous women, particularly in Queensland, Western Australia, South Australia and the Northern Territory. Recommendations 60 and 61 were made in response to these problems. Recommendation 60 is considered further below; it related to the need for less discriminatory policing practices. Recommendation 61 related to the need for a review of the use of para-military forces.¹⁰⁵ This recommendation did not specifically relate to the treatment of Indigenous women.

In a later section, the *National Report* referred to the Tasmanian AIU submission which noted that Indigenous women were often insulted in a derogatory and threatening manner. However, '[b]ecause of the time constraints the Royal Commission faced, no discussion was held in Tasmania to fully investigate the responses to the issue of Aboriginal police relations from the Tasmanian Aboriginal community nor from the Tasmanian police'.¹⁰⁶ In fact no other reference was made in the *National Report* to the problem of sexual and physical abuse of Indigenous women by police.

Commissioner Wootten's regional report placed the mistreatment of Indigenous women by police within the context of colonisation.¹⁰⁷ This discussion appeared in its own section. Reference was made to the Tasmanian AIU submission on the topic; it had a similar wording and focus to the discussion in the *National Report*. Indeed, recommendation 60 of the *National Report* mirrored the sentiments contained in Wootten's regional report.

¹⁰⁵ *National Report*, above n 20, vol 2, 223.

¹⁰⁶ *Ibid* vol 2, 242.

¹⁰⁷ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 280-281.

Commissioner Dodson's report focused upon complaints made about police harassment and sexual abuse of Indigenous women by police in certain towns in the Kimberley region. Like Wootten's report, it tied the discussion to the historical racist practices of police officers against Indigenous people. It appears that allegations of harassment were raised in an underlying issues hearing at Mary River and that the police superintendent promised to investigate the matter further if any evidence of such behaviour was presented. No evidence was submitted, however, and the matter was not pursued any further.¹⁰⁸ As mentioned above, Dodson's report also associated Indigenous women not calling the police in situations of family violence with their abusive treatment by police.

2 *Offending Patterns of Indigenous Women*

The two reports that gave prominence to this topic as a separate matter were the *National Report* and Commissioner O'Dea's regional report. Commissioner O'Dea's report broke down the custody rates of Indigenous people according to their gender.¹⁰⁹ As the discussion in the first part of this chapter revealed, and as O'Dea's regional report reiterated, findings from the National Police Custody Survey found that Indigenous women's national police custody rates were 'higher than expected ... for the offences of drunkenness and other good order offences ... More than seventy-five percent of the female drunkenness cases (78%) were Aboriginal'.¹¹⁰ Prison custody rates for Indigenous women in Western Australia revealed that Indigenous women were more frequently incarcerated than Indigenous men for offences against justice, other property offences,¹¹¹ fraud, drunkenness and Licensing Act offences, and disorderly conduct.¹¹² In making a national comparison of police custody rates, O'Dea's regional report noted as follows:

¹⁰⁸ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 250.

¹⁰⁹ *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 45, vol 1, 161. The word 'gender' was used in the title of the section which discusses the different offending patterns for males and females.

¹¹⁰ *Ibid.*

¹¹¹ Offences against justice included perjury, escaping legal custody and hindering police; other property offences included arson and damage to property: *Ibid* vol 1, 162.

¹¹² For a more detailed discussion of the different proportions of offences from which Indigenous males and females were detained in prison see Table 4.9 in O'Dea's regional report: *Ibid* vol 1, 163.

In Western Australia 25% of Aboriginal police custodies were female. The situation was the same in Queensland but contrasts markedly with New South Wales where only 9% of Aboriginal custodies were female. Nationally 21% of Aboriginal custodies were female.

Of non-Aboriginal custodies in Western Australia 12% of the custodies were females and 88% were males.

In Western Australia 72% of the female custodies in Western Australia were Aboriginal. The corresponding national proportion is 49% and other jurisdictions are as follows:

NT – 88%, Queensland – 57%, SA – 32%, NSW – 17%, ACT – 16%, VIC – 7%, Tasmania – 6%.¹¹³

A similar discussion was set out in the *National Report*.¹¹⁴ Despite these numbers, there was no further discussion of the over-representation of Indigenous women in custody.

3 *Custodial Care of Indigenous Women in Custody*

Many of the death reports noted that when the females were initially arrested there was inadequate assessment of their health, and that they had received inadequate care and supervision during their detention. The discussion of these types of problems, however, were not gender-specific but were instead considered in a general manner. This was also the case where the *Interim, National* and regional reports considered the arrest and custodial care of Indigenous people as an underlying issue.

A number of studies have proposed that Indigenous female detainees have different needs to those of their male counterparts.¹¹⁵ The recommendations

¹¹³ Ibid vol 1, 178. O’Dea’s regional report also briefly discussed the ‘gender differences’ of national prison custody rates and noted that there are many more Indigenous males in prison than females (2098 compared to 438): at vol 1, 189.

¹¹⁴ See *National Report*, above n 20, vol 1, ch 7.

made by these studies to address the particular needs of Indigenous female offenders include access to an Indigenous women's legal service, more female sobering-up centres, the need for Indigenous female police officers or aides to assist with the care and assessment of any female who is detained, more minimum security facilities to house less serious female offenders, and the ability of female offenders to continue to care for young children while in custody. None of the 11 female death reports or the other official reports of the RCIADIC addressed these matters in a gender-specific context.

The *National Report* identified just two problems with the custodial care of Indigenous females, which could be said to be gender-specific. The first, informed by Commissioner O'Dea's regional report, related to the lack of female police staff available to conduct searches of Indigenous female detainees.¹¹⁶ Instead of discussing this problem from the perspective of the female offender, the *National Report* focused on the financial benefits that accrued to police officers in remote areas when hiring their wives to search and care for female detainees. The second problem, raised in the *National Report* was the lack of appropriate training opportunities available in prisons for Indigenous female offenders. This was raised in relation to the Brisbane Women's Correctional Centre, where a survey conducted by the Incarcerated Peoples Cultural Heritage Aboriginal Corporation (IPCHAC) found that 'enrolling in meaningful courses, which could help ... [female prisoners] once they left prison, was actively discouraged'.¹¹⁷ A similar problem was identified for male prisoners; hence the gender-neutral wording of recommendations 184 and 185.¹¹⁸

One last matter to note in relation to the custodial care of Indigenous females is that Indigenous female deaths in custody made up a higher proportion of all female deaths than did Indigenous males when compared to all male deaths in

¹¹⁵ See for example: Marie Brooks, 'The Incarceration of Aboriginal Women' in Greta Bird, Gary Martin and Jennifer Nielsen (eds) *Majah: Indigenous Peoples and the Law* (1996) 266; Margaret Cameron, 'Women Prisoners and Correctional Programs' (2001) (194) *Australian Institute of Criminology - Trends & Issues in Crime and Criminal Justice* 1; Howe, above n 3; Kerley and Cunneen, above n 7; Marina Paxman, 'Women and Children First' (1993) 18(4) *Alternative Law Journal* 153.

¹¹⁶ *National Report*, above n 20, vol 3, 33-34.

¹¹⁷ *Ibid* vol 3, 343.

¹¹⁸ *Ibid* vol 3, 353-354.

custody (in fact the proportion of Indigenous male deaths in custody were lower than the non-Indigenous males).¹¹⁹ One can only assume, however, that the larger actual numbers of Indigenous male deaths in custody overshadowed the larger proportional statistic for Indigenous female deaths.¹²⁰

4 Visiting Family Members in Prison

The *Interim*, *National* and regional reports of New South Wales and Western Australia considered the importance of family visits to prison.¹²¹ Indeed, the *Interim Report* recommended that '[v]isits by family members or friends should not be unreasonably restricted'.¹²²

Although a non-Indigenous female lawyer from Western Australia recalled the provision of adequate facilities for visitors and visitors' ability to pay for travel to visit family members were concerns expressed by Indigenous women, only Commissioner Wootten's report expressly made reference to the fact that Indigenous women had raised such concerns.¹²³

The remaining reports, including Commissioner Wootten's regional report, noted the importance of family visits and establishing police cell visitor schemes for

¹¹⁹ Ibid vol 1, 188, vol 3, ch 23. The deaths in custody for the period 1980-88 were 7% for Indigenous females as compared to 4% for non-Indigenous females and 93% for Indigenous males as compared to 96% for non-Indigenous males: David Biles, David McDonald and Jillian Fleming, 'Research Paper No. 7 - Australian Deaths in Custody, 1980-88: An Analysis of Aboriginal and Non-Aboriginal Deaths in Prison and Police Custody' in David Biles and David McDonald (eds) *Deaths in Custody Australia, 1980-1989: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (1992) 213, 114.

¹²⁰ This is in contrast with the Manitoba Aboriginal Justice Inquiry (AJI) report which focused on the *rate* of Aboriginal women in prison, which was higher than the prison custodial rate of Aboriginal men. This might explain why the AJI report contained specific recommendations that culturally appropriate alternatives to incarceration for Aboriginal female offenders, and halfway houses that are managed by Aboriginal women for Aboriginal females who are released from prison, be made available. The AJI also recommended that incarcerated Aboriginal female offenders should be able to serve their sentences as close as possible to their children and families: Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, Vol 1-2* (1991) vol 1, 475, 501, 506, 504, 505.

¹²¹ See for example: *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 119-122, 355; *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 45, vol 2, 589-591, 718-720; *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 302-308; *Interim Report*, above n 100, 40; *National Report*, above n 20, vol 3, 237-238, 308-312.

¹²² See recommendation 21: *Interim Report*, above n 100, 40.

¹²³ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 355.

police lockups, from the perspective of a prisoner. For example, the *National Report* noted that

the provision of adequate access for Aboriginal prisoners to their family, their friends and associates from their home community is of paramount importance to the amelioration of the prison experience and the probable reduction of deaths in prison custody. That observation raises associated issues including the location of prisons and the transfer of inmates as well as prisoner access to visits and the provision of adequate affordable forms of transport for visitors.¹²⁴

The non-Indigenous female lawyer recalled that Indigenous women would say things such as: ‘to visit our families, our sons or uncles or husbands, takes money out of our budget for feeding kids’.¹²⁵ There was, however, little reference to this problem in the *Interim, National* and regional reports of the RCIADIC.

5 *Informing Families of Death in Custody and Post-Death Investigation*

Three of the non-Indigenous people I interviewed mentioned that Indigenous women were particularly concerned with ‘what took place immediately after the deaths and the lack of proper respect and protocol in informing ...’ the families.¹²⁶ Although none of the official reports viewed this as a particular problem for women, the fact that most deaths in custody were of males meant that most of the surviving partners were female. Therefore the majority of the affected next-of-kin and close family members referred to in the reports were female. This does not deny the fact that there would also have been a number of male relatives who would have been concerned with these matters. Indeed, one lawyer noted that:

I know we took a particular interest in whether the family was notified, whether it was the mother or the father. But there was no emphasis on notifying either mother or father. It was essential that the family be notified.¹²⁷

¹²⁴ *National Report*, above n 20, vol 3, 309.

¹²⁵ Interview with NIFL21 (Face-to-face interview, 29 May 2003).

¹²⁶ Interview with NIML20 (Telephone interview, 17 September 2003).

¹²⁷ Interview with NIML2 (Face-to-face interview, 11 March 2004).

All of the reports, except for Commissioner Dodson's regional report, referred to the need for better practices in informing families of a death and of any post-death investigation.¹²⁸ This topic was referred to in recommendations 19 and 21 to 25. The main concerns highlighted were the need for sensitivity when informing families of a death, to keep the families informed about and involved in the progress of any post-death investigation, to allow families to view the body soon after the death, to return clothes or body parts to the family for customary burial practices, and for counselling services for families. The reports recommended that these concerns be addressed to alleviate suspicion by families of the deceased regarding the circumstances of the death.

6 *Birthing Facilities, Housing and Employment Opportunities*

The *National Report* briefly referred to birthing facilities, housing and employment opportunities, as they related to Indigenous women. Four of the non-Indigenous people I interviewed, one of whom had been based in Queensland and three of whom had been based in Western Australia, recalled that housing had been one of the main concerns of Indigenous women in their State.¹²⁹ Commissioner Dodson's regional report contained a chapter relating to housing. Although the topic was considered in a gender-neutral manner,¹³⁰ the matters raised in that chapter are referred to in this section because of the comments made by the three people from Western Australia.

The *National Report* noted in Chapter 31, titled 'Towards Better Health', that the Queensland AIU had emphasised in its report the fact that women living in Doomadgee were 'most reluctant to comply with the requirement that they leave their community to give birth in alien, distant hospitals, and ... [were] calling for the establishment of a birthing centre in the community'.¹³¹ This problem was

¹²⁸ See for example: *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 147-170; *Regional Report of Inquiry in Queensland*, above n 15, 78-81; *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, above n 45, vol 2, 964-969; *Interim Report*, above n 100, 58-62; *National Report*, above n 20, vol 1, 157-180.

¹²⁹ Commissioner Wyvill's regional report did not contain any detailed sections on the topic of housing.

¹³⁰ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 2, ch 13.

¹³¹ *National Report*, above n 20, vol 4, 240.

considered within the context of Indigenous people being unwilling to comply with medical advice. It was the only example offered in this particular section to illustrate the way in which Indigenous people tended to discharge themselves early from hospitals and to ignore advice received regarding a medical condition. The section ended with this piece of advice:

A high level of ‘lack of compliance’ by Aboriginal people should be a warning sign to health care service delivery personnel and administrators that problems may exist in their own styles of operating.¹³²

For housing, the *National Report* highlighted the lack of rental houses available to Indigenous women and families. It drew from the 1986 *Women’s Business: Report of the Aboriginal Women’s Task Force* and from the Victorian AIU report.¹³³ The problem was noted as being common across the country. Many women had been subjected to racism and discrimination. The only alternative for many women and families was to find accommodation in caravan parks or hostels. Similarly, Commissioner Dodson’s regional report focused on the lack of adequate available housing. His report noted that a consequence of such a deficiency was homelessness.¹³⁴ The report also highlighted the unsuitability of housing designs for Indigenous people.¹³⁵

The *National Report* referred to the lack of employment and income earning opportunities that were available for Indigenous women in a number of places.¹³⁶ This lack of opportunities resulted in single parent families, with Indigenous women being concentrated in the lower income categories. The reasons given for why Indigenous women were less likely to be employed included the lack of child-minding and transport facilities, their role as the primary carer of families, racial discrimination, and a lack of appropriate jobs under the CDEP scheme. (This last reason was the subject of recommendation 319.) The *National Report*

¹³² Ibid.

¹³³ Ibid vol 4, 465-466.

¹³⁴ *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 2, 610.

¹³⁵ Ibid vol 2, 603.

¹³⁶ *National Report*, above n 20, vol 2, 347-348, 391, 394-395, 411, vol 4, 435-436.

briefly referred to the intersectional disadvantage suffered by Indigenous women in employment and income earning opportunities:

It would appear that Aboriginal women are subject to the structural disadvantage that affect Aboriginal people as well as to the structural disadvantages that affect women generally. Recent improvements in employment status have been limited to increasing participation and some increase in income, but low occupational status relative to men, continues to characterize the employment status of Aboriginal women in Australia.¹³⁷

This was the sole area where the *National Report* used an intersectional approach.

E *The Focus of the Recommendations*

The RCIADIC's recommendations have been central to the formulation of Indigenous policy by government. According to the *Keeping Aboriginal and Torres Strait Islander People Out of Custody* report, for example, '[t]he recommendations of the Royal Commission into Aboriginal Deaths in Custody ... still provide a blue print for reforming key aspects of criminal justice administration'.¹³⁸ To what extent did the recommendations take a gendered approach?

Five of the RCIADIC's 339 recommendations specifically referred to Indigenous women. Other recommendations also addressed their concerns, albeit in a non-gendered way.

Recommendation 60 focused on relations with police. It said:

That Police Services take all possible steps to eliminate:

¹³⁷ Ibid vol 2, 395.

¹³⁸ Chris Cunneen and David McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission in Aboriginal Deaths in Custody* (1997) 7.

- a. Violent or rough treatment or verbal abuse of Aboriginal persons *including women and young people* (emphasis added), by police officers; and
- b. The use of racist or offensive language, or the use of racist or derogatory comments in log books and other documents, by police officers.¹³⁹

Recommendation 88 related to diversion from police custody and stated:

That Police Services in their ongoing review of the allocation of resources should closely examine, in collaboration with Aboriginal organisations, whether there is a sufficient emphasis on community policing. In the course of that process of review, they should, in negotiation with appropriate Aboriginal organisations and people, consider whether:

- a. There is over-policing or inappropriate policing of Aboriginal people in any city or regional centre or country town;
- b. The policing provided to more remote communities is adequate and appropriate to meet the needs of those communities *and, in particular, to meet the needs of women in those communities* (emphasis added); and
- c. There is sufficient emphasis on crime prevention and liaison work and training directed to such work.¹⁴⁰

Recommendation 229 appeared in Chapter 29 of the *National Report*, titled 'Improving the Criminal Justice System: Aboriginal People and Police', and related to the recruitment of Indigenous people into the police service.¹⁴¹ It stated:

That all Police Services pursue an active policy of recruiting Aboriginal people into their services, *in particular recruiting Aboriginal women* (emphasis added). Where possible Aboriginal recruits should be inducted in groups.¹⁴²

¹³⁹ *National Report*, above n 20, vol 2, 223.

¹⁴⁰ *Ibid* vol 3, 43.

¹⁴¹ This chapter of the report begins at: *Ibid* vol 4, 79.

¹⁴² *Ibid* vol 4, 152.

Recommendation 319 considered increasing economic opportunity and the review of the CDEP scheme. In the section relating to equity considerations, the recommendation in paragraph (e) stated:

That in the coming review of the CDEP Scheme consideration be given to: ...

- (e) Addressing issues of access to income, and meaningful work activities *for women participants* (emphasis added) in CDEP.¹⁴³

Recommendation 323 related to housing and infrastructure, and appeared subsequent to a discussion about alternative housing options. It stated:

That:

- a. Increased funding be made available to Aboriginal community groups for the implementation of homemaker schemes. Groups that may be appropriate to receive such funding should include *women's groups* (emphasis added), housing organizations and community councils; and
- b. Adult education providers, and particularly Aboriginal community controlled adult education providers, be encouraged and supported to provide:
 - i. courses in homemaking and domestic budgeting; and
 - ii. courses for training Aboriginal persons as community advisers and teachers in homemaking.

Although women were referred to in these five recommendations, there was no express reference in the recommendations to the particular problems faced by Indigenous women in relation to family violence, policing, housing or employment. For example, not only were Indigenous women afraid of reporting violent attacks to police for fear of being ridiculed and not taken seriously, but they were also afraid of the consequences for Indigenous men of reporting such abuse; however, this was not expressly mentioned. Claims were also made in the official reports and in other literature that police had raped, abused and sexually threatened Indigenous women. Although recommendation 60 (which was phrased in general terms) advocated change in the manner in which police interacted with Indigenous people, and recommendation 88 addressed the need for police

¹⁴³ Ibid vol 4, 441.

consultation with Indigenous women to determine resource requirements, neither recommendation specifically identified the concerns of Indigenous women, nor did such recommendations go far enough in dealing with the problems of abuse by police officers. Although there was reference in the *National Report* to the lack of participation by Indigenous women in the training of police officers,¹⁴⁴ the recommendation that followed and that focused on police training courses (recommendation 228) failed to consider the need for Indigenous women to participate in the design and implementation of such programs.

There were numerous recommendations addressing the safety of offenders in custody.¹⁴⁵ In this respect, the concerns of Indigenous women may have been sufficiently addressed, even if the recommendations did not contain any explicit reference to their fears for the safety of their family members.

The most glaring omission of the RCIADIC was that there were no recommendations that addressed family violence. Indeed there were no recommendations relating to the ability of wives, daughters, mothers and grandmothers of violent offenders to access funds or resources to adequately deal with problems of safety. The only recommendations that may have had some relevance were those addressing alcohol and drug abuse. Excessive alcohol consumption was identified as one of the main contributors to the level of violence towards women in both Indigenous and non-Indigenous communities.¹⁴⁶ The *National Report* strongly recommended (recommendations 79 to 121) that drunkenness be decriminalised and that procedures be implemented that would allow a greater number of Indigenous people to be diverted from police custody.¹⁴⁷ No recommendation called attention to Indigenous women as victims of family violence by drunken men. The recommendations focused instead on the

¹⁴⁴ Ibid vol 4, 149.

¹⁴⁵ See for example recommendations 122 to 187 which dealt with custodial health and safety and the prison experience. Also recommendations 79 to 91 which recommended diverting offenders from police custody and recommendations 92 to 121 which recommended using imprisonment as a last resort are also relevant for addressing this concern.

¹⁴⁶ See for example *National Report*, above n 20, vol 2, 102 and also Payne, 'Aboriginal Women and the Law', above n 6, 35.

¹⁴⁷ The recommendations were reproduced in volume 5 of the *National Report*. Therefore this group of recommendations can easily be found at: *National Report*, above n 20, vol 5, 87-95.

decriminalisation of drunkenness and the establishment of detoxification units or sobering-up centres as an alternative to police custody.¹⁴⁸

Sharon Payne acknowledges that the lack of detoxification and sobering-up centres result in the police taking excessively drunk men home rather than to a watch house. She states ‘it is often the wives, mothers and grandmothers who are left to deal with the consequent violence and mental and physical problems’.¹⁴⁹ However none of the RCIADIC recommendations viewed diversion to a detoxification centre as a safety strategy for women. Rather, diversion was seen as a way to decrease the number of Indigenous people in custody.¹⁵⁰ As Judy Atkinson observed at the time, ‘the decriminalisation of public drunkenness will place Aboriginal women under threat of further violence unless the necessary resources are also provided to deal with men who are drunk, and safe places for women and children are provided.’¹⁵¹

Recommendation 111 highlighted the need for non-custodial sentencing options to be formulated with community consultation.¹⁵² Both Indigenous males and females would have supported this recommendation to reduce the over-representation of Indigenous people in custody. There was no recognition, however, of the impact of such sentencing for the safety of women and children. Race politics in this situation, overshadowed gender concerns by compromising the safety of Indigenous women in the pursuit of reduced imprisonment rates for Indigenous people as a whole. The mechanisms by which race politics influenced the findings of the RCIADIC is considered in more detail in Chapter 7.

Although recommendations 63 to 71 (‘The Harmful Use of Alcohol and Other Drugs’) and recommendations 272 to 288 (Coping with Alcohol and Other Drugs: Strategies for Change’) specifically related to alcohol abuse, no recommendation

¹⁴⁸ In contrast, the Manitoba AJI recommended the provision of safe houses and shelters for Aboriginal women and counselling programs for the prevention of family violence: Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, above n 120, vol 1, 488, 450.

¹⁴⁹ Payne, ‘Aboriginal Women and the Law’, above n 6, 35.

¹⁵⁰ *National Report*, above n 20, vol 3, 6.

¹⁵¹ Atkinson, ‘Violence against Aboriginal Women’, above n 39, 7.

¹⁵² *National Report*, above n 20, vol 3, 96.

expressly addressed the high incidence of family violence within Indigenous communities.¹⁵³ This was the case even though over half of the men who had died in custody had committed some form of physical or sexual abuse throughout their lives. In making recommendations relating to the harmful use of alcohol, the *National Report* focused largely on the regulation of liquor sales and canteen operators.

There was no express stipulation made in any of the recommendations relating to the consultation with or establishment of, community councils or community based decision-making bodies that affirmative action policies requiring the equal representation of Indigenous men and women be implemented. This was one of the recommendations, however, stipulated in the Queensland *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*.¹⁵⁴ Such a simple suggestion was beyond the realm of an organisation such as the RCIADIC which relied on liberal principles of equality.

Other recommendations that were relevant to Indigenous women included recognising the importance of family members visiting relatives in prison and being assisted financially to do so (recommendations 168 to 171),¹⁵⁵ proper post-death investigations (recommendations 6 to 40),¹⁵⁶ sensitivity in notifying family members of a death in custody (recommendation 19),¹⁵⁷ and keeping family members informed of the progress of an investigation into a death that had occurred in custody (recommendations 21 to 25).¹⁵⁸ These recommendations were stated in gender-neutral terms.

III A COMPARATIVE ANALYSIS OF INDIGENOUS TEXTS AND OFFICIAL REPORTS

¹⁵³ There were only scant references to the need for an examination of the 'social and health problems' associated with alcohol use (see for example recommendation 63) and 'the consequences of such use' (see for example recommendation 65): *Ibid* vol 2, 330, 331.

¹⁵⁴ Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, above n 68, 281.

¹⁵⁵ This group of recommendations can be easily found at: *National Report*, above n 20, vol 5, 107.

¹⁵⁶ *Ibid* vol 1, 170-180.

¹⁵⁷ *Ibid* vol 1, 174.

¹⁵⁸ *Ibid* vol 1, 174-175.

Despite the criticisms made by Indigenous and non-Indigenous scholars that the RCIADIC failed to adequately address problems of family violence in Indigenous communities and other matters relating to the experiences of Indigenous women when dealing with the criminal justice system, my analysis here and in Chapter 5 shows that the RCIADIC did not completely ignore the situation of Indigenous women. The material contained in the *Interim*, *National*, regional and death reports reflected, albeit to a limited extent, problems that had been raised in the Indigenous texts.

In particular, the existence of family violence and the inappropriate treatment of Indigenous women by police were briefly mentioned in the official reports. Additionally, some reference was made to the lack of access to appropriate legal services for victims of violence and the lack of appropriate health and training services for Indigenous female offenders whilst in custody. This latter topic contrasts with the way in which custodial care was referred to in the Indigenous texts where it was only mentioned within the context of the physical and sexual assault of female offenders by police and the denial of human rights whilst in custody. The official reports contained more information than the Indigenous texts about the need to immediately and appropriately inform families of a death in custody and post-death investigation, and of the need for family members to be able to easily visit an offender in custody. This information was not, however, framed in a gender-specific way. Housing was highlighted as a problem which concerned Indigenous women in the official reports, but here the problem was framed in a gender-specific way to a greater extent than in the Indigenous texts.

The official reports alluded to the fact that there were not enough Indigenous women employed as police officers by including a reference to Indigenous women in recommendation 229. This topic was, however, not explored in any great depth in the body of the official reports and it was not given as much consideration as in the Indigenous texts. Although the reluctance of Indigenous women to access birthing facilities in Queensland was mentioned in the *National Report*, it did not reflect the sentiments contained in the Queensland Aboriginal Issues Unit (AIU) report. The reasons highlighted in the Queensland AIU report as to why Indigenous women were reluctant to give birth in hospitals located

outside their communities were based on feelings of fear and vulnerability, which were not referred to in the *National Report*. This reflects the poor translation of the Indigenous texts by those drafting the official reports.

In summary, aside from the topics of housing, offending patterns of Indigenous women, visiting family members in prison, and informing families of a death in custody and of post-death investigations, other problems which concerned Indigenous women were not reported in the official reports to the same extent as in the Indigenous texts. This was particularly apparent in relation to the topics of family violence, police treatment of Indigenous women, the importance of employing Indigenous women in various service roles, and birthing facilities. The official reports lacked a gender-specific analysis of the problems that had the most harmful impact on Indigenous women: family violence and police treatment of Indigenous women. The extent of these problems and their effect on the lives of Indigenous women were far less explored in the official reports than the Indigenous texts. Reference to the fact that the victims of family violence were often women and children was made in the *National Report*, but there was little consideration of how recommendations concerning the treatment of alcohol abuse affected those victims. Nor was there any recommendation to specifically address the problem of family violence, although both the Indigenous texts and the official reports emphasised the importance of family members being included in any alcohol rehabilitation program.

Similarly, although recommendations 60 and 88 included references to the need for the elimination of violence and verbal abuse of Indigenous women by police and for policing services that better met the needs of Indigenous women, the recommendations did not explore the magnitude of those problems. There was no indication of how such criminal behaviour on the part of police should be disciplined or of the particular needs of Indigenous women in relation to policing services. The fact that a ruling was made by Commissioner Johnston to suppress the publication of claims made by the Northern Territory AIU that Indigenous females had complained of being sexually abused by police, and that the RCIADIC failed to investigate similar allegations against Tasmanian police due to

‘time constraints’, further supports the view that concerns relating to Indigenous women were to a large extent disregarded.¹⁵⁹

Most of the people I interviewed maintained that there was no gender-specific analysis of any topic because the focus was on race. However, 21 people who were interviewed, three of the regional reports¹⁶⁰ and the *National Report* noted that the disadvantage and marginalisation of young Indigenous males was the primary concern. It was noted in the *National Report*, for example, that

Aboriginal juveniles, particularly males, require very particular consideration in this Report. Of the 99 deaths investigated and reported upon by Commissioners 13 died under the age of 20; 14 died between the ages of 20 and 24; 23 between the ages of 25 and 29. The mean age for all deaths was 32 years, the median age ... was 29 years. Of those who died under the age of 30 (50 cases) only 5 were females. Whilst the increasing involvement of Aboriginal females in the juvenile and adult justice system and the deaths of some of them is a matter of great concern, overwhelmingly the typical portrait of the Aboriginal deaths in custody was that of young males.¹⁶¹

Similarly, Commissioner Dodson made the following statements in his underlying issues report:

A serious focus for this Commission has been the experience, in its broadest sense, of young Aboriginal men today.¹⁶²

Not only have the majority of deaths in custody been men in their early thirties, but a number of people have pointed out how the phenomenon of deaths in custody appears to have been paralleled with deaths of Aboriginal men outside of custody. Hence it has been important to focus on the experience of young Aboriginal men today and the underlying issues which affect their lives and experiences.¹⁶³

¹⁵⁹ Ibid vol 2, 242.

¹⁶⁰ Commissioner Dodson’s underlying issues report, the Queensland regional report and the New South Wales regional report all contained references to the fact that men, particularly young men, were the most marginalised and disadvantaged and to the fact that their situation was a particular focus of the RCIADIC.

¹⁶¹ *National Report*, above n 20, vol 2, 251-252.

¹⁶² *Regional Report of Inquiry into Underlying Issues in Western Australia*, above n 1, vol 1, 45.

¹⁶³ Ibid vol 1.

Commissioner Wyvill noted in his Queensland regional report that he had observed

the prevalence and severity of the problem of juvenile justice particularly on the communities. ... [S]ocial conditions have greatly marginalised young people, particularly, it would seem, young men, and rendered their status and role problematic.¹⁶⁴

Commissioner Wootten referred to the difficulties facing Indigenous male youth in his regional report, with this specific paragraph in a chapter dedicated to 'Juveniles':

In all States the number of Aboriginal juveniles held in custody is alarming and holds very disturbing implications for the future. I have already referred to the fact that Aboriginal juveniles are 25 times more likely to be in detention than non-Aboriginals in New South Wales, and 20 times in Victoria. A major national effort is necessary to attack this problem. It is a national crisis by any standard, as the continuation of the present situation means compounding human suffering, social disturbance and economic cost. ... It is clear that, if the involvement of Aboriginal boys and men with police can be reduced then the rate of incarceration of Aboriginals can be generally reduced.¹⁶⁵

The problems facing Indigenous people were therefore assumed to be about men and boys alone.¹⁶⁶ Although the observations in the official reports were based on empirical research which found that young Indigenous males did suffer many disadvantages and were greatly marginalised, other alarming statistics for females were identified in the Indigenous texts and official reports. For example, the Northern Territory AIU found that there were more deaths of Indigenous females by 'alcohol-related murders' than there were Indigenous deaths in custody during

¹⁶⁴ *Regional Report of Inquiry in Queensland*, above n 15, 49.

¹⁶⁵ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 346.

¹⁶⁶ This is in stark contrast to the Manitoba AJI report which acknowledged that the situation of Aboriginal women and children had to be prioritised when making changes to the justice system: Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, above n 120, vol 1, 475.

the relevant period.¹⁶⁷ Similarly, in New South Wales ‘43% of homicides were within the family’ between 1968 and 1981 and ‘almost half (47%) of female victims of homicide were killed by their spouse compared with 10% of male victims’.¹⁶⁸ In Queensland, data collected from ex-reserve communities during 1987 to 1989 indicated that the death rate of Indigenous females was ‘more than 4 times that of all Australian females’ as compared to Indigenous males, whose death rate was three times that of all Australian males.¹⁶⁹ Despite such alarming statistics the problems concerning Indigenous women did not capture the interest of the RCIADIC.

CONCLUSION

This chapter describes the extent to which the official reports of the RCIADIC explicitly and implicitly considered problems of direct relevance to Indigenous women. It also provides details of how the RCIADIC represented the effects of colonisation on Indigenous women and men. It is incorrect to say that the RCIADIC ignored Indigenous women, since their position in society was raised in the official reports in a number of areas. However, the reports themselves noted that their main focus was on young Indigenous males, which tended to marginalise the Indigenous female voices even when their concerns were being considered. The reasons why the RCIADIC decided to focus on collective rights, particularly those that concerned young Indigenous males, to the detriment of Indigenous women are considered in the next chapter.

On a personal note, it has not been easy to summarise how the RCIADIC considered or portrayed problems relating to Indigenous women. Researching and writing this chapter has made me more sympathetic to the task the RCIADIC was required to undertake. The information and material available for the RCIADIC to use was enormous, and deciding what material to use and how to interpret that material would not have been an easy or enviable task.

¹⁶⁷ *National Report*, above n 20, vol 5, 285.

¹⁶⁸ *Regional Report of Inquiry in New South Wales, Victoria and Tasmania*, above n 47, 339.

¹⁶⁹ *Regional Report of Inquiry in Queensland*, above n 15, 64.

CHAPTER 7: EXPLAINING THE FAILURE TO TAKE AN INTERSECTIONAL APPROACH

INTRODUCTION

This chapter identifies and analyses the principal ideological and procedural reasons for the RCIADIC's focus upon men and Indigenous youth and its marginalisation of Indigenous women. These reasons were given by the 48 people interviewed. In the final section of the chapter, I relate these reasons to my hypotheses set out in Chapter 1.

Although the reasons are clearly delineated, they are certainly not unrelated and there is considerable overlap between them. Where it is possible, the reasons that were particular to certain Aboriginal Issues Units (AIUs) and RCIADIC offices are identified, unless this would jeopardise the anonymity of the person interviewed. The information is also categorised according to whether the person interviewed was Indigenous or non-Indigenous and, if possible, according to the position they held.¹

I OVERVIEW OF RESULTS OF PROCEDURAL ANALYSIS

The seven principal reasons, ranked by frequency, for the RCIADIC's failure to take an intersectional race and gender approach, are as follows:

1. The Indigenous men and women who were consulted by the RCIADIC and the AIUs, for various reasons, focused on community rather than individual rights.
2. The large number of male deaths and consequently the problems faced by young Indigenous males overshadowed any problems faced by Indigenous women.

¹ The main reason why a person's position is not mentioned is to protect their anonymity. In most cases a person's role has been categorised according to whether or not they were legally trained (which, for the sake of convenience, I have labelled 'lawyers').

3. The terms of reference were interpreted in a narrow and conservative manner which did not allow a gendered focus.
4. The predominant reliance on legal procedures, which searched for findings of fact, made it difficult for other sociological inquiries to emerge.
5. The legal and sociological research methods used by the RCIADIC did not adequately provide for cultural differences, further colonising Indigenous people and prohibiting Indigenous female voices to emerge.
6. The people who were appointed to senior positions within the RCIADIC were predominantly non-Indigenous male lawyers who did not see beyond the politics of race.
7. There was insufficient time and a lack of resources for the RCIADIC to take a gendered approach.

I organised the seven reasons into two main categories: (a) reasons that relate to the struggle between race and gender politics; and (b) reasons that are procedural in nature. The first category reflects the conscious and unconscious race and gender biases of the Indigenous communities consulted and of the people who worked for the RCIADIC and the AIUs. The second category were dictated by the procedural practices adopted by, or procedural constraints imposed upon, the RCIADIC. Although the practices may have been influenced by the ideological biases identified in the first category of reasons, they also stand apart from those reasons because, as summarised in Chapter 2, they reflect the procedures adopted by most royal commissions regardless of the subject matter under investigation. Such procedures are to a large extent dictated by the prevailing liberal legal ideology typically permeating commissions of inquiry.

The frequency with which each reason was cited according to whether the person interviewed was Indigenous or non-Indigenous is set out in Table 7.1 and frequencies according to whether they were lawyers or non-lawyers is in Table 7.2. Most people offered more than one reason for the RCIADIC's failure to adopt an intersectional approach, which is why in Tables 7.1 and 7.2 the total numbers add to greater than 48. The number of reasons given by the people interviewed is shown in Table 7.3.

There were 20 Indigenous and 28 non-Indigenous people interviewed. Twenty-three people were lawyers; only three of the lawyers were Indigenous. The main question I wanted people to explain was why the RCIADIC did not focus on Indigenous women and why it did not, therefore, adopt an intersectional approach. Each person had the opportunity to give one or more reasons when answering this question. The set of seven reasons was created from the responses, not from a set of predetermined reasons, by reading and re-reading the interview transcripts to find the main reasons that emerged.

Table 7.1: Summary of Findings - Indigenous and non-Indigenous

	Number and (%) Indigenous (n=20)	Number and (%) non-Indigenous (n=28)	Total Number Per Reason	Percentage of total people interviewed (48)
Race and Gender Politics: Community (Race) Focus	11 (55%)	17 (61%)	28	58%
Race and Gender Politics: Male Deaths	10 (50%)	9 (32%)	19	40%
Procedural Reasons: Terms of Reference	4 (20%)	9 (32%)	13	27%
Procedural Reasons: Legal Inquiry	1 (5%)	10 (36%)	11	23%
Procedural Reasons: Deep Colonising Methodologies	4 (20%)	6 (21%)	10	21%
Procedural Reasons: Senior People Appointed	2 (10%)	6 (21%)	8	17%
Procedural Reasons: Time and Resource Constraints	3 (15%)	2 (7%)	5	10%
Totals	35	59	94	

Table 7.2: Summary of Findings - Lawyer and non-Lawyer

	Number and (%) non-Lawyers (n=25)	Number and (%) Lawyers (n=23)	Total Number Per Reason	Percentage of total people interviewed (48)
Race and Gender Politics: Community (Race) Focus	14 (56%)	14 (61%)	28	58%
Race and Gender Politics: Male Deaths	12 (48%)	7 (30%)	19	40%
Procedural Reasons: Terms of Reference	6 (24%)	7 (30%)	13	27%
Procedural Reasons: Legal Inquiry	3 (12%)	8 (35%)	11	23%
Procedural Reasons: Deep Colonising Methodologies	8 (32%)	2 (9%)	10	21%
Procedural Reasons: Senior People Appointed	4 (16%)	4 (17%)	8	17%
Procedural Reasons: Time and Resource Constraints	3 (12%)	2 (9%)	5	10%
Totals	50	44	94	

Table 7.3: Number of Reasons by Number of People

Number of People	Number of Reasons
17	1
18	2
11	3
2	4

The Indigenous and non-Indigenous people gave similar reasons for the oversight, but the non-Indigenous people more often gave reasons that related to procedure. In contrast, lawyers and non-lawyers were fairly evenly split between both race and gender politics, and procedural reasons. This indicates that the non-Indigenous non-lawyers focused on procedural reasons to a greater extent than the Indigenous non-lawyers. When comparing the responses given by the lawyers

and non-lawyers, Table 7.2 shows that when it comes to the procedural reasons, the lawyers focused on the fact that the inquiry was dominated by legal procedures more than the non-lawyers, whereas the non-lawyers identified the lack of cultural understanding (deep colonising methodology) and the way this silenced female voices more than the lawyers.

In reaction to the question of whether the RCIADIC considered gender in its investigations, only seven people explicitly mentioned that in hindsight they thought that more focus should have been placed on Indigenous women. Most said there was no explicit and conscious agreement to ignore Indigenous women. Instead, the oversight had occurred unconsciously. Of all the people interviewed, only two (non-Indigenous and lawyers) said that they did not think the RCIADIC should have adopted an intersectional approach.

II RACE AND GENDER POLITICS

A *Community (Race) Focus*

The most frequently cited reason for the RCIADIC's failure to adopt an intersectional approach was the fact that the Indigenous people (including Indigenous women) who had participated in the community consultations during the RCIADIC process preferred to focus on problems that concerned communities generally rather than women in particular. These problems had emerged from a history of colonisation and racism which had led to the dispossession of Indigenous people. This reflects what Indigenous scholars such as Aileen Moreton Robinson have noted: 'Indigenous women give priority to the collective rights of Indigenous people rather than the individual rights of citizenship'.² Over half of the Indigenous people interviewed and 61% of the non-Indigenous interviewees said that the focus of the consultations conducted during the RCIADIC was on problems facing Indigenous people as a racialised and dispossessed group and not on problems arising within their own communities and which were caused by their own people. As a result, the view held by most of

² Aileen Moreton-Robinson, *Talkin' up to the White Woman: Indigenous Women and Feminism* (2000) 160.

the people was that the RCIADIC was an investigation into race and collective rights, and that it did not focus exclusively on men or women. To illustrate, one person made the following remarks:

The *National Report* has been accused of being silent concerning Aboriginal women; by the same tests it could be accused of being silent in relation to Aboriginal men.³

And the other thing is that ... [they say] it doesn't make recommendations about women. It makes 339 recommendations about women. They're not recommendations about men. They're recommendations about prisoners and Aboriginals and shared problems.⁴

This view was expressed despite acknowledgement by some people that Indigenous men and women had different problems. However, '[i]t was just not a politically sound, not a politically motivating idea to pursue women's issues [such as family violence] in the Royal Commission ...' because more political leverage could be gained from focusing on who was to blame for the deaths and the overwhelming disadvantage experienced by Indigenous people around the country.⁵

When asked whether Indigenous people had raised problems relating to Indigenous women, most people were quick to emphasise that Indigenous women were present during the consultations:

I didn't feel that women were not there because they were so prominent by being there physically... and all over Australia, not just where I was.⁶

In fact, it was Indigenous women who encouraged the community to attend the consultations with the RCIADIC and who explained its investigative procedures. One Indigenous person recalled that he found it difficult to watch the women

³ Email from NIML14, 29 April 2003.

⁴ Interview with NIML14 (Face-to-face interview, 29 April 2003).

⁵ Interview with IFNL3 (Face-to face interview, 30 June 2003).

⁶ Interview with NIFNL18 (Face-to-face interview, 26 August 2004).

explain the process to other community members, knowing that they did not have much faith in the process themselves:

I know from what I can recall ... the hardest part for me was actually being there and seeing these situations and seeing the women [explaining the process but also needing the resolution] because it was obviously a very very hard process.⁷

Although women attended the meetings, they focused predominantly on community problems rather than problems which could be categorised as gendered. As one of the commissioners noted:

Aboriginal women were often the primary participants in community meetings, but the concerns they expressed rarely related specifically to women.⁸

There were three⁹ 'powerful' Indigenous women who were working for the RCIADIC. Two people recalled that these women had raised problems such as family violence, but their voices were overshadowed by the predominantly non-Indigenous male legal voices:

So for Ruby, as a woman and head of the Aboriginal Issues Unit, she was a strong women's issues advocate but I've got no recollection of women's issues ... women's deaths in custody wasn't in the forefront, and that's no reflection of her and her ability and the unit's ability. That reflects where people's mindset was at the time.¹⁰

Chilla Bulbeck, a non-Indigenous sociologist, argues that a presumption existed during the RCIADIC investigations that the focus was to be on Indigenous people as a whole and the conflict between white and black, instead of scrutinising internal Indigenous relationships.¹¹ This view was confirmed by most of the

⁷ Interview with IMNL25 (Face-to-face interview, 24 October 2003).

⁸ Email from NIML14, 29 April 2003.

⁹ Marcia Langton, Ruby Hammond and Sandra Bailey were appointed as heads of Aboriginal Issues Units (AIUs). Marcia Langton and Ruby Hammond worked closely with Elliott Johnston and they therefore had the most opportunity to influence the direction of the research.

¹⁰ Interview with IFNL40 (Face-to-face interview, 15 April 2003).

¹¹ Chilla Bulbeck, 'The Dark Figures: How Aboriginal Women Disappeared from the Findings of the Royal Commission into Aboriginal Deaths in Custody' (undated).

people interviewed. They recalled that most of the Indigenous people who participated in the community consultations were concerned with matters of importance to both Indigenous men and women. These included racism in the police force, treating people with appropriate cultural respect during coronial inquests, more information be provided to families about an investigation into a death, housing, employment, education, the removal of children, access to welfare, youth and police, substance abuse, and self-determination. These were recurring themes which emerged in all Indigenous communities around Australia and 'it didn't matter if it was a male or female; it was the same - it didn't go deeper than this'.¹² Therefore, although present at the consultations, the women were not emphasising 'women's interests'. Instead, they were concerned about matters that affected their families and communities as a whole. Both Indigenous and non-Indigenous people who were interviewed noted that the people who were primarily devastated by children or men being placed in detention or in custody were the mothers, sisters, aunties or grandmothers of those people because they were the ones who looked after the children and were responsible for their family members. It was therefore not surprising that their focus was on the welfare of children and other family members.

Despite this majority position, two people (one in New South Wales and one in Western Australia) thought that Indigenous women fell into two camps: those who thought that land rights and family unity were the most important and those who thought that men and women have different problems which should be considered separately. In general, however, those interviewed said that the concerns of Indigenous women were with collective rights and their focus was 'race first'.

We may wonder why Indigenous women focused on 'the community' as a whole, rather than on problems that affected them strongly, such as family violence. Three possible reasons emerge from the interviews.

¹² Interview with NIML17 (Face-to-face interview, 2 October 2003).

Firstly, family violence in Indigenous communities was less frequently discussed at the time of the RCIADIC than other community concerns. As one of the lawyers said:

And while people talked about domestic violence ... it wasn't significant. There were always, in people's families, there were always issues of family breakdown.¹³

One-fifth of the people I interviewed thought that family violence was not a topic that was discussed as openly as it is now. There was a lot of pressure on Indigenous women at that time not to talk about this topic and to only focus on matters such as land claims and self-determination. Additionally, women were often blamed for the incarceration of their partners if they reported incidents of family violence. They therefore avoided discussing such matters to 'outsiders'. Moreover, they were more fearful about what might happen to the perpetrator in custody than wanting to ensure their own or another's safety. The reluctance of Indigenous women to talk about family violence is discussed further within the context of RCIADIC procedures in Part III below.¹⁴

Secondly, lawyers and research and field officers did not expressly ask communities and Indigenous women about their specific problems, but instead allowed the communities to focus on the problems they thought fell within the RCIADIC investigation. One of the lawyers called it a 'leadership issue', meaning that they (the RCIADIC staff) did not ask any questions specifically relating to problems such as family violence. He said:

And it may well be a product of the focus that we gave because we didn't put any of that emphasis at all. Therefore they didn't see it [family violence] as a point worthy of any emphasis or bringing it up or anything like that. And had we had done it, then it might have been a different issue and different outcome.¹⁵

¹³ Interview with NIFL21 (Face-to-face interview, 29 May 2003).

¹⁴ Although family violence was raised as a topic in the Indigenous texts, it was mainly raised by the Northern Territory AIU report. The extent to which the Indigenous texts were incorporated into the official reports is discussed in Part III of this chapter.

¹⁵ Interview with NIML17 (Face-to-face interview, 2 October 2003).

Considering that the RCIADIC was initially established to investigate Indigenous deaths in custody and that Indigenous people wanted someone to be blamed for the deaths, it is not surprising that the focus of the Indigenous women and men who were consulted was on police conduct, racism and racial oppression in general. As Diane Bell, an Australian anthropologist, noted in a paper published in 1991, when arguing for Indigenous self-determination, politics of race become paramount and gendered perspectives are set aside as internal affairs.¹⁶

The lawyers in particular said it was up to Indigenous women to voice their concerns and that it was not up to non-Indigenous people to 'be going off and saying "this is how Aboriginal women should be doing this"'.¹⁷ This was influenced by debates that were raging in academic circles at the time regarding who should speak for Indigenous women.¹⁸ Although one of the female lawyers admitted that the sentiment might have been misguided, she said that at the time they thought that if Indigenous women wanted to raise the problem of family violence, they would, and they would do so in a manner with which they felt comfortable. 'But it is not for us to be imposing our ... feminist views.'¹⁹

The third reason for the focus by Indigenous women on problems concerning the community, according to seven of the non-Indigenous people interviewed and one Indigenous person, was that Indigenous women did not want to disparage Indigenous men by discussing violence against women and children. This need to protect Indigenous men is critical and is taken up more fully below. Indigenous communities did not want to encourage any line of inquiry that would reflect poorly on their communities, and in particular, their Indigenous men, which might be seen as contributing to the self-harm or other misfortune. They were concerned that such topics would shift the blame for the deaths from police and prison officers to the deceased. Nor did those working for the RCIADIC wish to

¹⁶ Diane Bell, 'Intracultural Rape Revisited: On Forging a Feminist Future Beyond Factions and Frightening Politics' (1991) 14(5) *Women's Studies International Forum* 385.

¹⁷ Interview with NIFL27 (Face-to-face interview, 7 May 2003).

¹⁸ In particular see Diane Bell, 'A Reply from Diane Bell' (1990) 6(2) *Anthropological Forum* 158; Diane Bell and Topsy Napurrula Nelson, 'Speaking About Rape Is Everyone's Business' (1989) 12(4) *Women's Studies International Forum* 403; and Jan Larbalestier, 'The Politics of Representation: Australian Aboriginal Women and Feminism' (1990) 6(2) *Anthropological Forum* 143.

¹⁹ Interview with NIFL27 (Face-to-face interview, 7 May 2003).

give the public further reason to criticise Indigenous people. One of the non-Indigenous research officers thought that Indigenous people may have ‘felt a bit of a betrayal or something if ... [the RCIADIC had] started to identify that maybe Aboriginal people had some agency in control of some of the stuff as well’.²⁰ The lawyers who investigated the deaths or represented the families of the deceased during the RCIADIC hearings into the deaths were also reluctant to raise problems of family violence for fear of undermining the reputation of the people they were representing.

B *The Large Number of Male Deaths and the Deep Disadvantage of Young Indigenous Males*

Half of the Indigenous people interviewed and almost a third of the non-Indigenous interviewees expressed the view that the large number of male deaths that were investigated influenced the focus of the research conducted by the RCIADIC into underlying issues. The first half of the RCIADIC inquiry was consumed by the investigations of the deaths in custody, and the larger proportion of male deaths investigated by the RCIADIC, as compared to female deaths, had a considerable bearing on the type of information collected by the lawyers and other research staff. After having read all the death reports, one after the other, over the space of a couple of months, I came to understand the influence this must have had on what the commissioners, lawyers and research staff thought was most troubling Indigenous communities. Over and over I read about the life of one Indigenous male deceased after another; I found this started to overshadow the female deaths.

The lives of the deceased females were considered to be no different to those of the males that were investigated. One of the lawyers noted that ‘no one perceived any women’s issue in relation to the death being a woman as distinct from a man’.²¹ The profile of the male deaths therefore became the norm and the female deaths needed to fit the male profile to be considered. An Indigenous female research officer commented that the female deaths were almost treated as

²⁰ Interview with NIMNL45 (Telephone interview, 30 August 2004).

²¹ Interview with NIML29 (Face-to-face interview, 1 October 2003).

something unusual, as ‘outside of the focus on Aboriginal male deaths in custody’.²²

The large number of male deaths and evidence of their involvement with the criminal justice system from a young age influenced the focus of not only the non-Indigenous lawyers but also the other Indigenous and non-Indigenous AIU and RCIADIC staff. The following comment was made by an administrative officer employed by the RCIADIC:

I mean the focus was on men because most of the deaths were men. There was a kind of theme which was common to a number of them, which was that in relation to some of the deaths in the communities which were, as I said, typically suicides of young men, it was felt ... and I heard this analysis and it was hard to disprove it in some sense, but that the young men in these communities were, in a sense, particularly disenfranchised or that they had no kind of useful social function.²³

As this quote well illustrates, a guiding assumption emerged from the investigations into the deaths and from the sociological, anthropological and criminological research: that young Indigenous males were more disadvantaged than Indigenous females. This view was reflected in the way the effect of colonisation on Indigenous males was reported in the *National Report*. The report took a classic liberal view of Indigenous culture by dividing life into public and private spheres and concluding that loss of status in the public sphere resulted in more damage than anything that could happen in people’s private lives.²⁴ One of the Indigenous male field officers I interviewed described the way in which the history of colonisation had affected Indigenous males as an ‘emasculatation’ of Indigenous men. He used this term to mean the men had been stripped of their traditional cultural strength and power because they ‘were no longer storytellers and dancers and choreographers and law givers or whatever’.²⁵ Therefore there was much more empathy given to the loss suffered by Indigenous males as a result of colonisation and particularly the ensuing lack of employment

²² Interview with IFNL3 (Face-to-face interview, 30 June 2003).

²³ Interview with NIMNL15 (Face-to-face interview, 17 October 2003).

²⁴ See Stephen Bottomley and Stephen Parker, *Law in Context* (2nd ed, 1997) 41-43 where there is an explanation of the way liberalism divided life into two separate spheres, public and private.

²⁵ Interview with IMNL1 (Face-to-face interview, 10 April 2003).

opportunities, which in turn resulted in a reduced focus on the needs of Indigenous women and less sympathy for women who were violent or dependent on alcohol.

Bulbeck came to a similar conclusion in her unpublished paper. One of the reasons she gave for the lack of reference to problems concerning Indigenous women in the recommendations was that most of the 11 women investigated by the RCIADIC were older and had died of natural causes, and this made their deaths appear less contentious and therefore less important to the RCIADIC.²⁶ This perception was reflected in the comment made by one of the lawyers who thought that most women who had died had been long-term alcoholics, had lived on the street, and had been used to incarceration. On the other hand, he recalled that the men had been young non-alcoholics and that many had been incarcerated for the first time when they committed suicide. Other lawyers expressed similar views.

The influence that the large number of male deaths had on the focus taken by the RCIADIC was summed up by a research officer who worked on compiling the *National Report* in the following way:

It was so traumatic to look at all of those deaths. I mean it was 99 deaths, well it was 99 lives; it was 99 deaths. But really the most common profile was of men of a particular age group and dying quite young most of them, or committing suicide quite young. And there's a passage I was looking at earlier in the report where it kind of defines that quite clearly, which you would have read: 'Overwhelmingly the typical portrait of the Aboriginal death in custody was that of young males' and ... that just sort of summed up how they built the information around the *National Report* in lots of ways.²⁷

Therefore, although the investigation of the deaths was kept separate to the research on underlying issues, it had a strong influence on the focus of the underlying issues research. The number of male deaths directed the research towards what was happening in the lives of young Indigenous males. While, as

²⁶ Bulbeck, above n 11, 6.

²⁷ Interview with NIFNL18 (Face-to-face interview, 26 August 2004).

stated above, the focus of Indigenous women was on community problems, they were predominantly related to how Indigenous males were treated by various institutions. An Indigenous man I interviewed put the matter eloquently:

Well, it was what people understood at that time; the over-representation, the large number of their young men being locked up and what was happening to them when they were locked up. So the people were saying this is our experience, in other words we have a lot of our young fellas, they're getting into trouble with the police. They weren't saying we had a lot of our young women getting to trouble. Although there were women in custody at that time, they were small in number. Their concern was the young fellas. Now, it wasn't just young fellas going to prison it was what's happening to our young fellas generally. Our young fellas were being picked on; our young fellas haven't got jobs; our young fellas not getting their act together.²⁸

The prevalence of suicide amongst the deceased, particularly in North Queensland, captured the interest of the commissioners and lawyers. Only one female death was by hanging as compared to 29 male deaths. This became an indicator that Indigenous males were more dispossessed than Indigenous females:

A much more common discourse was that women had remained strong and had to hold families and communities together because men had been robbed of their roles as warriors and providers and lost their way. Men were, in this focus, the ones who needed attention.²⁹

One of the lawyers thought that whether or not more should have been said about problems such as family violence depended on 'whether saying more about that would have explained more about why particularly young men were going to jail'.³⁰ This relates to the way in which the terms of reference were interpreted and what information was ultimately considered relevant to the mandate of the RCIADIC, a topic taken up below.

²⁸ Interview with NIMNL45 (Telephone interview, 30 August 2004).

²⁹ Interview with NIML14 (Face-to-face interview, 9 May 2003).

³⁰ Interview with NIML13 (Face-to-face interview, 27 May 2003).

Those interviewed said that if the inquiry had occurred now, the focus might have been different since the rate of imprisonment of Indigenous females has dramatically increased since the late 1980s. It was never expected that this would happen at the time of the RCIADIC.

III PROCEDURAL REASONS

A *The Terms of Reference*

The most frequently cited procedural reason for the RCIADIC's failure to adopt an intersectional approach was the RCIADIC's strict adherence to the terms of reference. The manner in which the RCIADIC determined whether particular information was relevant to its terms of reference affected its decision not to further explore certain gender-specific problems that emerged during the inquiry. The liberal legal ideology that permeated the investigations into the deaths and the underlying issues research dictated that a narrow and conservative interpretation of the terms of reference was adopted.³¹

A fifth of the Indigenous people interviewed and almost a third of the non-Indigenous interviewees thought that gendered problems such as family violence were not an 'underlying issue' and therefore irrelevant to the terms of reference contained in the RCIADIC's Letters Patent. All five commissioners interviewed identified this as one of the reasons that an intersectional approach was not adopted. In fact, in his Western Australian underlying issues, Commissioner Dodson noted:

The Commission's research and investigation [in Western Australia] has revealed that 3 out of the 32 deaths in custody, for the identified period, were women. What needs to be considered, however, is that women were sometimes the victims of the offences for which men are incarcerated. *While it is not within my brief to consider*

³¹ It did not have to be this way because as we have seen the Manitoba Aboriginal Justice Inquiry (AJI) adopted a wide interpretation of its terms of reference.

the extent and seriousness of such a proposition (emphasis added), it is necessary to refer to the position of Aboriginal women.³²

Commissioner Dodson then went on to consider ‘Aboriginal women with regard to their relationships with men, non-Aboriginal society, and factors such as change and continuity in Aboriginal social life’.³³ However, there was little reference to the effect of family violence on Indigenous women in his report. Generally, the underlying issues investigated by each commissioner had to be related to the deaths in custody and if a particular jurisdiction had few or no female deaths in custody then problems relating to Indigenous women were given little consideration.

In her 1991 article about the RCIADIC processes, Gillian Cowlshaw, who worked as a research officer for the New South Wales office of the RCIADIC, recognised that the legal culture of the RCIADIC substantially influenced what facts were considered relevant:

In the legal framework ‘facts’ tend to be *Facts*, and there is little room for recognising that a particular kind of account of events is being created, and another kind excluded. Specific, discrete events are defined and scrutinised and those facts which are believed to be relevant to the event in question are examined in order to ascertain which individuals were responsible for them.³⁴

The power of the legal mindset of the RCIADIC is reflected in the fact that even non-lawyers who were interviewed defended the race-only focus of the RCIADIC by referring to its need to stay within the terms of reference:

It was not the task of the royal commission to examine the situation of women prisoners except to the extent that that might be covered in some way by the terms of reference. Nor was it the task of the commission to cover the situation of

³² Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Underlying Issues in Western Australia, Vol 1-2* (1991) vol 1, 375 (abbreviated as *Regional Report of Inquiry into Underlying Issues in Western Australia* in repeated citations).

³³ *Ibid.*

³⁴ Gillian Cowlshaw, 'Inquiring into Aboriginal Deaths in Custody: The Limits of a Royal Commission' (1991) (4) *Journal for Social Justice Studies, Special Issue Series: Politics, Prisons and Punishment - Royal Commissions and 'Reforms'* 101, 108.

Aboriginal women outside of prison except to the extent that that might be covered in some way by the terms of reference. And so to the extent that these problems were discussed it is because Commissioner Johnston was able to find a way to interpret the terms of reference to enable this broader reading of the situation.³⁵

There was little acknowledgement of the fact that the interpretation of the terms of reference depended on the discretion of the commissioners and their willingness to embrace a wider approach. As we have seen, the death reports indicated that 55% of the 88 male deceased had been convicted of physical or sexual assault often against other family members. However, the RCIADIC still did not consider family violence relevant to the question of why so many Indigenous people were in custody:

Our first question was as to deaths in custody and how they had occurred and what led to the deaths and what was the background and should that person have been arrested and put in custody and lots of other questions like that. The broader question, very, very much broader question was how is it, why is it, what has to be done to stop such a disproportionate number of people with Aboriginal backgrounds coming in to custody? And I think that family disputes and family misbehaviour have very little to do with that.³⁶

Here then we see why family violence had little or no significance at the time. Family violence was not considered to be directly relevant to the question of deaths in custody; instead it was considered an indirect result of the effects of colonisation. Colonisation itself, and the way in which it had marginalised and dispossessed Indigenous people, became accepted as one of the direct causes of the over-representation of Indigenous people in custody. One of the lawyers interviewed recalled that it was difficult to identify what was the immediate cause of the deaths in custody and what was instead an effect of the colonisation and dispossession Indigenous people had suffered. For example, he said that alcohol was frequently mentioned by the Indigenous communities consulted by the RCIADIC as the cause of incarceration and ultimately of Indigenous deaths in custody. However, upon further analysis, alcohol consumption could be

³⁵ Interview with IFNL47 (Telephone interview, 3 November 2004).

³⁶ Interview with NIML11 (Face-to-face interview, 17 April 2003).

considered an effect of the disadvantage and marginalisation of Indigenous people and not necessarily the cause of Indigenous offending. Therefore, certain identified problems were recognised as being more complex than originally anticipated. The lawyer noted, however, that their complexity and relevance to the terms of reference was often difficult for communities and the lawyers themselves to understand.

One reason suggested as an explanation for the conservative interpretation of the terms of reference was that the commissioners felt obliged to only include evidence they themselves had encountered during their inquiries. The inclusion of evidence which the commissioners had not themselves tested, such as accusations of sexual assault of Indigenous women by police, would have left the decisions of the commissioners open to challenge. Another suggested reason was that it was much more politically savvy for the RCIADIC to focus on improving the custodial experience of Indigenous people and on increasing the number of prisons in remote areas. These types of recommendations attract the attention and approval of government officials. Since the number of female offenders was much lower than the number of male offenders, recommendations that specifically related to Indigenous female deaths, whether in custody or not, were less likely to be seen to be immediately relevant to governments.

Although Indigenous women were rarely mentioned in the recommendations, when they were mentioned, it was because the person drafting that section of the *National Report* had a particular interest in the concerns of Indigenous women or because an agreement was reached between the commissioners to include some reference to the gendered problems that had been identified as a compromise to their conservative approach. Two people I interviewed noted, however, that the inclusion of the words ‘including Indigenous women’ did not mean that the rest of the recommendations only related to Indigenous males.

B *The Legal Procedures Used to Investigate the Deaths*

The initial objective of the RCIADIC - to investigate deaths in custody – and the legal procedures adopted to achieve this objective continued to influence the

investigation into underlying issues, even though this latter inquiry called for a different approach. One Indigenous woman and ten non-Indigenous people who I interviewed thought that the legal inquiry into the ‘truth’ about how the deaths had occurred took precedence and ultimately dictated what factors were considered important when the wider social inquiry was introduced. The dominance of the legal inquiry left little scope for the inclusion of other important questions, such as how was life different for Indigenous men and women. As one of the lawyers noted:

I think that we still had the residue of the commencement point involved in all of the decisions that everybody took so that people still thought this is a legal inquiry, an inquiry about police brutality, is a review of all the inquests you know. And I mean I think that continued to filter down all the way right to the end.³⁷

The fact that the legal inquiry dominated the RCIADIC meant that there was ‘not an appropriate framework to inquire into wider social processes, although in some cases significant clues emerged in the evidence’.³⁸ In addition to a conservative interpretation of the terms of reference, legal constraints set priorities on the research that was considered relevant. Research that was ultimately considered most important supported a factual rather than a sociological analysis and was directly related to how the deaths had occurred. With these parameters, problems that specifically confronted Indigenous women were effaced.

In addition to legal constraints imposed on the underlying issues research, it was introduced far too late. The late establishment of the AIUs and their inability to take a national, coherent focus further hampered their ability to fully investigate all the problems that were raised by the communities. An Indigenous research officer was of the view that the AIU in her jurisdiction was

just set up to be seen. ... There were two prongs to the Royal Commission: the legal aspects as to why Aboriginal people were dying, but also the social and cultural aspects as to why Aboriginal people were dying and that was massive,

³⁷ Interview with NIFL21 (Face-to-face interview, 29 May 2003).

³⁸ Cowlshaw, above n 34, 107.

that's a massive bloody topic there, the social and cultural aspects as to why Aboriginal people were dying. And by the time it [the AIU] was set up and really was on board here, the parameters were already set anyway.³⁹

There was therefore little opportunity for further investigation of the gender-specific problems that the AIUs had uncovered.

C Deep Colonising Methodologies

The social science methodology used by the RCIADIC to research underlying issues did not embrace Indigenous cultural norms and understandings. Nor was there a discussion of whether the RCIADIC needed to change its methodological practices. Although Indigenous people were employed to ensure that an Indigenous voice was included in the RCIADIC's investigations, their lack of power to direct and influence the research and recommendations ultimately inhibited the nature of the data collected. For instance, community rights and concerns about male deaths in custody were raised by Indigenous women because it was culturally inappropriate for them to discuss individual rights and female deaths. The RCIADIC's ignorance of these norms prevented them from implementing a methodology which would have allowed female voices to surface. Over a fifth of the people interviewed referred to Indigenous cultural norms as affecting the extent to which an intersectional approach could be adopted. This resulted in the further colonisation of Indigenous people, particularly Indigenous women. Only voices that imitated non-Indigenous cultural norms and that fell within liberal legal understandings emerged.⁴⁰

A non-Indigenous research officer said that although women were invited to meet and speak with RCIADIC staff, the information gained from such encounters always depended on who came forward and who was allowed to speak:

³⁹ Interview with IFNL40 (Face-to-face interview, 15 April 2003).

⁴⁰ This resulted from what Deborah Bird Rose describes as a deep colonising methodology: Deborah Bird Rose, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6; Deborah Bird Rose, 'The Silence and Power of Women' in Peggy Brock (ed) *Aboriginal Women, Politics and Land* (2001) 92.

So you are sort of hearing certain voices only I would think. So it's not to say that women's views aren't there, but they are not made explicit. ... I know women's presence was certainly there at meetings or as loved ones of people who died in custody or indeed as victims of violence or whatever, but in a way, the voices were muted. I mean it's interesting for example that there wasn't a female commissioner appointed.⁴¹

This was also reflected in the memorandum written by an Indigenous consultant hired by the Northern Territory AIU in relation to a visit to the Yirrkala community in the Northern Territory. The consultant indicated that in mixed meetings the women tended to let the men speak.

The inability of RCIADIC staff to fully understand and embrace Indigenous cultural norms contributed to the silencing of Indigenous female voices. For example, one of the Indigenous women I interviewed thought that it would have been 'disrespectful' or 'inappropriate' to 'actually put the focus on the women' because so many men had died.⁴² Similarly, although family violence was acknowledged as having been raised by Indigenous women, one of the Indigenous research officers said that 'in Aboriginal affairs in some communities the women are not allowed to talk about death and about dying publicly'.⁴³ In addition, the research officer observed that Indigenous women may also not have had the language to fully articulate and explain their circumstances, particularly when talking to non-Indigenous male lawyers. Another Indigenous male field officer, who I interviewed, advised that Indigenous men did not discuss 'women's business because it would have been totally inappropriate'.⁴⁴ The Indigenous research officer referred to above, who was from a different jurisdiction to the male field officer, expressed a similar sentiment: '[y]ou know women's death, woman's business, man's death, man's business. But we all can speak about the men, but we can't talk about our women. And our men won't talk about it

⁴¹ Interview with NIFNL42 (Face-to-face interview, 24 June 2003).

⁴² Interview with IFNL41 (Face-to-face interview, 14 April 2003).

⁴³ Interview with IFNL3 (Face-to-face interview, 30 June 2003).

⁴⁴ Interview with IMNL1 (Face-to-face interview, 10 April 2003).

either.’⁴⁵ These types of cultural restrictions prevented full and frank discussion about the life of the deceased by female family members and friends.

For Indigenous women these cultural taboos prohibiting frank disclosure were coupled with a fear of retribution if they spoke poorly about a person who had died in custody. This applied whether the deceased was female or male. Unless such disclosures could be made in private, Indigenous women were at risk of violence by other aggrieved family members. The Indigenous female research officer quoted above warned, ‘[t]he blackfella’s telephone is like wildfire, you know’.⁴⁶ The cultural pressure not to speak up and the fear of retribution were reinforced by community views which dismissed any mention of gendered problems, such as family violence, as ‘radical feminist lesbian hairy legged talk.’⁴⁷

One of the main goals of the RCIADIC (and of Indigenous people) was to decrease Indigenous over-representation in custody. Expecting Indigenous women to report incidents of family violence and expose their family members to the risk of being incarcerated conflicted with this primary aim. Instead of reporting offenders there was a strong perception within Indigenous communities that they themselves should sort out ‘within community’ problems. Therefore, any attempts by ‘white people to tell [Indigenous women] what the answers were, which could possibly divide men and women within communities ...’, were not welcomed.⁴⁸ RCIADIC lawyers and research officers at the time did not understand the complexity of such cultural norms and societal fears, and the degree to which they silenced the voices of Indigenous women. This inevitably affected the type of information they were able to collect.

Commissioner Dodson’s office in Western Australia and the Northern Territory AIU were the only offices that made an attempt to speak to Indigenous women separately from Indigenous men. Breaking them up into groups according to their sex gave ‘both genders the ability to speak quite freely because then there may

⁴⁵ Interview with IFNL3 (Face-to-face interview, 30 June 2003).

⁴⁶ Interview with IFNL3 (Face-to-face interview, 30 June 2003).

⁴⁷ Interview with NIFL27 (Face-to-face interview, 7 May 2003).

⁴⁸ Interview with NIMNL45 (Telephone interview, 30 August 2004).

have been, Aboriginal specific issues, gender issues ... that people wouldn't have felt comfortable with in a joint environment'.⁴⁹ This approach was considered culturally appropriate by some of the people interviewed, particularly in regional areas. The impact that such a practice had on gathering information of relevance to Indigenous women is reflected in fact that the Northern Territory AIU report contained the most information about family violence and other problems such as the sexual assault of Indigenous women by police. The fact that a powerful, politically active Indigenous woman headed that AIU is also important, as is discussed in the next section.

D *Ideological Values of the Predominantly Male Senior People Appointed*

The next most frequently cited reason for the RCIADIC's failure to adopt an intersectional race and gender approach was the fact that the investigations and reporting decisions depended on the interests and knowledge of the most senior people appointed. Eight of the people interviewed noted that the research directions taken by the lawyers and researchers of the RCIADIC were significantly influenced by whether they were male or female and by their research interests. The most senior people appointed were men from conservative backgrounds who adopted a liberal legal ideology.⁵⁰ Of the non-Indigenous staff, there was only one senior woman appointed at a national level, Kathy Whimp, who for most of the RCIADIC was acting as either the national solicitor or the associate to the national commissioner. There was only one female counsel assisting in the investigation into the deaths, Kate O'Brien, who was appointed in Western Australia. The other non-Indigenous women who were employed by the RCIADIC were more junior and had little power to influence the direction of the investigations and research. Although over the life of the AIUs there were four Indigenous female heads appointed, the deep colonising methodologies adopted by the RCIADIC limited the power of these women to influence the direction of the research to any great extent.⁵¹ It is important to acknowledge, however, that

⁴⁹ Interview with IMNL37 (Face-to-face interview, 30 June 2003).

⁵⁰ For example, they had attended white private schools and had been trained as lawyers.

⁵¹ Marcia Langton had the most influence on what was finally reported in the *National Report* and in the recommendations. This was mainly because she worked with the national commissioner but

the adoption of a particular epistemological perspective is not guaranteed simply because of the researcher's sex or race.

An Indigenous woman I interviewed observed that at the time the non-Indigenous female lawyers were trying to find their feet in a culture dominated by white males. Since it was still unusual in the late 1980s for female lawyers to remain and advance in the legal profession, those who were employed by the RCIADIC were struggling with their own entry into the profession. This inhibited their ability to direct the investigations into areas that were relevant to Indigenous women:

Maybe they were defining themselves politically as lawyers. And so to think about dealing with women's deaths in custody while you yourself were perhaps struggling not to die in custody, maybe it was something that you just didn't think about or if you thought about it, you put it aside because you're in there now with the men. And you've got to play a man's game the man's way.⁵²

Although there were a number of senior⁵³ female staff appointed in this woman's office, they tended to defer to the advice of the commissioner and other men.

The lawyers' lack of social science research expertise also affected the focus of the RCIADIC. The lawyers, who controlled the investigations, were unable to fully comprehend the gendered nuances that emerged from the legal inquiry. As one of the lawyers noted:

In retrospect it would have been better to have had onboard some people or some experts who would have been able to bring that sort of focus to the inquiry ... but I won't pretend ... I mean I'm very limited in my understanding and appreciation for gender issues and how that could impact in the whole scheme of things.⁵⁴

also due to her academic capabilities and because of the fact that she had the opportunity to work in Adelaide and assist with the compilation of the *National Report*.

⁵² Interview with IFNL3 (Face-to-face interview, 30 June 2003).

⁵³ The reference to the word 'senior' in this sentence is meant to include counsel assisting and instructing solicitors.

⁵⁴ Interview with NIML17 (Face-to-face interview, 2 October 2003).

Other problems created by the inherent conservatism of some of the commissioners and lawyers are explored further in the next chapter.

E *Time and Resource Constraints*

Time and resource constraints impeded the RCIADIC's ability to fully investigate underlying issues, including the taking of an intersectional approach:

Again, just my perception, but we just didn't have time. There wasn't any time to unpack whatever was unpacked so to speak within the Aboriginal Issues Unit, it was incredibly surface stuff. What can you do in two years?⁵⁵

Such limitations often restrict the ambit of the investigations conducted by royal commissions.⁵⁶ Three of the Indigenous people interviewed and two non-Indigenous interviewees blamed a lack of time and resources for the lack of gender analysis. Indeed, as mentioned in Chapter 6, one of the reasons given in the *National Report* for the failure of the RCIADIC to further investigate the allegations of mistreatment of Indigenous women by police was that there was insufficient time to do so. Although gender-specific problems such as family violence and other forms of abuse emerged as the RCIADIC progressed, by that stage of the investigation there was no longer enough time to give such problems 'space'.⁵⁷ There was certainly not enough time to properly research and develop such topics for inclusion in the *National Report* since its composition was something that occurred towards the end of the RCIADIC. The Northern Territory AIU was often referred to by those interviewed as having dealt with problems such as family violence. However, since no regional report was written for the Northern Territory, some of that material 'really just got lost'.⁵⁸

⁵⁵ Interview with IFNL40 (Face-to-face interview, 15 April 2003).

⁵⁶ Liora Salter, 'The Two Contradictions in Public Inquiries' in A Paul Pross, Innis Christie and John A Yogis (eds) *Commissions of Inquiry* (1990) 173, 177; Richard Simeon, 'Inside the Macdonald Commission' (1987) 22 *Studies in Political Economy* 167.

⁵⁷ Interview with NIMNL45 (Telephone interview, 30 August 2004).

⁵⁸ Interview with NIML13 (Face-to-face interview, 27 May 2003). I was unable to find a reason for why there was no regional report published for the Northern Territory and South Australia. I was told that the drafts reports written for those jurisdictions were incorporated into the *National Report*.

CONCLUSION

The claim that specific problems concerning Indigenous women had been deliberately omitted from the RCIADIC inquiry was rejected by most of the people interviewed. Instead, they said that the principal focus was on men and youth. The first two hypotheses set out in Chapter 1 - that the commissioners consciously chose to ignore material that pointed to particular difficulties faced by Indigenous women, and that they had been instructed by government to ignore any evidence pointing to the need for a gendered approach because of a political agenda which emphasised problems of race - are not supported by the interview data. The sheer number of youthful male deaths and what this implied for Indigenous communities more generally set the stage for the inquiry. It was not as if Indigenous women were *deliberately* excluded, but that their concerns were seen to be 'one' with Indigenous men. To raise any questions about Indigenous men's harms to women and children in the community would have distracted the race-only focus of the RCIADIC.

Instead, I found that the decisions taken by the RCIADIC regarding its focus and recommendations supported hypotheses (c) to (f) because they were made unconsciously, were influenced by liberal legal understandings of what was required, were restricted by time and resources, and reflected the views of the Indigenous community. The limited amount of time and resources which were available for the RCIADIC to conduct its inquiry were constraints over which it had little control, but these constraints significantly affected its focus.⁵⁹ Although the commissioners and other staff of the RCIADIC did not set out to deliberately exclude Indigenous women from the investigations and recommendations, their commitment to legal methodologies left little scope for questions of gender to be raised. As many scholars have noted, '[t]he voice of law and legal practice is

⁵⁹ Although the Manitoba AJI had approximately the same amount of time to carry out its investigation as the Australian RCIADIC inquiry, it was able to more fully explore problems that confronted Aboriginal women. The RCIADIC was, however, larger in scope than the AJI since it adopted a national perspective instead of simply a regional one, with investigations conducted in six States and in the Northern Territory as well as nationally. This would have made the administration and management of the RCIADIC a more onerous task than that of the AJI, where the focus was solely on one province. While the commissioners of both inquiries had a discretion regarding which material to include, the enormity of the task assigned to the RCIADIC compelled its commissioners to focus on certain problems rather than others.

“male”, although this voice is construed as representing a gender-neutral stance’.⁶⁰

The politics of race took precedence over the politics of sex and gender. As scholars such as Judy Atkinson, Diane Bell, Marilyn Fontaine-Brightstar, Emma LaRocque, and Melissa Lucashenko note, collective rights become paramount when making indigenous claims.⁶¹ The Indigenous submissions made to the RCIADIC predominantly focused on community problems, and this ultimately ensured that the politics of race were considered but not the politics of race *and* gender. Problems of physical and sexual abuse in Indigenous communities were hidden because they are controversial and more difficult to confront. As Lucashenko suggests, the State is not the only entity that has denied the existence of such problems. Indigenous men have for many years silenced Indigenous women from exposing the violence:

Although individual Black women struggled in the past to highlight the issues of domestic violence, rape, child abuse, and parental neglect, it has taken until now to have these problems even acknowledged by Aboriginal men. There is still widespread denial among Aboriginal communities about these sensitive topics. Land rights, poverty, police brutality, and poor health status are much more palatable issues for debate, because they do not require an explicit examination of power relations within the Black community. In the situation in which Black men are dispossessed, brutalized by police, and generally as poor and unhealthy as Black women, it is seen as unproblematic in the Black community for Black women to ‘talk up’ about the injustices of the State. Talking about the bashings,

⁶⁰ Kathleen Daly, 'Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions About Justice' (1989) 17 *International Journal of the Sociology of Law* 1, 1. See also Kerry Carrington, 'Feminist Research in Crimino-Legal Studies: Reflections on 'Absolute Rubbish'' (2002) 6 *Law Text Culture* 107.

⁶¹ Judy Atkinson, 'Violence against Aboriginal Women: Reconstitution of Community Law - the Way Forward' (1990) 2(46) *Aboriginal Law Bulletin* 6; Diane Bell, above n 16; Marilyn Fontaine-Brightstar, 'Breaking the Silence. (Violence against Aboriginal Woman and Children)' (1992) 26(2) *Canadian Dimension* 5; Emma LaRocque, 'Re-Examining Culturally Appropriate Models in Criminal Justice Applications' in Michael Asch (ed) *Aboriginal and Treat Rights in Canada: Essays on Law, Equity and Respect for Difference* (1997) 75; Melissa Lucashenko, 'Violence against Indigenous Women: Public and Private Dimensions' in Sandy Cook and Judith Bessant (eds) *Women's Encounters with Violence: Australian Experiences* (1997) 147. Note that as mentioned at the start of this thesis the word 'indigenous' has not been capitalised when it is used to refer to native peoples generally.

rapes, murders, and incest for which Black men themselves are responsible, however, is seen as threatening in the extreme.⁶²

The victimisation of Indigenous men by the State became the paramount concern. The victimisation of Indigenous women and children might have diluted the political strength of a race-only focus.⁶³

My focus thus far has been on how the RCIADIC failed to adequately consider Indigenous women in its reports and recommendations. There are, however, other failures that have not previously been brought to light about the role of law and legal procedures, and race relations in producing the reports. These matters are discussed in the next chapter.

⁶² Lucashenko, above n 61, 149.

⁶³ Interestingly, although the suppression of Indigenous female voices had been acknowledged as occurring in Canadian Aboriginal communities, the AJI produced a report that managed to break the silence. Paula Gunn Allen acknowledged in 1986 that '[t]o survive culturally, American Indian women must often fight the United States government, the tribal governments, women and men of their tribe or their urban community who are virulently misogynist or who are threatened by attempts to change the images foisted on us over the centuries by whites. The colonizers' revisions of our lives, values, and histories have devastated us at the most critical level of all – that of our own minds, our own sense of who we are': This excerpt was taken from a reprinted version of the paper which appears in Paula Gunn Allen, 'Angry Women Are Building: Issues and Struggles Facing American Indian Women Today' in Margaret L Anderson and Patricia Hill Collins (eds) *Race, Class, and Gender: An Anthology* (3rd ed, 1998) 43, 47. It is unclear why the AJI was able to break the silence since a detailed analysis of the AJI has not been conducted. Without further research, one can only posit that Aboriginal communities in Manitoba were more politically active and organised in bringing family violence on to the political agenda in the late 1980s. Since problems of family violence had been exposed some years prior to the inception of the AJI, the discussion of such a topic may have been more acceptable and less shameful to the Manitoba Aboriginal population, which therefore allowed it to be properly considered by the AJI. It may also have been the case that Canadian academics and bureaucratic personnel were more informed and politically motivated in the area of domestic and family violence than those in Australia, and that they were therefore able to offer a richer research perspective to the Canadian commissioners. Related to this is the fact that there is a strong history of Canadian royal commissions conducting social research: see for example Innis Christie and A Paul Pross, 'Introduction' in A Paul Pross, Innis Christie and John A Yogis (eds) *Commissions of Inquiry* (1990) 1; Frank Iacobucci, 'Commissions of Inquiry and Public Policy in Canada' in A Paul Pross, Innis Christie and John A Yogis (eds) *Commissions of Inquiry* (1990) 21; Scott Prasser, 'Royal Commissions and Public Inquiries: Scope and Uses' in Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 1; A Paul Pross, Innis Christie and John A Yogis (eds), *Commissions of Inquiry* (1990); Salter, above n 56; Simeon, above n 56.

CHAPTER 8: INSTITUTIONAL PROCEDURES AND PROCESSES, RACE AND OFFICE POLITICS

INTRODUCTION

What follows is a description of what the people who worked for the RCIADIC and the Aboriginal Issues Units (AIUs) thought the RCIADIC had done well and what it could have done differently. It also compares Indigenous and non-Indigenous views, and lawyer and non-lawyer views, on the conduct of the RCIADIC. The problems identified relate to the processes and procedures undertaken by the RCIADIC that were within its power to alter. Although many royal commissions commonly experience some of the problems identified, other difficulties were particular to the RCIADIC investigation and the subject matter it was investigating.

In contrast to Chapter 7 which considered gender-specific problems, much of the data presented in this chapter relates to institutional procedures, and office and race politics which were more general in nature. The material presented in this chapter critiques how the RCIADIC made decisions about how to investigate the deaths and the underlying issues, and about what it should include in the reports that it published. Having said that, the procedures and politics, and their effect on the decision-making process of the RCIADIC also indirectly affected the extent to which the RCIADIC considered the problems relating to Indigenous women. This is because many of the difficulties and constraints that the RCIADIC had to contend with ultimately affected its ability to incorporate other perspectives, such as gender, into its investigations. Although this chapter focuses on more general institutional procedures and politics, it is still very much related to my research question. The way the problems identified affected the RCIADIC's consideration of Indigenous women is discussed throughout this chapter where appropriate.

I INSTITUTIONAL AND OFFICE STRUGGLES, POLITICS AND RACE

A *The Tension Between Legal and non-Legal Perspectives*

One of the largest obstacles faced by the RCIADIC was how to manage the vast amount of information generated by the investigations into the deaths and underlying issues. Such a problem is not uncommon with commissions of inquiry when given unusually broad mandates. Innis Christie and Paul A Pross note in relation to the Canadian Macdonald Royal Commission that

the mass of documentation was beyond the capacity of the commissioners to absorb and several stratagems were used to integrate the material. These included the capacity to retrieve testimony from computerized records of hearings and, as research neared completion, a continuous programme of seminars in which commissioners and members of the research groups debated findings and their implications. Even with these devices, the commissioners seem to have been unusually dependent on the research group for assistance in drafting the final report.¹

Although the difficulties associated with having to conduct both an inquisitorial and investigative inquiry did hamper the progress of the RCIADIC, other tensions arose as a result of the conflicting interests of the staff employed. More than a third of the Indigenous people I interviewed and over 80% of the non-Indigenous people stated that disagreements between different groups of RCIADIC staff about which information was to be categorised as important, and therefore worthy of collection and inclusion, created the most tensions during the inquiry. One non-Indigenous lawyer observed that the need to conduct both a legal and sociological analysis, which is discouraged by many royal commission commentators, resulted in the RCIADIC operating ineffectively.

The interest in underlying issues was supported across the country:

¹ Innis Christie and A Paul Pross, 'Introduction' in A Paul Pross, Innis Christie and John A Yogis (eds) *Commissions of Inquiry* (1990) 1, 11. The 1985 Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission) investigated the long-term economic prospects and challenges facing the Canadian economy, including whether or not to adopt a free-trade policy with the United States.

People really wanted to talk about a whole range of things that weren't specifically about the circumstances surrounding the deaths, like other circumstances that led people to custody in the first place and including things like relationships with the police, relationships with agencies and the local councils, pubs and neighbourhood shops, a whole range of things that people wanted improvements to and had grievances about.²

Despite this support from Indigenous people in the general community, within the RCIADIC there was a great deal of dissent amongst staff about whether the focus should be predominantly on the deaths or on the underlying issues. The Criminology Research Unit (CRU) and the AIUs, and various other staff members, wanted to embrace a more criminological and sociological perspective and focus on the underlying issues, but many of the lawyers working for the RCIADIC wanted to concentrate more on investigating the deaths. Kathy Whimp, the associate to the national commissioner, notes in a paper written about the conduct of the inquiry that '[t]he structure and development of the commission exposed major differences between legal method and social research'.³ The initial motive for establishing the RCIADIC and its original structure had an enormous influence on how it proceeded, even though its mandate was later amended. As Gillian Cowlshaw, a research officer who worked for the New South Wales office, notes in a paper she wrote about her experience while working in that office:

The resources of the RCIADIC were almost fully absorbed in these hearings [into the deaths], making it impossible for systematic attention to be paid to what were widely agreed to be the causes of the high numbers in custody, that is, the oppressive relationship Aboriginals experience with the dominant society.⁴

² Interview with IML33 (Face-to-face interview, 12 June 2003).

³ Kathy Whimp, 'The Royal Commission into Aboriginal Deaths in Custody' in Patrick Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 80, 83.

⁴ Gillian Cowlshaw, 'Inquiring into Aboriginal Deaths in Custody: The Limits of a Royal Commission' (1991) (4) *Journal for Social Justice Studies, Special Issue Series: Politics, Prisons and Punishment - Royal Commissions and 'Reforms'* 101, 106.

As a result of the competing interests, a power struggle ensued between many of the lawyers who took a literal interpretation of what they had been asked to do, and the research staff and members of the AIUs who called for a broader inquiry. One of the lawyers I interviewed believed that there were not enough senior people in the RCIADIC who were feeding or driving the research regarding the underlying issues, particularly in Queensland. Overall, only one commissioner was appointed to focus solely on underlying issues (Patrick Dodson) and his focus was on the underlying issues in Western Australia. This lawyer observed that the underlying issues research was therefore marginalised ‘and they were funding it and they were trying to keep it on track, they were trying to use it to inform the inquiries but it didn’t really fit the same time lines and it was very different sort of work’.⁵

Many thought that the investigation into the underlying issues should have been proposed from the outset, but since it was not, it limited what the RCIADIC could consider. The RCIADIC realised too late that the underlying issues were important and that police officers were not deliberately trying to kill Indigenous people. It took a long time for this message to get through ‘and when it did get through, it was almost like the reports were then written’.⁶ Possible alternative approaches, such as focusing on men and women separately, were not considered. According to the commissioners and most of the lawyers, the RCIADIC was about the investigation of the deaths because they were not originally set up to investigate underlying issues. Consequently, the investigation into the underlying issues took a back seat and its assessment and incorporation ultimately became the responsibility of the national commissioner. One of the commissioners also noted that there was no plan for the investigation of the underlying issues whereas there was such a plan for the investigation of the deaths. This made the investigation into the underlying issues more difficult.

The division arising from what was considered important was not only something that existed between the lawyers and the social scientists. There were also differences of opinion amongst the lawyers regarding the best way to investigate

⁵ Interview with NIML31 (Face-to-face interview, 19 September 2003).

⁶ Interview with NIFNL42 (Face-to-face interview, 24 June 2003).

the deaths and the recommendations that should be made. Some believed they should recommend simple changes which could be implemented immediately and leave the more complex changes for later, whereas others wanted to conduct a more overarching investigation and proceed more slowly.

At another level, the commissioners could not agree upon what to include in the *National Report* because of their differing philosophical and political attitudes. As one might expect of a group of prominent lawyers meeting to discuss the merits of evidentiary material, there was 'quite a lot of jockeying ... for seniority in the writing and so on'.⁷ The conservatism of some of the commissioners ultimately affected what material was included. This had an effect on how the commissioners incorporated gender-specific recommendations. The way the terms of reference were interpreted also affected the way the commissioners decided what was relevant to their investigations.⁸

Both Indigenous and non-Indigenous people said that if they were to have another royal commission into Indigenous deaths in custody they would mostly likely focus purely on the underlying issues. Two of the lawyers acknowledged that underlying issues were introduced too late and that there had been 'a lost opportunity'.⁹

In retrospect, we would have done it quite differently, I'm sure but if we had known at the start what we knew at the end. We thought we were addressing a regime of official murder.¹⁰

Many claimed that the focus on how to prevent deaths in custody was too narrow, technical and legalistic. They should have focused on 'what brought them [the deceased] to that point'.¹¹ The RCIADIC focused too much on prolonging life rather than on the quality of life. However, some observed that if such an

⁷ Interview with NIFNL30 (Face-to-face interview, 12 June 2003).

⁸ Interestingly, one of the research officers who had spent a substantial amount of time in Adelaide assisting with the composition of the *National Report* noted that lawyers and non-lawyers appeared to work well together during this period.

⁹ Interview with NIML17 (Face-to-face interview, 2 October 2003).

¹⁰ Interview with NIML31 (Face-to-face interview, 19 September 2003).

¹¹ Interview with NIMNL15 (Face-to-face interview, 17 October 2003).

investigation were again to take place, someone other than a lawyer should head the inquiry. Ultimately, the feeling was that if they had had the full three years to conduct the underlying issues investigation they might have done a better job for Indigenous people.

B *Time and Resource Constraints*

Like many royal commissions, the RCIADIC was under enormous pressure from governments and from police and prison officers unions to complete its investigations.¹² Forty percent of the Indigenous people I interviewed and over two-thirds of the non-Indigenous people thought that a lack of time and resources, such as the number and type of staff employed in each office, also influenced the scope of the RCIADIC's work to a large extent. As outlined in Chapter 7, this was one of the reasons given for the RCIADIC's failure to adopt an intersectional race and gender focus.

Both administrative and professional staffing resources were often scarce and inadequate.¹³ Typically the police and prison officers unions had more legal staff appearing at the death hearings than the RCIADIC. Because the RCIADIC investigations were occurring nationally, it drained the availability of experts in various fields, which made it difficult for some offices to appoint all the necessary experts they required.

Staff of the RCIADIC and the AIUs thought they had been given insufficient time to complete their respective tasks. Many of those working in the AIUs felt that they were 'behind the eight ball' since the RCIADIC had already started when the AIUs were established and because they had a very short time within which to

¹² Iacobucci notes that when evaluating the effectiveness of a commission, efficiency and economy are important factors to consider. Therefore a commission will always be conscious of how much time and money has been expended: Frank Iacobucci, 'Commissions of Inquiry and Public Policy in Canada' in A Paul Pross, Innis Christie and John A Yogis (eds) *Commissions of Inquiry* (1990) 21.

¹³ Christie and Pross note that the key to a 'successful' commission is the quality of the management, which in turn depends on the quality of the staff. They propose, however, that commissions are often under-resourced in terms of administrative or management staff to maintain the independence of the commission from the sponsoring government: Christie and Pross, above n 1, 7.

achieve their goals.¹⁴ As one might expect, the commissioners were ‘working under enormous pressure all the time’.¹⁵ Many people commented that they had worked very long hours during the inquiry. Indeed, several people I interviewed said that working for the RCIADIC took a toll on their personal life. Lawyers and field officers spent weeks away from families, while having to deal with a subject matter that was difficult to assess and understand. According to anecdotal evidence, some marriages ended during the RCIADIC.

Some indicated that while working for the RCIADIC they became emotionally drained.

We were probably working at about 14 to 16 hours a day, seven days a week for some extent for about 18 months. It was pretty heavy going for most of us. I think probably some of the reasons I want to forget ... not forget but it was a daunting task and a very highly emotionally charged area to work in.¹⁶

The lack of time, coupled with the vast amounts of information collected and the complexity of the matters being investigated, influenced the types of recommendations made and the reports that were written. Rather than having the time to fully debate and discuss the findings, much of what was contained in the reports depended ultimately on ‘how knowledgeable the draftperson was, what their particular interest was, their ideology, all of those other sorts of factors’.¹⁷ This is not uncommon with royal commissions. For example, Richard Simeon’s critique of the Canadian Macdonald Royal Commission attributes the outcomes of that commission to the political and disciplinary predispositions of those who were involved in conducting the investigation.¹⁸

One of the lawyers viewed the compilation of the *National Report* as an unrealistic and overly ambitious goal due to the impediments they all faced.

¹⁴ Interview with IFNL41 (Face-to-face interview, 14 April 2003). The Aboriginal Issues Units (AIUs) were only in existence for approximately 18 months.

¹⁵ Interview with NIML14 (Face-to-face interview, 9 May 2003).

¹⁶ Interview with IMNL37 (Face-to-face interview, 30 June 2003).

¹⁷ Interview with NIML13 (Face-to-face interview, 27 May 2003).

¹⁸ Richard Simeon, 'Inside the Macdonald Commission' (1987) 22 *Studies in Political Economy* 167.

Legal and informal challenges made by governments and by police and prison officers unions against the RCIADIC's powers of investigation created further delays. Additionally, the hostility directed towards those employed by the RCIADIC often made the working environment unpleasant for many of the staff. One lawyer noted that '[i]t was almost intolerable the attacks from the police on individuals within the commission, which would be made in open court.'¹⁹

The actual investigation of the deaths was an overwhelming assignment in light of the number of deaths that fell within the terms of reference, the procedures used to conduct the investigations and the geographical magnitude of two of the States (Western Australia and Queensland). The fact that each death was investigated using a quasi-judicial process made the investigations into the deaths a protracted endeavour. Four of the counsel assisting and instructing solicitors believed that many of the less contentious deaths could have been investigated by reviewing the enormous amount of written material collected from government agencies and by having a series of brainstorming sessions with various members of the community and other institutions, rather than having separate hearings for each deceased.²⁰

The other thing about the royal commission process was that we wasted a lot of time in starting off doing a whole range of repeat inquests. I think that people would say that now. It's a difficult observation to make because that's what people wanted, people really wanted a second guess or a second chance at what had happened in the courts. And that's where we started.²¹

As this person noted, however, it is unlikely that many members of the Indigenous and non-Indigenous communities would have accepted an abridged process. It would also have been impossible for the RCIADIC to adopt such a process early on in its existence since there had been no preliminary work carried out by the

¹⁹ Interview with NIFL22 (Face-to-face interview, 25 June 2003).

²⁰ Indeed attempts were made in some jurisdictions to shorten the length of the some of the hearings. This was necessitated in Western Australia by the number of deaths needing investigation. In New South Wales, Queensland, Victoria and Tasmania, some deaths received more attention than others due to time limitations. Having said this it is important to acknowledge that a number of the people I interviewed emphasised the fact that all deaths were thoroughly investigated. See also the reassurance given in the *National Report: Australia, Royal Commission into Aboriginal Deaths in Custody, Royal Commission into Aboriginal Deaths in Custody: National Report, Vol 1-5* (1991) vol 1, 59 (abbreviated as *National Report* in repeated citations).

²¹ Interview with NIFL21 (Face-to-face interview, 29 May 2003).

federal government to determine what parameters, if any, should be placed on the investigations.

C Conservative Interpretation of Terms of Reference and Powers of Investigation

When investigating the deaths, one of the questions that the commissioners were attempting to answer was whether any police or prison officers could be blamed. In doing so, the commissioners were bound by their terms of reference and the Commonwealth, State and Territory Acts that regulated their powers of investigation.²² The commissioners applied a civil standard of proof to any findings of fact. They were also able to consider evidence that would not have been admissible in a court of law. They could not therefore find police and prison officers criminally responsible for the deaths. Instead, the most the commissioners could do was to make recommendations that appropriate prosecutorial or disciplinary agencies conduct further investigations. In doing so, the commissioners needed to consider whether there was sufficiently persuasive evidence to warrant such a recommendation. As it turned out, not many of the commissioners were prepared to rely on the evidence presented to such a degree.²³

The Indigenous people I interviewed were particularly disappointed with the failure of the RCIADIC to apportion blame to individual police and custodial officers. Half of them thought that the RCIADIC had failed to use the full extent of its powers and had acted in a conservative manner when making determinations regarding why the deceased had died. Although most of the Indigenous people I interviewed were aware that the RCIADIC could not make any findings of guilt,

²² As outlined in Chapter 4, the Acts that governed the RCIADIC's investigative powers at the time were: *Royal Commissions Act 1902* (Cth); *Royal Commissions Act 1923* (NSW); *Commission of Inquiry (Deaths in Custody) Act 1989* (NT); *Commissions of Inquiry Act 1950* (Qld); *Royal Commissions Act 1917* (SA); *Evidence Act 1958* (Tas); *Constitution Act 1975* (Vic); *Evidence Act 1958* (Vic); *Royal Commissions Act 1968* (WA).

²³ As outlined in Chapter 1, some scholars argue that evidence provided by non-Indigenous people was considered more reliable than evidence provided by Indigenous people which may have affected the final determinations made by some of the commissioners in relation to the deaths. See for example: Mark Harris, 'Deconstructing the Royal Commission - Representations of "Aboriginality" in the Royal Commission into Aboriginal Deaths in Custody' in Greta Bird, Gary Martin and Jennifer Nielsen (eds) *Majah: Indigenous Peoples and the Law* (1996) 191; Jeannine Purdy, 'Royal Commissions and Omissions: What Was Left out of the Report on the Death of John Pat' (1994) 10 *Australian Journal of Law and Society* 37.

many thought that the commissioners should have at least used stronger wording in the death reports against some individuals whom they thought had lied giving evidence.

Anyway what I objected to was the fact that the royal commission could have found in those cases that they believed that this person was killed deliberately and then required some further work to be done with the purpose of setting charges. ... But they chose simply to say overall that they're suspicious and I think, as I said in Queensland, the strongest one that came up was that the evidence of the police leaves a lot to be desired. ... I mean they were out and out lying and they made up stories to cover themselves.²⁴

Another Indigenous person claimed that the commissioners lacked the 'will' to take allegations of abuse against Indigenous women any further.²⁵ Additionally six non-Indigenous people I interviewed (five of whom were legally trained) thought that the commissioners could have used their powers to make more radical recommendations, not only in relation to findings of fault but also in relation to other aspects of criminal justice policy. One lawyer said:

I think the majority view at that commissioners' table at the end was that if we go in too hard or too radical, we'll be completely dismissed and nothing will happen. Whereas I think the reality has turned out to be that by going in moderately, the governments were able to just sort of parry them away and make the outrageously dishonest statements about implementing this and that recommendation. Of course they didn't, and I mean quite frankly, when you look at Aboriginal affairs in regards to the criminal justice system on the ground, nothing's any better.

You then had a probably once in a life time opportunity with that royal commission that really did have a national focus, shall we say, a national visibility. It was being reported heavily and it really was probably a once in a lifetime opportunity to really put out some radical proposals that would really have started to impact on the rate we are locking these people up.²⁶

²⁴ Interview with IMNL25 (Face-to-face interview, 24 October 2003).

²⁵ Interview with IMN46 (Telephone interview, 30 August 2004).

²⁶ Interview with NIML20 (Telephone interview, 17 September 2003).

As Liora Salter and Simeon note, however, the ability of a royal commission to make radical recommendations depends heavily on the availability of resources and the pressures that are exerted upon the inquiry by external agencies.²⁷

The tension over how much blame should be placed on certain individuals was present throughout the inquiry. This tension existed because the RCIADIC had been portrayed as primarily wanting to investigate why the deaths had occurred and to determine whether there had been any foul play on the part of police and custodial staff. Two of the people I interviewed thought that Indigenous communities had not been adequately informed about what the RCIADIC was doing and what powers it possessed, which meant that many Indigenous people believed that there would be different findings in relation to the deaths.

One of the lawyers thought that the *Mahon v Air New Zealand*²⁸ case had influenced the way that the commissioners made their rulings. The case considered the personal liability of Commissioner Mahon in recommending prosecutions (in a 1981 royal commission report) against Air New Zealand for the crash of one of its aircraft in Antarctic. Air New Zealand was successful in proving that Mahon had made the recommendations without there being any substantial evidence to support findings of fault. This case had been decided in the mid 1980s, so the commissioners of the RCIADIC were very likely to have been aware of the possibility of being held personally liable if they incriminated individual police or prison officers without ensuring that the rules of natural justice had been followed. They were likely to have been conscious of the need to make sure that they had a sufficient amount of evidence to substantiate any claims they made. The fact that witnesses had died, the deaths had occurred a long time ago, documents were missing, and some witnesses were considered unreliable resulted in the commissioners taking a cautious stance in relation to the allocation of blame.

²⁷ Liora Salter, 'The Two Contradictions in Public Inquiries' in A Paul Pross, Innis Christie and John A Yogis (eds) *Commissions of Inquiry* (1990) 173; Simeon, above n 18.

²⁸ *Mahon v Air New Zealand* (1984) AC 808.

One Indigenous person felt that because of its caution the RCIADIC had become ‘a very soulless exercise’.²⁹ The same person noted that the families of the deceased had suffered because of the repeat investigations and in the end there were one or two very minor ‘raps over the knuckles out of the entire process’.³⁰ According to another Indigenous person, the overall feeling was that there was no conclusion to the story and the RCIADIC did not deal with the cases. Some families are still questioning the cause of their loved one’s death and are seeking to open some of the files. Yet another Indigenous person thought that the appointment of judicial officers and senior lawyers as commissioners meant that the reports into the deaths could not be challenged but that the final outcomes were ‘pretty light’.³¹

D *Adoption of Deep Colonising Methodologies*

1 *Social Subordination*

In most jurisdictions³² the staff of the AIUs and the lawyers clashed or had little to do with each other, partly because of disagreements about what should be investigated and what was the ‘right’ knowledge that needed to be acquired, but also because those who worked in the AIUs felt that they were disadvantaged. Factors such as being located on lower floors, being paid substantially less than other RCIADIC staff, and the perception that the lawyers (predominantly non-Indigenous) were the most powerful group because of their professional qualifications, resulted in some members of the AIUs feeling marginalised and oppressed. Ironically, the RCIADIC was established to encourage the reversal of such treatment of Indigenous people by the wider community and by the criminal justice system. Its own contribution to the marginalisation of Indigenous people epitomises what Deborah Bird Rose describes as a deep colonising process existing within ‘institutions that are meant to reverse processes of colonisation’.³³

²⁹ Interview with IMNL32 (Face-to-face interview, 4 April 2003).

³⁰ Interview with IMNL32 (Face-to-face interview, 4 April 2003).

³¹ Interview with IMNL25 (Face-to-face interview, 24 October 2003).

³² According to those interviewed, this was particularly the case in Queensland and Western Australia.

³³ Deborah Bird Rose, ‘Land Rights and Deep Colonising: The Erasure of Women’ (1996) 3(85) *Aboriginal Law Bulletin* 6, 6.

One Indigenous person who worked in one of the RCIADIC regional offices (and not for one of the AIUs) observed that because the AIUs were established over a year and a half after the RCIADIC had started, it resulted in ‘more credence [being given] to the legal aspects as to why Aboriginal people were dying’.³⁴ The ‘right’ knowledge was over-determined by the legal (white) worldview. The lawyers had already established a particular methodological and research philosophy and this made it difficult to incorporate other perspectives. Another Indigenous person noted: ‘There were some disputes over the white fella’s perception of what we were, how it was going to go and an Aboriginal perception of what it is we should be doing’.³⁵

2 *Denial and Devaluation of Indigenous Knowledge*

The inability of the RCIADIC to incorporate other perspectives denied the aspirations held by Indigenous staff members that they would be able to contribute their skills and knowledge to the inquiry. A non-Indigenous research officer said:

Indigenous people [were] hoping that they could claim some space and some control over it ... there were a number of people that were coming on board hoping to add another voice to that I think.³⁶

There was a perception on the part of some of the lawyers that the AIUs were not capable of doing the job they were given. Two of the non-Indigenous lawyers said that the AIUs had failed to contribute an underlying issues perspective and that the solutions they had offered had been unrealistic. They commented that it would have been difficult for the AIUs to come up with reasonable recommendations because they believed they were inadequately trained to operate effectively within a government appointed entity.

³⁴ Interview with IFNL40 (Face-to-face interview, 15 April 2003).

³⁵ Interview with IFNL41 (Face-to-face interview, 14 April 2003).

³⁶ Interview with NIMNL45 (Telephone interview, 30 August 2004).

I mean I don't know, there was this kind of divide in a sense a sort of Berlin Wall between the commission and the [Aboriginal] Issues Units I think in most places. But I'd be interested to know whether they actually would have liked to receive more direction than they got.³⁷

According to two of the people interviewed, one of whom was Indigenous, those who worked for the AIUs felt more accountable to their own communities rather than to the research philosophy of the RCIADIC. This made the Indigenous staff determined to record all of the concerns reported to them during their consultations with Indigenous people. At times this information was unsubstantiated (according to legal standards), making it difficult for the commissioners and lawyers to use it in their investigations and reports.³⁸

The dominant legal mindset denied Indigenous authority and knowledge by requiring that all information acquired satisfy legal evidentiary rules. This occurred despite the RCIADIC's discretionary power to assess all evidence presented and to further investigate allegations it considered appropriate. The information collected by the AIUs was often dismissed as being biased or unreliable:

[The AIUs] were to give us the raw opinion as best they could, but to do that in fairness to others or say things like if you want to say something, well what's the basis for this. And once you start in that argument, then I think the units felt they were being questioned about their integrity to deliver. That somehow or other they were being challenged over their integrity which wasn't what was intended. But it was the nature of the commission to question everything about what was being put to it and to seek some form of comprehension to it, or to establish some principle base by which to go forward upon or to relate it to a set of occurrences or facts that you could point to.³⁹

³⁷ Interview with NIFL23 (Telephone interview, 8 November 2003).

³⁸ For example, as explained in Chapter 6, the lack of evidence (and ultimately the lack of time to pursue that evidence) supporting allegations of police sexual abuse of Indigenous women prohibited the commissioners from making any findings of fact in relation to such complaints.

³⁹ Interview with IMNL34 (Face-to-face interview, 16 July 2004).

According to three Indigenous people interviewed, the use of predominantly non-Indigenous academics to research matters pertaining to Indigenous people contributed to the flaws in the procedures used by RCIADIC:

The commission, in terms of its investigation and findings in my view, was dominated by a non-Indigenous interpretation. In saying that, of course you had researchers contributing that have good currency within the general Indigenous affairs domain. But it's still not Aboriginal people ... [which is who] I would be looking for to put it together and that remains an issue, I think.⁴⁰

The reports of the AIUs were written in regional offices, but they were only substantially incorporated as part of a published report when the *National Report* was prepared. Consequently, it was predominantly left to non-Indigenous staff to conduct an analysis of the data collected by the AIUs. The AIUs had, in the end, little or no control over how their work was incorporated into the regional reports or into the *National Report*.⁴¹ The use of non-Indigenous researchers and the denial of Indigenous knowledge reinforced the perception that only the dominant white colonisers could properly assess what was required to change the lives of the colonised other.

3 *White Ignorance of Cultural Practices and Knowledge*

Some of the Indigenous staff members were related to those who had died. Some came across personal information about their own lives. Asking these Indigenous workers to continue with their jobs while also dealing with their past and with the lives and deaths of their family members was, according to one Indigenous and three non-Indigenous people I interviewed, an unreasonable request. It was a request which forced the Indigenous workers to ignore their feelings of anger from having uncovered certain historical facts and suppressed their own cultural values and protocols. A non-Indigenous research officer recalled:

⁴⁰ Interview with IMNL32 (Face-to-face interview, 4 April 2003).

⁴¹ The Northern Territory AIU was an exception to this. The reason for this is unclear but some have indicated it was partly to do with the capabilities of the head of the Northern Territory AIU and partly to do with the way in which the commissioner associated with that jurisdiction interacted with the unit.

I mean the other thing that needs to be acknowledged is that Aboriginal people for the first time were digging up some of the stuff that was lying around in history and records and people's statements and it was about their own stories too. ... So often this was the first time that I think some of the Aboriginal people in a very public way were being told things and had to face things in a leadership way that were really nasty and tapped into stuff that they were still coming to terms with in their own lives. ... [And] they had relations in prison, they had relations who had died, they had relations who were violent, they knew issues of abuse and so on and somehow to pretend or not pretend but to put them aside, it was asking a hell of a lot of the people involved.⁴²

Most of the Indigenous people who were interviewed indicated that they found their job difficult because they had to deal with a sensitive issue - the issue of death - and at the same time they had to be careful of the manner in which they spoke to the family and friends of a deceased. One Indigenous person remarked that there was little, if any, acknowledgement on the part of the lawyers that by talking about death they were talking about something sacred.

The cultural values and beliefs which made working conditions for the Indigenous staff members extremely difficult were not understood by the non-Indigenous RCIADIC staff members. Nor had such problems been anticipated. Over half of the Indigenous people I interviewed and almost two-thirds of the non-Indigenous interviewees observed, in retrospect, that the non-Indigenous lawyers breached many cultural protocols and traditions because of their lack of knowledge and understanding about Indigenous cultural traditions and laws. For example, one Indigenous research officer described how she had been asked to retrieve certain evidence associated with one of the deaths from the evidence room. This research officer experienced much offence and grief from sighting the evidence which included photos of the deceased. Indigenous and non-Indigenous people who were interviewed observed that the aim of the legal staff was to get the job done, over and above concerns about cultural sensitivities. These oversights and limitations ultimately affected what information was collected and the weight that

⁴² Interview with NIMNL45 (Telephone interview, 30 August 2004).

it was given. This in turn affected the RCIADIC's ability to fully explore how Indigenous men and women experience post-colonial life in different ways.

It took some time before many of the lawyers were in a position to fully understand the material they had collected. Indeed, some of the facts that they uncovered caused the non-Indigenous staff members significant distress. Five of the non-Indigenous legally trained people who were interviewed felt that they (and other lawyers) were working in an area that they did not have a right to work in or that they were unfamiliar with. As one of these people reflected: 'at what point is it really my right or responsibility or obligation to pry heavily into those issues when they're not really ones that I think benefit from some outsider like me putting their gloss on it?'⁴³

4 *Lack of Support*

There was no counselling offered to the Indigenous staff or to the families of the deceased during or after the RCIADIC because no one had considered that it would be necessary. Many of the Indigenous people interviewed felt that the lack of counselling services and opportunities to talk about their experiences left them without any closure. This was also true of the families of the deceased. There was no healing process implemented for Indigenous people to say 'well this is what it was like for me ... when the commission came to town'.⁴⁴

Other Indigenous staff members faced hostility and were placed in unsafe situations when asked by the lawyers to approach Indigenous communities or to act as spokespeople for the RCIADIC. The lawyers had not anticipated Indigenous people would react in such a hostile manner towards other Indigenous people working for the RCIADIC. The antagonism directed at the Indigenous workers made their job extremely difficult and contributed to the problem of trying to balance the interests of the communities with the need to maintain a level of objectivity:

⁴³ Interview with NIML39 (Face-to-face interview, 9 May 2003).

⁴⁴ Interview with IFNL3 (Face-to-face interview, 30 June 2003).

And I guess being a community person too, you kind of feel like your allegiance is to your community but you're also trying to do a job and represent that community point as much as you can.⁴⁵

5 *Communication and Representations*

None of the families were provided with copies of the death reports prepared by the commissioners.⁴⁶ The responsibility of the commissioners was to deliver the reports to the Commonwealth, State and Territory governments. Once the governments received a report it was their responsibility to distribute it to interested parties, but according to one of the commissioners, this did not include the families of the deceased. In most cases it was ultimately left up to individual Indigenous staff members who either worked for the RICADIC or were associated in some other way with the work of the RCIADIC to distribute copies to families. Others received copies of the reports by courier, a form of contact which the families considered impersonal and uncaring. Such practices left some families with a lasting resentment towards the RCIADIC. Ironically, the RCIADIC in many of its published reports stressed the importance of police and coroners keeping families members informed of their investigations.

The primary focus of the State commissioners was upon the individual deaths. One Indigenous person I interviewed believed that the investigation into the individual deaths had been overly personalised and had not fully considered the context within which the 'official' records had been created. This caused significant trauma for some of the families:

People thought that their life had been exposed. Their whole community had been exposed and they had no control over it because it's just white lawyers and community welfare people and the police departments and everything who pulled old welfare records out, which people thought were lies in the first instance and so for them it wasn't a matter of the truth being out there, it was a matter of the lies being regurgitated in the official royal commission.⁴⁷

⁴⁵ Interview with IFNL19 (Face-to-face interview, 24 November 2003).

⁴⁶ Interview with IFNL3 (Face-to-face interview, 30 June 2003).

⁴⁷ Interview with IFNL16 (Face-to-face interview, 1 July 2003).

Another Indigenous research officer expressed the same sentiment by saying that the RCIADIC was supposed to have

opened the doorway ... but it also opened a wound in the heart of the Aboriginal nation in Australia. That wound that has been festering since early '88. ... And instead of taking a cloth, a healing cloth to clean it out... cleaning out all the garbage, it was ripped by the way in which certain things were done so that the wound is still open, it's festering now.⁴⁸

The commissioners and lawyers had a different perception of this process. They thought they were doing the families a service by putting together a detailed 'life story of the individual'.⁴⁹ Unfortunately, in doing so, the RCIADIC failed to provide answers for many of the families about how their family member had died in custody.

II LESSONS

From the interviews there are several lessons that, if acknowledged, may prevent negative outcomes when future royal commissions or inquiries are established to deal with Indigenous affairs. The lessons are:

- Non-Indigenous RCIADIC staff should have undergone extensive cultural awareness training and Indigenous staff should have been appointed at an equivalent level as the non-Indigenous senior staff members.
- In order to obtain and retain public support, particularly of the Indigenous communities, there should have been adequate dissemination of information about the RCIADIC investigation before and during the inquiry.
- Preliminary research, with appropriate Indigenous involvement should have been conducted prior to the establishment of the RCIADIC, in order for the staff and the public to properly understand what it was that needed investigating.

⁴⁸ Interview with IFNL3 (Face-to-face interview, 30 June 2003).

⁴⁹ Interview with NIML14 (Face-to-face interview, 9 May 2003).

- Multi-member commissions should only be used with caution.

A *Cultural Awareness Training and Indigenous Staff Appointments*

The most important lesson from this research is that to avoid deep colonising practices, the non-Indigenous people working for the RCIADIC should have undertaken extensive cultural awareness training prior to embarking on, and even during, the research project. This requirement should have been imposed regardless of a person's prior experience with Indigenous people. The complexity of Indigenous culture, like any culture, means that any such training is always incomplete. In conceptualising a decolonising methodology for indigenous researchers, Linda Tuhiwai Smith notes that

[i]ndigenous methodologies tend to approach cultural protocols, values and behaviours as part of methodology. They are 'factors' to be built in to research explicitly, to be thought about reflexively, to be declared openly as part of the research design, to be discussed as part of the final results of a study and to be disseminated back to the people in culturally appropriate ways and in a language that can be understood.⁵⁰

It is not enough for investigators to have worked with Indigenous people in some legal capacity in the past and to assume that an awareness of Indigenous marginalisation is enough to create an environment which does not further colonise and oppress. Indigenous cultural traditions and beliefs need to form part of the research project.

To assist with this goal, the Indigenous advisors and researchers should have been given positions of power equal to those of non-Indigenous appointees. This would have ensured the substantive and symbolic presence of Indigenous authority and knowledge. Such a powerful and significant presence would have facilitated more appropriate debates and discussions instead of stifling Indigenous voices and knowledge which occurred despite the sincere desire of non-

⁵⁰ Linda Tuhiwai Smith, *Deconlonizing Methodologies: Research and Indigenous Peoples* (1999) 15.

Indigenous staff to be on the side of Indigenous people. One of the ways Tuhiwai Smith suggests Western researchers can decolonise their methodology is to ‘make space’ for indigenous researchers and voices.⁵¹ This Indigenous presence should have been appointed at the beginning of the project. Without a proper understanding of Indigenous culture, traditions and values, it was impossible for the RCIADIC to fully comprehend the complexity of the matters they investigated, including how the position of Indigenous women is different to that of Indigenous men.

B *Communication of the Research Project*

A second lesson learned is that educating the people most affected by the outcome of the RCIADIC about the reason for the inquiry and the parameters of its powers was necessary for engendering a supportive and trusting environment. This should have happened prior to the establishment of the inquiry. Regular reporting back to Indigenous communities in ways that avoided the use of complex legal language would have lessened the misunderstandings and misgivings of families and friends of the deceased. Tuhiwai Smith notes that an important aspect of decolonising research methodologies is the reporting back to the people, which ‘is never a one-off exercise or a task that can be signed off on completion of the written report’.⁵² This is contrary to typical non-Indigenous research which views a project completed once the report is written. However in the absence of such careful dissemination of information, the RCIADIC, in its investigation of such a highly controversial and politically sensitive matter, found it difficult to maintain public support and to appear effective. As Janet Ransley concludes:

[t]o succeed as investigators of political wrongdoing ... royal commissions need more than their powers and flexible procedures. They need to maintain their independence from government influence, and the public perception of that independence. That is, they need to develop and maintain their own pool of public support in a politically contentious environment.⁵³

⁵¹ Ibid 177.

⁵² Ibid 15.

⁵³ Janet Ransley, *Inquisitorial Royal Commissions and the Investigation of Political Wrongdoing* (PhD thesis, Griffith, 2001) 221.

The RCIADIC did, to some extent, inform the families and communities associated with the deaths about the purpose and role of the investigation shortly before each hearing. However, this was done on an ad hoc basis as each hearing was prepared and did not occur prior to the establishment of the RCIADIC. When the AIUs were set up 18 months after the RCIADIC was first established, further community consultations were conducted, but by this time, the focus of the inquiry was changing and no one had been held accountable for the deaths. Any attempt to gain public support was, at this late stage, futile.

Associated with the need for proper continuing communication is the requirement for the provision of counselling services, both during and at the conclusion of the investigation for all staff (whether Indigenous or non-Indigenous) and for the family and friends of the deceased. This would have facilitated the healing process that was anticipated from the RCIADIC findings.

C The Need for Preliminary Research

It was important for the federal government to have acquired a clear understanding of the problem prior to the establishment of the RCIADIC. This applies despite the fact that the RCIADIC was initially established as a legal and quasi-judicial inquiry. A better grasp of the parameters of the problem was needed before establishing the inquiry and before expecting the inquiry to commence its investigation. This would have assisted with the early identification of unanticipated outcomes, and would have ultimately informed the manner in which the terms of reference were framed. This was particularly important for the RCIADIC - which was partly an investigative inquiry as opposed to purely an inquisitorial one - since the topic that needed researching turned out to be unexpectedly broad.

Related to this is the possibility that someone with both legal and social science research skills should have been appointed to head the inquiry or at least an equal number of legal and sociological researchers should have been appointed. This would have addressed many of the problems that arose because of the

predominant use of legal procedures and the powerful influence of the liberal legal mindset. Of course, the requirement that both sociologists and lawyers be appointed could only have occurred if prior to establishing the RCIADIC a thorough preliminary investigation of the problem had occurred and had discovered that more was needed than just an investigation into the custodial deaths.

D *The Inappropriate Use of Multi-Member Commissions*

As Leonard Hallett notes, there are both advantages and disadvantages to the multi-member structure.⁵⁴ One of the most common disadvantages of appointing more than one commissioner is the delay caused by the need to obtain various views. When the RCIADIC was initially established, only one commissioner was appointed. The discovery of more deaths requiring investigation led to five additional commissioners being appointed. The inquiries into the deaths were conducted using a single member approach in each of the jurisdictions, including Western Australia.⁵⁵ This was not the case in making the final recommendations. Although the federal government did not require the consensus of all the commissioners in making recommendations, this was the approach the commissioners decided to adopt.⁵⁶ In doing so, it ensured the government received well-informed advice, since the recommendations made did not depend on the view of only one person. Nevertheless, many of those who took part in the drafting of the *National Report* and recommendations noted that the consensus approach was a long drawn-out and frustrating process which may have inhibited certain views from emerging.

CONCLUSION

Despite the enormous problems with and shortcomings of the RCIADC, over half of all of those interviewed expressly stated that the inquiry managed to achieve many positive outcomes. Many pointed out, however, that the extent of the

⁵⁴ Leonard Arthur Hallett, *Royal Commission and Boards of Inquiry: Some Legal and Procedural Aspects* (1982) 73.

⁵⁵ Although Western Australia had two commissioners, only one focused on the deaths.

⁵⁶ *National Report*, above n 20, vol 1, xx.

RCIADIC's 'success' depended very much on whether governments implemented the recommendations made.

Most of the people interviewed said that the recommendations addressed very important problems confronting Indigenous people. Despite its limitations 'it was an important thing to have done.'⁵⁷ There have been some small improvements to the treatment of Indigenous people when arrested and when detained as a result of the RCIADIC findings. For example, police cells have improved, visitor schemes have been introduced, coroner inquiries are now more thorough, Indigenous sentencing courts have been established, police awareness about best practices to be used when dealing with Indigenous detainees has improved and the administration of Indigenous affairs has been restructured, which has led to improved coordination between departments.⁵⁸

One non-Indigenous person expressed the following view, which was endorsed by others:

The royal commission achieved far more during its life than was really ever achieved afterwards and it did that because of the constant sort of threat hanging over the heads of authorities responsible for these sorts of policies. The commission had warned them, and if they didn't do something about it then the potential was that there would be another death, and then they would be in deep trouble because they would be called to account for the fact that they hadn't actually responded to the commission's early criticisms. Whereas I think once the commission finished, that same pressure wasn't there.⁵⁹

The prevailing view amongst the Indigenous people interviewed was that they now have 339 recommendations to 'hang their hat on'.⁶⁰ When arguing for policy reforms, they can use the recommendations as support. Many were of the view that the inquiry committed the various governments to making changes, even though they may not have fully implemented the recommendations.

⁵⁷ Interview with IMNL12 (Face-to-face interview, 26 May 2003).

⁵⁸ Although who knows what will happen now with the proposed dismantling of the Aboriginal and Torres Strait Islander Commission (ATSIC).

⁵⁹ Interview with NIFL23 (Telephone interview, 8 November 2003).

⁶⁰ Interview with IFNL41 (Face-to-face interview, 14 April 2003).

One Indigenous person referred to the *National Report* as ‘compulsory reading’ for anyone dealing with Indigenous people.⁶¹ It is a resource that provides a foundation upon which other dialogues can be generated. As a result of the RCIADIC, there is a better understanding about the needs of Indigenous people and about the diversity of the Indigenous culture.

Finally, the RCIADIC

skyrocketed Australia on the map as a country that violates the rights of Indigenous people. ... Within the national domestic framework it was a campaign, and the subject of the inquiry put Aboriginal issues on the breakfast table every day, every night for many years and so people were getting history lessons. In fact we used to say ... it was the biggest history lesson in Australia.⁶²

The following and final chapter firstly revisits the research questions and hypotheses and summarises the findings of my content and procedures analyses. Other unexpected findings are also outlined. Secondly, suggestions are made about how the RCIADIC could have more adequately dealt with the problems concerning Indigenous women.

⁶¹ Interview with IMNL37 (Face-to-face interview, 30 June 2003).

⁶² Interview with IFNL16 (Face-to-face interview, 1 July 2003).

CHAPTER 9: MISSING SUBJECTS

I WHAT WAS LEARNED?

It has long been observed that Indigenous women were ‘missing’ from the RCIADIC. My thesis sought to explain this omission. In particular I have endeavoured to answer three questions:

1. How, if at all, were problems confronting Indigenous women considered:
 - (a) in the texts prepared and submitted to the RCIADIC by the Aboriginal Issues Units (AIUs); and
 - (b) in the *Interim*, *National*, regional and death reports, and recommendations of the RCIADIC?
2. To what extent did these considerations differ?
3. Why did the RCIADIC consider the problems relating to Indigenous women in the way that it did?

In addition to answering these questions, I have given a detailed historical account of the reasons why and manner in which the RCIADIC was established and how it undertook its inquiry. My thesis has utilised material that was prepared at the time of the RCIADIC investigation by Indigenous and non-Indigenous lawyers and researchers, as well as interviews with 48 people who were involved with the inquiry, to document what concerned Indigenous women at the time, the extent to which the RCIADIC reflected those concerns, and why the RCIADIC focused primarily on Indigenous men instead of problems that particularly affected Indigenous women.

While conducting the inquiry, the RCIADIC commissioners, and legal and research staff were aware of the potential for non-Indigenous modes of cultural hegemony to affect the process and attempted to mollify these influences: for example, death hearings were held in venues other than courts in rural and regional towns, the use of government files and documents were acknowledged as being imbued with non-Indigenous viewpoints, seven AIUs were established,

Indigenous staff were employed, and an Indigenous commissioner was appointed. These initiatives were radical for the time. Unfortunately, as outlined in previous chapters, the RCIADIC was unable to adequately convey and satisfy Indigenous aspirations, particularly those of Indigenous women. The research relating to the underlying issues culminated in the publication of a *National Report* and the making of 339 recommendations to improve the lives of Indigenous people, but only five recommendations specifically referred to Indigenous women as a separate group and none specifically related to reducing family violence. The findings of my content analysis support the early feminist and Indigenous critiques of the RCIADIC, which in particular highlighted the lack of consideration of family violence in the *National Report* and recommendations. My content analysis (used to answer the first two research questions) has illustrated that the RCIADIC did not embrace the problems highlighted in the Indigenous texts that posed the most threat to the safety of Indigenous women.

Although many Indigenous women who contributed to the RCIADIC did not emphasise problems relating to family violence, the topic was raised particularly by the Northern Territory AIU. Furthermore, sexual and physical assaults by police against Indigenous women were also expressly highlighted as a problem in at least two jurisdictions.¹ Family violence and police assaults put Indigenous women in physical danger in the same way that the risk of custodial death placed Indigenous men in a precarious position. Family violence was often a reason why Indigenous men ended up in custody and police misconduct was directly relevant to the custodial experience of Indigenous people. Thus, both were within the scope of the RCIADIC's terms of reference. This was not, however, how the commissioners and other legal staff interpreted the terms of reference.

An intersectional race and gender analysis of the Indigenous texts I was able to access, together with the death, regional, *Interim* and *National* reports, has revealed that Indigenous women were not completely ignored by the RCIADIC. In fact their community-focused concerns, particularly those relating to housing,

¹ The Queensland and Northern Territory Aboriginal Issues Unit (AIU) reports contained specific references to the sexual exploitation of Indigenous women by police. Other jurisdictions referred to the mistreatment of Indigenous women by police in more general terms.

alcohol and drug abuse, visits of family members in custody, and adequate notification of deaths in custody and investigations of those deaths, were reflected in the reports. 'Community' rights were, however, ultimately framed in a way which emphasised the situation of Indigenous males and youth, who were identified as the 'critically disadvantaged other'. The interview data supported my interpretation.

Overwhelmingly the view was that the inquiry focused on 'race', with an acknowledgement that Indigenous males were at the forefront of the racialised inquiry. The main explanation given was that there was no requirement or request by Indigenous people to focus on gender. However, as Emma LaRocque notes, when dealing with gendered problems such as family violence, the promotion of community rights favours 'one individual (offender) over another (victim), elevating the offender's interests to "collective rights" while reducing the victim's interests to "individual rights"'.² This happened in the RCIADIC investigation. The disadvantaged position of Indigenous men, who were violent towards women, children and other community members, was afforded more concern and attention than the experience of Indigenous women at the hands of those men. There was greater value placed on male bodies as a resource for the future. The men were viewed as leaders and builders of the next generation; the women had children to keep them going and there was no expectation that they will be leaders and builders. Although other serious complaints emerged, such as the sexual assault and mistreatment of Indigenous women by police, they were put aside for the sake of saving the men from State inflicted forms of violence and thereby saving Indigenous people as a whole.

In Chapter 1, I offered six hypotheses regarding the RCIADIC's failure to take an intersectional race and gender approach. I repeat these in full here. These hypotheses guided the procedural analysis which answered the third research question. The ideological and procedural reasons for the RCIADIC's inability to take an intersectional approach were expected to include:

² Emma LaRocque, 'Re-Examining Culturally Appropriate Models in Criminal Justice Applications' in Michael Asch (ed) *Aboriginal and Treat Rights in Canada: Essays on Law, Equity and Respect for Difference* (1997) 75, 80.

Intentional omission

- a. The commissioners consciously ignored material that pointed to particular difficulties faced by Indigenous women because this would have complicated the inquiry by requiring a gendered as well as a racialised approach (an 'intersectional approach').
- b. The commissioners were instructed or influenced by government to ignore gender and to focus on race which implicitly emphasised male problems.

Unintended omission caused by an implicit or explicit 'race focus', liberal legal ideology, and time and resource constraints

- c. The commissioners were not specifically told to take an intersectional approach. They assumed it would be sufficient to make 'gender-neutral race focused' (but implicitly male-centred) recommendations in relation to the 'underlying issues'. The commissioners, in this case, would have acted with a gender bias, even if unconscious and unintended.
- d. The commissioners (all but one of whom were legally trained) adopted legalistic frameworks and assumptions in relation to Indigenous women. In adopting such legalistic frameworks and assumptions, the commissioners acted with gender and race biases, even if unconscious and unintended.
- e. The manner in which the RCIADIC was conducted, the fact that it was organised on a regional basis and the enormity of the investigation all contributed to an outcome in which certain material was inadvertently omitted.
- f. Neither the AIUs nor the RCIADIC considered problems specifically relating to Indigenous women because they were guided by what members of Indigenous communities said about the problems they were experiencing. The people consulted in the communities excluded gender and familial

relations from their discussions because it was easier and more politically prudent to focus on the State and its agencies.

Based on my interviews, I have found that hypotheses (c) to (f) explain the RCIADIC's failure to take an intersectional approach. Of particular importance was the establishment of the RCIADIC as a quasi-judicial organisation that embraced a liberal legal ideology. For some readers, my argument may seem paradoxical -- that the RCIADIC adopted a liberal legal ideology, but it was one that ultimately supported 'race' as a collectivity that did not recognize gender differences or women. In fact, both streams of thought were present. Liberal legal ideology, as I mentioned in Chapter 2, can manifest itself in many forms. It may, as was the case with the RCIADIC, embrace welfare or utilitarian values rather than values that espouse classic, rights-based principles. Additionally, the focus on liberal legal ideology in this thesis was predominantly on the way in which it tends to espouse formalistic notions of equality rather than on its other elements. In the case of the RCIADIC, the formalistic nature of liberalism structured the ways in which the terms of reference were interpreted, the ways in which evidence was gathered and interpreted, and the RCIADIC's inability to use declonising methodologies, all of which reflect the procedural aspects of the inquiry. Such an approach was not able to grasp an intersectional race/gender analysis at all, and this led to the 'missing subjects' of women and gender difference. At the same time, the RCIADIC's analyses of the deaths and the underlying issues, was undeniably focused on the effects of racial disadvantage, where 'race' as a collectivity was gendered as male, although not explicitly.

Although there was never any express direction given to the RCIADIC that it should ignore gender-specific problems, as an entity that was predominantly managed by non-Indigenous male lawyers, it overlooked gendered nuances. The commissioners conducted a predominantly legally directed investigation about 'race' without realising that by doing so, Indigenous males would be favoured. This unconscious bias towards Indigenous males supports the findings of feminist and deep colonising epistemological scholarship, particularly that which has considered the intersection of both race and gender (hypotheses (c) and (d)).

The time and resource constraints imposed by federal, State and Territory governments also affected the RCIADIC's ability to take a wider perspective and include an intersectional analysis (hypothesis (e)). With limited time and resources the RCIADIC did what it knew how to do best: it relied on legal knowledge, resources and procedures. According to law and politics scholarship that has critiqued the processes of royal commissions, such constraints are typical of royal commissions and markedly affect their efficacy and final recommendations.

There was an ideological bias towards the problems confronting Indigenous men by both Indigenous people and by the staff employed by the RCIADIC, including those that worked in the AIUs (hypotheses (c), (d) and (f)). This reflects what many critical Indigenous scholars have described as the silencing of Indigenous women for the sake of race-centred (which typically equates to 'male-centred') politics. This silencing occurred during the RCIADIC investigations through a variety of mechanisms including the use of inappropriate methodologies, cultural norms that made it difficult for Indigenous women and men to speak freely, significant pressure on Indigenous women to focus on 'community' claims such as self-determination, and the overwhelming emotional impact the large number of male deaths had on RCIADIC staff and Indigenous people consulted in the communities.

There were other unexpected findings that arose in conducting the research. First, my research methodology has revealed that 'missing subjects' were not 'just women', but also the knowledge and testimonies contained in the reports of the AIUs that appear to be no longer accessible for research. Although the *National Report* listed the missing reports as having been produced, it is uncertain if they exist today. My repeated efforts to obtain the reports have demonstrated the formidable obstacles that exist in accessing archived RCIADIC documents. Indigenous knowledge, as so often happens, was denied and devalued by an institution that intended to do quite the opposite.³

³ According to information collected from the interviews, many RCIADIC documents went missing when they were collected for archiving. This may have been how the AIU reports got lost.

Second, the interviews revealed there were many forms of institutional procedures and office politics present in producing the reports. Procedures and politics that not only reflected the dominance of the legal mindset, but also positions of power between Indigenous and non-Indigenous staff, influenced the RCIADIC's investigation. Unexpectedly, but fortunately, the 'underside' of the RCIADIC's procedures was revealed by the research.

II INDIGENOUS WOMEN POST-RCIADIC

The situation of Indigenous women as offenders and victims has dramatically worsened since the RCIADIC investigation. The incarceration rates for Indigenous females have increased at a much greater rate than for Indigenous males. The national female Indigenous prison population increased by 147% from 1991 to 2001 as compared to the male Indigenous prison population which increased by 69% over the same period.⁴ Two AIU staff and two non-Indigenous lawyers, during their interviews, specifically referred to the 'exponential' rate of increase of Indigenous female incarceration since the RCIADIC as something which was now of grave concern. According to one lawyer, 'since the royal commission, the imprisonment rates for women have increased by 300% [sic] and I don't think we really picked that as being what was going to happen'.⁵ The suicide of young Indigenous males in custody and their escalating criminal behaviour instead captured the attention of the commissioners, lawyers and other research staff.

⁴ Aboriginal and Torres Strait Islander Commission, 'Social Justice Report 2002' (Human Rights and Equal Opportunity Commission, 2002) ch 5; Australian Bureau of Statistics, *Prisoners in Australia: Catalogue 4517.0* (2004) <<http://www.abs.gov.au/ausstats/abs@.nsf/b06660592430724fca2568b5007b8619/8d5807d8074a7a5bca256a6800811054>> at 2 February 2005; Margaret Cameron, 'Women Prisoners and Correctional Programs' (2001) (194) *Australian Institute of Criminology - Trends & Issues in Crime and Criminal Justice* 1.

⁵ Interview with NIML13 (Face-to-face interview, 27 May 2003). It is unclear why the lawyer thought that the rate of imprisonment of Indigenous female offenders had increased by 300%. It may be that he was referring to a State rather than national figure. The important point that emerges from his quote, however, is that he was now aware of the fact that the imprisonment rate for Indigenous females had increased dramatically but that at the time of the RCIADIC this was not expected.

Of the State and Territory government implementation reports in the two years following the RCIADIC, the New South Wales, South Australian, and Western Australian reports contained references to the fact that the incarceration rates of Indigenous women had increased.⁶ In particular, the South Australian and Western Australian reports contained specific references to the fact that the RCIADIC had not addressed problems concerning Indigenous women in its recommendations.

Indigenous women in New South Wales made up 12.2% of the female prison population compared to 9.4% of Indigenous males as at 30 June 1993. As a result the 1992/93 New South Wales implementation report recognised that special consideration was required to address gendered custodial needs.

The 1993 South Australian implementation report identified two key areas which were of particular concern to Indigenous women and which required further attention: one was the over-representation of Indigenous women in the criminal justice system and the other was 'the critical carer's role played by Aboriginal women (accentuated by the absence of positive male role models in many Aboriginal families)'.⁷ In response to the first key area, a position of Women's Issues Officer was created in the Department of State Aboriginal Affairs to ensure that policies reflected the needs of Indigenous women.

Although the Western Australian implementation report recognised the high prevalence of Indigenous women in custody, there were no specific policies that had been implemented or that were recommended that addressed the needs of such women.

⁶ New South Wales Office of Aboriginal Affairs, 'Implementation of Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, 1992/93' (New South Wales Office of Aboriginal Affairs, 1994) 5; South Australia Department of Aboriginal Affairs, 'Royal Commission into Aboriginal Deaths in Custody: South Australian Government 1993 Implementation Report' (South Australia Department of Aboriginal Affairs, 1994) 30; Western Australia Aboriginal Affairs Planning Authority, 'Royal Commission into Aboriginal Deaths in Custody: Government of Western Australia Implementation Report 1993' (Western Australia Aboriginal Affairs Planning Authority, 1993) 22.

⁷ South Australia Department of Aboriginal Affairs, above n 6, 30.

The fact that shortly after the RCIADIC ended government agencies charged with assessing the implementation of the recommendations recognised the absence of a gendered custodial analysis in the *National Report* indicates that such an analysis should have been within the scope of the RCIADIC's investigation. Had the RCIADIC separated its data on offending and custodial experiences according to gender, it may have been better able to see the gender-specific patterns that were present. Had it also tailored the questions asked during its consultations towards separately examining the experiences of Indigenous female and male offenders, such information may have been more forthcoming. Had it then made specific recommendations concerning the welfare and needs of Indigenous women in custody, there may have been more of an effort made by governments to implement reforms and to commission research on the topic of Indigenous women in custody.

The three reports referred to above also made specific reference to the prevalence of family violence in Indigenous communities. Although brief, the reports acknowledged the need for more appropriate programs that were specifically directed towards ensuring the safety of Indigenous women and children. The involvement of Indigenous women in family violence prevention planning and programs was specifically highlighted.

The incidence and severity of family violence in Indigenous communities is, according to many, on the increase.⁸ In a report prepared by Paul Memmott et al for the Federal Attorney-General's Department, it was noted that most of the literature concerning family violence in Indigenous communities was published in the 1990s.⁹ According to Memmott et al this recent interest in, and movement to address, the problem of family violence in Indigenous communities is primarily a response to 'the fact that violence in Indigenous communities has dramatically increased in certain regions, at least since the 1980s, and in many cases from the

⁸ See for example Joan Kimm, *A Fatal Conjunction: Two Laws Two Cultures* (2004) ch 1; Paul Memmott et al, 'Violence in Indigenous Communities' (Crime Prevention Branch, Federal Attorney-General's Department, 2001) 6; Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (2nd ed, 2000) xiii.

⁹ Memmott et al, above n 8, 6.

1970s'.¹⁰ The Queensland Aboriginal and Torres Strait Islander Task Force on Violence, however, claimed that violence in Indigenous communities is not new and that 'Indigenous women's groups, concerned about their disintegrating world, have been calling for assistance for more than a decade'.¹¹ This in fact reflects the findings of this thesis: that the topic of family violence was of concern to Indigenous women even at the time of the RCIADIC.

The tension that exists between choosing whether to focus on 'community' or 'individual' rights when addressing family violence is analysed by Melissa Lucashenko.¹² Lucashenko, an Indigenous author, claims that black feminism requires the inclusion of a discussion of the position of Indigenous men. Only in this way can there be a full and frank dialogue of the topic. Neither Indigenous women nor men are in a position of power due to their common historical experiences. Therefore, any discussion of family violence needs to consider not only the position of women, but also men as a marginalised group. Lucashenko believes that by acknowledging the disempowerment of Indigenous men as a result of colonisation, women are in a better position to address the problem of family violence. This is because Indigenous women

can refuse to be verbally bullied or deceived by Aboriginal men seeking to hide their violence behind the rhetoric of disempowerment. ... [They] can openly acknowledge their oppression, while refusing to accept their violence as a necessary accompaniment to it.¹³

The RCIADIC exposed the appalling levels of disempowerment experienced by Indigenous men, but it did not do so with a view to equalising power relations within Indigenous communities. Rather, it was intent on exposing the oppression of Indigenous men by the dominant non-Indigenous culture. Although Indigenous and non-Indigenous race relations was the RCIADIC's primary focus, it would

¹⁰ Ibid.

¹¹ Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, above n 8, x.

¹² Melissa Lucashenko, 'Violence against Indigenous Women: Public and Private Dimensions' in Sandy Cook and Judith Bessant (eds) *Women's Encounters with Violence: Australian Experiences* (1997) 147.

¹³ Ibid 158.

still have been able to maintain that focus if the disempowered position of women had been given more consideration. It was well within the terms of reference to do so.

Instead the RCIADIC dealt with family violence as a matter unrelated to deaths in custody and therefore not an underlying issue. Mick Dodson, one of the Indigenous counsel assisting the RCIADIC, in a recent Press Club presentation agreed that the veil of silence regarding family violence needs lifting. However, he emphasised that this could only occur when Indigenous people felt safe to talk, which meant that fears of retribution by the community or the police and of being shamed needed to be allayed. The solution had to be a 'whole of government – whole of community' approach which had to be prioritised and not dealt with as a secondary program.¹⁴ One of the reasons which emerged from the interviews I conducted which explained why family violence was not raised as a prominent concern during the RCIADIC consultations was that Indigenous women were fearful about raising the topic. Providing them with a safe environment within which to discuss such a topic would have assisted the women in overcoming their fears. This would have required the appointment of appropriate facilitators who would need to have been Indigenous women, as well as the introduction of the topic of family violence during the consultations in a sensitive and culturally appropriate manner.

In their 2003 paper Don Weatherburn, Jackie Fitzgerald and Jiuzhao Hua report that Indigenous offenders are more likely to commit serious and violent offences than non-Indigenous offenders and that most of the violent crimes are committed against other Indigenous people, particularly women and children.¹⁵ They argue that diversion from custody of such offenders simply puts women and children at risk and that although all Indigenous people have suffered from colonisation there are some Indigenous people that do not commit violent offences. Therefore, they propose that 'we need to understand what it is that distinguishes Aboriginal people who frequently come into conflict with the law from those who do not',

¹⁴ Mick Dodson, 'Violence Dysfunction Aboriginality' (Paper presented at the National Press Club, Canberra, 11 June 2003) 7.

¹⁵ Don Weatherburn, Jackie Fitzgerald and Jiuzhao Hua, 'Reducing Aboriginal over-Representation in Prison' (2003) 62(3) *Australian Journal of Public Administration* 65.

particularly in relation to violent offenders, since in those cases the diversionary practices espoused by the RCIADIC are not suitable.¹⁶ This type of research was not conducted by the RCIADIC, although, according to some of the people I interviewed, it had been suggested by one of heads of the Queensland AIU.

Supporting Indigenous women to ‘foster a climate of intolerance toward physical and sexual abuse’ is considered by Weatherburn, Fitzgerald and Hua to be just as important for decreasing the Indigenous offending rate as reducing substance abuse and unemployment.¹⁷ Alcohol abuse causes violence in Indigenous communities but Weatherburn, Fitzgerald and Hua recognise that it is not the sole cause. An holistic approach is recommended whereby both the police and the community treat the problem seriously. Whatever programs are required, Weatherburn, Fitzgerald and Hua emphasise that family violence in Indigenous communities must be considered separately in order to reduce the over-representation of Indigenous people in custody. The RCIADIC did not reach this conclusion, despite data that showed over 55% of the deceased males had at some stage been convicted of physical or sexual assault.

The RCIADIC’s treatment of the problems concerning Indigenous women, particularly those that were detrimental to their safety, was inadequate. Although there were many procedural constraints placed upon the RCIADIC’s ability to conduct its inquiry, there have been other government appointed inquiries, such as the Manitoba Aboriginal Justice Inquiry (AJI), that have been able to see beyond the concept of race and adopt an intersectional race and gender approach. This raises questions about why it was that an inquiry that occurred at the same time as the RCIADIC, for a similar amount of time, with comparable terms of reference, was able to view the position of Aboriginal women as separate to Aboriginal men. Was it because Aboriginal women’s groups in Manitoba were more politically active and organised in highlighting gender-specific problems in the late 1980s? Or was it that Canadian academics and bureaucratic personnel consisted of more informed and politically motivated people who were prepared to advance the position of Aboriginal females as separate to that of Aboriginal males, and thus to

¹⁶ Ibid 70.

¹⁷ Ibid 71.

offer a richer research perspective to the Canadian commissioners? Was it that the Canadian commissioners' wide interpretation of the terms of reference encouraged the inclusion of gender diversity which ultimately impacted on the questions asked during community consultations? Or was it simply that the Australian inquiry was larger and therefore more overwhelming for the RCIADIC commissioners than the Canadian commissioners?

These are questions this thesis cannot answer. A comparative analysis of the two inquiries would provide many more insights into the operations of royal commission inquiries and into the way in which research about Indigenous people is conceptualised in Australia. Such an analysis would shed further light on the positioning of Indigenous women in legal and quasi-legal inquiries and it would identify more appropriate research methodologies. Most importantly, however, Indigenous women would be guaranteed a full voice in future inquiries and legal processes.

APPENDIX 1: THE MANITOBA ABORIGINAL JUSTICE INQUIRY

The Manitoba Aboriginal Justice Inquiry (AJI) tabled its report in 1991; this was the same year as the RCIADIC tabled its *National Report*. The information presented below is largely a descriptive account of how the AJI was established and of the way in which the AJI considered the problems relating to Aboriginal women. My account of the AJI's findings is based on the AJI report and on academic scholarship that has considered its investigation and recommendations.

A WHY THE AJI WAS ESTABLISHED AND HOW IT CONDUCTED ITS INQUIRY

The AJI was a provincial inquiry, that is, limited to Manitoba alone, which reported its findings on 29 August 1991, 4 months after the RCIADIC. It was initially established on 13 April 1988 (6 months after the RCIADIC) to examine how various aspects of the justice system treated Aboriginal people in Manitoba. Two commissioners were appointed to head the AJI: Commissioner Alvin Hamilton, a Justice of the Manitoba Court of Queen's Bench,¹ and Murray Sinclair, a Provincial Court Associate Chief Judge who was the first Aboriginal judge in Manitoba and the second to be appointed to the Bench in Canada.² Paul Chartrand notes that the appointment of an Aboriginal lawyer as one of the commissioners made the establishment of the inquiry 'remarkable'.³

The impetus for the AJI's establishment was the alleged inadequacy of the police investigations conducted into the death of two Aboriginal people.⁴ Helen Betty

¹ Aboriginal Justice Implementation Commission, *Biographies: Associate Chief Justice Alvin Hamilton* The Aboriginal Justice Implementation Committee <<http://www.ajic.mb.ca/bio/hamilton.html>> at 14 October 2004.

² Aboriginal Justice Implementation Commission, *Biographies: Judge Murray Sinclair* The Aboriginal Justice Implementation Committee <<http://www.ajic.mb.ca/bio/sinclair.html>> at 14 October 2004.

³ Paul L A H Chartrand, 'Manitoba's Aboriginal Justice Inquiry: 1988-1990' (1990) 2(42) *Aboriginal Law Bulletin* 18, 18. Paul Chartrand states that the broad mandate given to the inquiry, which was later ratified by the incoming conservative government, also made the inquiry 'remarkable'.

⁴ The information relating to the deaths was obtained from volume 2 of the Aboriginal Justice Inquiry (AJI) report: Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, Vol 1-2* (1991).

Osbourne was killed in 1971 and it was only in 1987, sixteen years after her death, that a man was finally convicted for her murder, although three other men who were allegedly involved with the murder escaped conviction. Both the investigation into her death by police and the trial were criticised by many Aboriginal and non-Aboriginal people as having shielded the alleged killers from prosecution.

Six months after the trial of Helen Osbourne, John Joseph Harper died during a struggle with police while being questioned about his identity. The Winnipeg Police Department claimed that the shooting was an accident, and exonerated the police officer involved the day after the shooting. Many people, particularly in the Aboriginal community, believed that several questions about the incident were left unanswered by the police service's internal investigation. They claimed that it had been tainted by racial prejudice.

These two deaths, as well as statistics that showed Aboriginal people were vastly over-represented in prison (the AJI report noted that at the time of the inquiry, although Aboriginal people comprised only 11.8% of Manitoba's population, they made up at least 50% of the Province's prison population),⁵ prompted a call for a judicial inquiry into the manner in which Aboriginal people were treated by the Manitoba justice system.

Similar controversies to those surrounding the inception of the RCIADIC were present during the establishment of the AJI. A number of legal challenges were launched which opposed the validity of the establishment of the AJI. In one of the challenges by the Winnipeg Police Association in 1989, the Manitoba Court of Appeal ruled that the Orders-in-Council establishing the AJI were invalid because they were passed only in English. This led to the enactment of *An Act to Establish and Validate the Public Inquiry into the Administration of Justice and Aboriginal People* (AJI Act) to legally re-establish the AJI.⁶

The terms of reference set out in the schedule of the Act were as follows:

⁵ Ibid vol 1, 2.

⁶ Ibid vol 1, 5. The Act came into effect in 1988.

The purpose of the commission is to inquire into, and make findings about, the state of conditions with respect to aboriginal people in the justice system in Manitoba and produce a final report for the Minister of Justice with conclusions, options and recommendations.

The commission's deliberations are to include considerations of all aspects of the cases of J.J. Harper and Helen Betty Osborne, and the commission may make any additional recommendations that it deems appropriate with respect to those cases, including a recommendation that there be further consideration of particular matters or further inquiry into any aspect of either case.⁷

Luke McNamara notes that the commissioners interpreted the terms of reference widely.⁸ According to the scope of the inquiry, the AJI was to consider all aspects of the justice system in its investigation, including the police, courts and correctional services. It was also required to examine whether Aboriginal and non-Aboriginal people were treated differently by the justice system.⁹ Nothing in the terms of reference indicated that Aboriginal women were to be considered separately.

The AJI, like the RCIADIC, took both a quasi-judicial and a consultative approach.¹⁰ The inquiry into the deaths and police investigations of Helen Osborne and John Harper were conducted more formally than the rest of the inquiry. Interested parties were allowed legal representation, witnesses were cross-examined and due process was respected, in a manner similar to that of the

⁷ Ibid vol 1, 763.

⁸ Luke McNamara, 'The Aboriginal Justice Inquiry of Manitoba: A Fresh Approach to the "Problem" of Over-Representation in the Criminal Justice System' (1992) 21(1) *Manitoba Law Journal* 47, 58.

⁹ Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, above n 4, vol 1, 763.

¹⁰ For an explanation of the two types of inquiries see David M Grenville, 'The Role of the Commission Secretary' in A Paul Pross, Innis Christie and John A Yogis (eds) *Commissions of Inquiry* (1990) 51 where the author talks about the Ocean Ranger Inquiry.

RCIADIC's hearings of the 99 individual deaths.¹¹ The AJI was given wide powers to obtain evidence.¹²

In relation to the investigation into the more general problems facing Aboriginal people in the justice system, the AJI sought the views of Aboriginal people. It did not, however, go as far as the RCIADIC, which established AIUs to obtain Indigenous views. The AJI visited over 36 Aboriginal communities. Hearings were also held in Manitoba communities and five Provincial correctional institutions. The public hearings were conducted informally without the need for written submissions, cross-examination of attendees and evidence being obtained under oath. Formal procedures were ignored in order to make Aboriginal people feel more at ease with the process. Approximately 1000 people presented their views to the AJI at the public hearings. Submissions were sought from the general public, government departments and police forces.¹³ Research projects were established in order to gather evidence. Some of the projects were administered by the AJI's own staff and some by experts commissioned to prepare background papers. The AJI also observed the operation of a number of tribal courts in the United States.¹⁴ In total the AJI

received more than 1,200 presentations and exhibits, held 123 days of hearings, travelled more than 18,000 kilometres in Manitoba alone and accumulated approximately 21,000 pages of transcripts (including exhibits but not including research papers, library materials or written presentations).¹⁵

The AJI's primary concern was 'to learn how the legal system was working, what people felt about the system and if people were being well served by it'.¹⁶

At the end of the investigation the commissioners concluded that the police inquiry into the death of John Harper, conducted by the City of Winnipeg Police

¹¹ Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, above n 4, vol 1, 5.

¹² See the provisions in the Aboriginal Justice Inquiry (AJI) Act which are replicated in the Ibid vol 1, 759-762.

¹³ Ibid vol 1, 5.

¹⁴ Ibid vol 1, 5-6.

¹⁵ Ibid vol 1, 6.

¹⁶ Ibid vol 1, 5.

Department, was 'at best, inadequate. At worst, its primary objective seems to have been to exonerate Const. Robert Cross and to vindicate the Winnipeg Police Department'.¹⁷ Although some criticism was levelled at the manner in which the investigation into the death of Helen Osborne had been conducted, the commissioners did not find it inadequate or suspicious.¹⁸ Other recommendations addressing the problems Aboriginal people faced in the justice system were made in Volume 1 of the AJI report and are described in more detail below.

The reaction to the report by Aboriginal people was generally a positive one.¹⁹ This response appeared to be based 'on a belief that the justice concerns of Aboriginal people had finally been addressed in a serious and constructive manner by an independent inquiry'.²⁰ McNamara claims that

[t]his response ... [was] indicative of a conviction that the *Report of the Aboriginal Justice Inquiry of Manitoba* was signalling a departure from the era of internal reforms and 'tinkering' within the justice system that had failed to significantly improve the system's capacity to deal successfully with Aboriginal people.²¹

However, criticisms were later levelled at the Manitoba government for refusing to embrace the spirit of self-government and direction proposed by the AJI.²² This lack of action may, to some extent, have been due to the change in government after the AJI had been established. The New Democratic Party returned to office in October 1999 and, after nine years of inaction, immediately established the Aboriginal Justice Implementation Commission²³ in order to review the recommendations made by the AJI.

¹⁷ Ibid vol 2, 'The Death of John Joseph Harper', 113.

¹⁸ Ibid vol 2, 'The Death of Helen Betty Osborne', 97-98.

¹⁹ McNamara, above n 8, 68.

²⁰ Ibid 69.

²¹ Ibid.

²² Ibid 70.

²³ The Aboriginal Justice Implementation Commission was established in November 1999. The commission was instructed to complete its work by 31 March 2001. This date was, however, later extended to 30 June 2001: Aboriginal Justice Implementation Commission, *The Aboriginal Justice Implementation Commission* <<http://www.ajic.mb.ca/index.html>> at 8 November 2001.

B *AJI FINDINGS*

The RCIADIC and the AJI reached similar conclusions regarding the manner in which indigenous people experienced the criminal justice system. Recommendations were made by both inquiries to address problems relating to recidivism, poor police relations, over-representation of indigenous people in the justice system, inequitable education and employment opportunities, and a lack of self-determination. Racist practices and attitudes by many non-indigenous people working within the justice system, particularly police officers, were emphasised in both reports as having contributed to the problems faced by indigenous people in Australia and in Manitoba. Indeed, both reports acknowledged the devastation caused by colonisation and concluded that the overrepresentation of indigenous people in the criminal justice system was primarily a product of the dispossession and oppression they had suffered.²⁴

Despite these similarities, the way in which the reports considered and made recommendations regarding indigenous women were quite different. The experiences of Aboriginal women in Manitoba was documented in a separate chapter of the AJI report, and 19 recommendations were made that specifically related to the abuse of Aboriginal women and children, and to the sentencing and parole of Aboriginal women. Chapter 13, titled 'Aboriginal Women' was 32 pages long in a volume containing 789 pages. The introductory paragraph to the chapter gave the following reasons for focusing on the disadvantage of Aboriginal women:

Aboriginal women and their children suffer tremendously as victims in contemporary Canadian society. They are the victims of racism, of sexism and of unconscionable levels of domestic violence. The justice system has done little to

²⁴ The report of the AJI discusses the history of colonisation in Volume 1, Chapter 3 and introduces the topic of Aboriginal over-representation in Chapter 4 by stating that 'we believe that the causes of Aboriginal criminal behaviour are rooted in a long history of discrimination and social inequality that has impoverished Aboriginal people and consigned them to the margins of Manitoban society': Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, above n 4, vol 1, 85. The *National Report* briefly introduces this topic in Chapter 1 but it also goes into a lot more detail about the 'legacy of history' in Volume 2, Chapter 10 of the report: Australia, Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody: National Report, Vol 1-5* (1991) vol 1, 7-12, vol 2, 3-47 (abbreviated as *National Report* in repeated citations).

protect them from any of these assaults. At the same time, Aboriginal women have an even higher rate of over-representation in the prison system than Aboriginal men. In community after community, Aboriginal women brought these disturbing facts to our attention. We believe the plight of Aboriginal women and their children must be a priority for any changes in the justice system. In addition, we believe that changes must be based on the proposals that Aboriginal women presented to us throughout our Inquiry.²⁵

There were two other chapters which focused on particular groups of Aboriginal people: 'Child Welfare' and 'Young Offenders'.²⁶ There was no separate chapter about Aboriginal men.²⁷

The AJI found that the effect of colonisation on Indigenous women 'was especially destructive'.²⁸ Their role in Aboriginal society was partially transformed with the arrival of the Europeans, but fully destabilised with the introduction of the residential school system.

Many Aboriginal grandparents and parents today are products of the residential school system. The development of parenting skills, normally a significant aspect of their training as children within Aboriginal families, was denied to them by the fact that they were removed from their families and communities, and by the lack of attention paid to the issue by residential schools. ... In addition to the physical and sexual abuse that Canadians are now hearing took place in residential schools, emotional abuse was the most prevalent and the most severe. ... Not only did residential schools not support the development of traditional parental roles among the children, but they taught the children that they were 'pagan' – an inferior state of being – and should never use their language or honour their religious beliefs. ... The damage done by residential schools is evident today as Aboriginal people, long

²⁵ Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, above n 4, vol 1, 475.

²⁶ Ibid vol 1 509, 549.

²⁷ Considering the AJI had recognised the gender-specific needs of Aboriginal women, it stands to reason that they could have considered the gender-specific needs of Aboriginal men in a separate chapter. It seems, however, that they treated Aboriginal men as the norm.

²⁸ Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, above n 4, vol 1, 477.

deprived of parenting skills, struggle with family responsibilities and attempt to recapture cultural practices and beliefs so long denied.²⁹

The breakdown of cultural values through the imposition of the residential school system contributed to the breakdown of the Aboriginal family unit, and ultimately led to the cycle of family violence. 'This began a cycle of abuse in Aboriginal communities, with women and children being the primary victims.'³⁰

Indian women were particularly affected by the sexist and racist legislation that had been passed by the Canadian government.³¹ These laws resulted in the loss of legal status for Indian women, which placed them in an inferior and subjugated position when compared to Indian men. Not only did women and children lose their Indian status for various reasons under legislation, they were also denied the right to vote in the chief and council system of local government.

The acknowledgment that Aboriginal women and children suffered from colonisation in ways that were different to Aboriginal men paved the way for the AJI to consider the ways in which the justice system had failed Indigenous women separately to that of Aboriginal men. This led to the formulation of 19 recommendations which specifically related to Aboriginal women.

The recommendations focused on:

- the amendment of sexist and racist legislation so that property would be divided equally between Aboriginal women and men in the event of a divorce;³²
- the establishment of spousal and child abuse programs with the involvement of Aboriginal leaders and police forces;³³
- the establishment of shelters and safe homes controlled by Aboriginal women;³⁴

²⁹ Ibid vol 1, 478.

³⁰ Ibid.

³¹ Ibid. Aboriginal women in Canada include the Indian, Metis and Inuit people. The legislation referred to affected only Indian women.

³² Ibid vol 1, 486.

³³ Ibid vol 1, 486, 487.

- the need to learn from the recommendations made by the Child Advocacy Project (a project established by the Children’s Hospital of Winnipeg to ‘document the dynamics of sexual abuse involving children ...’),³⁵ including: requiring police officers to undertake specialised training in the area; involving Elders in the community when responding to abuse; providing legal support within communities; and developing specialised treatment programs;
- the implementation of programs emphasising healing and restitution rather than punishment, and working towards the unification of the family rather than its disintegration (if possible and if beneficial for the victim);³⁶
- emphasising the need to develop culturally appropriate alternatives to incarceration for Aboriginal women;³⁷
- ensuring that women who were incarcerated were allowed to serve their sentences in Manitoba or in other facilities nearest to their home community;³⁸
- the need for children to be able to frequently visit their mothers while in detention and to do all that was possible to ensure that the family was kept together;³⁹
- the need for Aboriginal women to be appointed to the National Parole Board;⁴⁰ and
- the need for halfway houses for Aboriginal women who were released from correctional institutions, and managed by Aboriginal women.⁴¹

Other recommendations recognised the need for ‘[t]he *Indian Act* [to] be amended to eliminate all continuing forms of discrimination regarding the children of Indian women who regain their status under Bill C-31’;⁴² financial assistance to

³⁴ Ibid vol 1, 488.

³⁵ The recommendation appears at Ibid vol 1, 492. A description of the Child Advocacy Project and its recommendations appear at Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, above n 4, vol 1, 489.

³⁶ Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, above n 4, vol 1, 496.

³⁷ Ibid vol 1, 501.

³⁸ Ibid vol 1, 504-505.

³⁹ Ibid vol 1, 505.

⁴⁰ Ibid vol 1, 506.

⁴¹ Ibid.

⁴² Ibid vol 1, 204. The full citation for the Act is *Indian Act*, RSC 1985, c 1-5.

be given to families so that they could remain in contact with and travel to visit relatives in custody;⁴³ and for culturally appropriate

counselling programs, particularly those having to do with the treatment of alcohol abuse, family violence, anger management and culturally appropriate ways for inmates to cope with their problems, [to] be provided in every Manitoba correctional institution.⁴⁴

The recommendations made by the RCIADIC are considered at greater length in Chapter 6. At this juncture, however, it is important to note that despite similar evidence of family disintegration existing in Australian Indigenous communities and despite the RCIADIC acknowledging the appalling levels of family violence against Indigenous women and children,⁴⁵ none of the recommendations made by the RCIADIC specifically referred to the problem of family violence. Nor was there a separate chapter in the *National Report* dedicated to the circumstances of Indigenous women.

⁴³ Ibid vol 1, 442.

⁴⁴ Ibid vol 1, 450.

⁴⁵ *National Report*, above n 24, vol 2, 98-99.

APPENDIX 2: LIST OF RCIADIC RECORDS

The RICADIC consisted of the following records:¹

- Individual case records (transcript folders – individual case hearings; individual case files deemed to be outside the jurisdiction of the RCIADIC; individual case files consisting of correspondence, press clippings; general exhibits mainly addressing general economic or social problems but there are some that relate to a specific death; case files consisting of historical information such as coroners reports, welfare files, social security files, material from doctors and hospitals, detoxification centres etc; exhibit records relating to each death; final case reports).
- Underlying issues reports (transcript folders – special hearings covering general matters and problems unrelated to individual cases; transcript folders – underlying issues hearings covering hearings before the RCIADIC in the Northern Territory and Western Australia which were unrelated to individual cases; general submission files relating to the general issue of Indigenous relations with white society and more specific submissions relating to matters of custody and suicide as well as submissions from medical, legal and religious groups with concerns and also individual submissions; miscellaneous underlying issues records of the Aboriginal Issues Units (AIUs) in Alice Springs, South Australia, and Queensland; general submissions records consisting of 40 submissions from individuals, religious organisations, government agencies and private companies given to the Western Australian Office of the RCIADIC).
- Research material (21 research papers prepared by the RCIADIC's Criminology Research Unit (CRU); 46 research papers prepared by consultants).

¹ The information contained in this appendix was obtained from Peter Nagle and Richard Summerrell, *Aboriginal Deaths in Custody: The Royal Commission and Its Records, 1987-91* (1998).

- Background papers of the commissioners and staff (general correspondence records of the various commissioners; working papers of Dr A McGrath, project coordinator, New South Wales; working papers of J Bathgate, support staff, Victoria; Miscellaneous records of K Whimp, research staff coordinator and assistant to the national commissioner, South Australia).
- Records of counsel assisting the RCIADIC (general correspondence records of M Dodson, counsel assisting, Northern Territory; general correspondence records of G Barbaro, instructing solicitor, Northern Territory; general correspondence records of M Jordan, instructing solicitor, Western Australia; general correspondence records of K O'Brien, counsel assisting, Western Australia; general correspondence records of D Wilson, national solicitor; national solicitor's files; underlying issues response, national solicitor; general correspondence records of C Caruana, instructing solicitor, Northern Territory; general correspondence records R Bleechmore, counsel assisting, South Australia; general correspondence records G Eames, counsel assisting, South Australia; general correspondence records of D Allen, instructing solicitor, Northern Territory; miscellaneous research records of D Fyfe, instructing solicitor, South Australia).
- Administrative records (administrative records – New South Wales office; Perth administration files; administrative and legal files – Queensland; personnel files; administrative files of the RCIADIC secretariat; general correspondence records of the Northern Territory office, AIU Alice Springs office, Victorian office, Perth office, AIU South Australia, Adelaide office; press clippings; Queensland resource material; South Australian and Broome administration files).
- *The National Report* (5 volumes).
- Report on Underlying Issues in Western Australia (2 volumes including the report on the inquiry into the individual deaths in custody in Western Australia) (Commissioner Dodson).

- Regional Reports of Inquiry into Individual Deaths in Custody in Western Australia (two volumes) (Commissioner O’Dea); New South Wales, Victoria and Tasmania (one volume) (Commissioner Wootten); and Queensland (one volume) (Commissioner Wyvill). Although the titles of the State and Territory reports seem to suggest that only the matters concerning the individual deaths were investigated, they also included an investigation into the “underlying issues”.
- The 97 deaths reports prepared by the five commissioners who investigated the deaths.
- *Interim Report* 1988 prepared by Commissioner Muirhead.

APPENDIX 3: INFORMATION STATEMENT AND CONSENT FORM



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INFORMATION STATEMENT

Missing Subjects: Women, Gender and Family Violence in the Royal Commission into Aboriginal Deaths in Custody

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Principle Supervisor:**

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PhD Candidate:

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Elena is a solicitor and a lecturer in law in the School of Criminology and Criminal Justice, Griffith University, where she is also enrolled part-time in a PhD. She is conducting research into the manner in which the Royal Commission into Aboriginal Deaths in Custody considered the problems relating to Aboriginal women. Her principal supervisor is Associate Professor Kathleen Daly and her associate supervisor is Dr Janet Ransley. Associate Professor Kathleen Daly is an experienced international scholar in the areas of feminist criminology, critical race/Indigenous perspectives in criminology and restorative justice. Dr Janet Ransley completed her PhD at Griffith University on Royal Commissions of Inquiry in 2001 and conducts research in the areas of police reform and critical legal theory.

Elena's PhD research in particular compares what the reports of the seven Aboriginal Issues Units said, and what the Final National Report and the recommendations said, about Aboriginal women, concepts of gender and family violence. Elena's thesis will also consider why, if at all, the texts differ and how the Commission came to embrace certain perspectives contained in the indigenous narratives and not others. She is particularly interested to learn how the Commission conducted its inquiry and whether there were any political, ideological or procedural constraints placed on its investigation.

As someone who had a key role in the Royal Commission investigation Elena would like to talk to you about these matters. It is envisaged that the interview will take about 1 hour and that the questions will focus primarily on your recollection of how the Inquiry was conducted and what matters were of particular importance to the Inquiry and why. All the information she gathers will remain completely confidential. It is envisaged that you will be referred to by your role in the Royal Commission inquiry, in a general way and in a manner with which you agree. Elena will discuss this with you at the beginning of the interview to ensure that you are satisfied that your anonymity will be protected.

Your participation in the research is voluntary, and you can end the interview at any time. If you decide not to participate in this research, you will not be penalised in any way. Elena would also like to record the interview and she is seeking your consent to do that. If at any point in the interview you would like Elena to stop the recorder, she will of course do so. The reason for recording the interview is so that she has an accurate record of what was discussed during the interview for analysis. Once transcribed and analysed the recording will be destroyed. The data collected will be stored in a secured filing cabinet at Griffith University.

Should you have any questions about the project, please do not hesitate to contact Elena by telephone on (07) 3875 5957 or by email on e.marchetti@griffith.edu.au.

The University requires that all participants be informed that if they have any complaints concerning the manner in which a research project is conducted it may be given to the researcher, or, if an independent person is preferred, either:

the University's Research Ethics Officer, Office for Research, Bray Centre, Griffith University, Kessels Road, Nathan, Qld 4111, telephone (07) 3875 6618;

or

the Pro Vic-Chancellor (Administration), Bray Centre, Griffith University, Kessels Road, Nathan, Qld 4111, telephone (07) 3875 7343.

Elena's thesis will be completed sometime in 2006. At that time a summary of her findings will be available if requested.

Thank you for taking the time to read this information sheet and for your anticipated participation.



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CONSENT FORM

Missing Subjects: Women, Gender and Family Violence in the Royal Commission into Aboriginal Deaths in Custody

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I have read the information sheet and the consent form. I agree to participate in the PhD research project conducted by Elena Marchetti, titled "Missing Subjects: Women, Gender and Family Violence in the Royal Commission into Aboriginal Deaths in Custody" and give my consent freely.

I understand that the research relates to the manner in which the Royal Commission into Aboriginal Deaths in Custody considered the problems relating to Aboriginal women and that the project will be carried out as described in the information statement, a copy of which I have retained.

I understand that my participation is voluntary and that I can end the interview at any time without needing to explain my reasons for withdrawing. I also understand that the interview will be recorded and I agree to this.

I understand that my identity will remain confidential and that the researcher will protect the confidentiality and privacy of any information I give. I also understand that when the results are reported my role in the Royal Commission into Aboriginal Deaths in Custody will be referred to in general terms, in the manner agreed to between the researcher and myself.

I have had all my questions answered to my satisfaction and I am aware that I can obtain a copy of the results of the project at the end of 2006, once the PhD has been completed.

Signatures:

.....
Participant Date

.....
Elena Marchetti Date

APPENDIX 4: CODING THEMES AND VARIABLES

The main themes that were used to code the texts and the interview data appear below in bold and the sub-themes appear in underlined text.

Process and Procedure (P&P)

- Establishing the RCIADIC – how the RCIADIC was established; when did each person start their employment; what were they told to do; how processes were established; how decisions were made about how the inquiry was to be conducted; how people were selected for the job.
- Establishing the Aboriginal Issues Units (AIUs) – how each AIU was established; when each person started their employment; what were they told to do; how processes were established; how decisions were made about how the tasks were to be carried out; how people were selected for the job.
- Investigating deaths – how each office went about investigating the deaths and how this was decided; what influenced how the deaths were investigated in a general sense.
- Investigating underlying issues – how each office went about investigating the underlying issues and how this was decided;
- Focus of AIU – what did each AIU investigate or research.
- Tasks of AIU – how did the AIU go about carrying out its tasks; were there community consultations; did they conduct research; did they write a report; why or why not.
- Writing the *National Report* and recommendations – how the *National Report* was written and how the recommendations were drafted; who was involved in this process; how did the commissioners go about determining

the recommendations; what were the problems encountered during this process.

Office Politics (OP)

- RCIADIC relationship with AIUs – how the RCIADIC office within each State dealt with the AIU; what did each RCIADIC office think the AIU in their State should be doing.
- AIU problems – how did the AIU staff feel about their powers and functions; what problems were encountered by each AIU.
- Relationship with each commissioner – comments about the commissioners.
- Relationship with government – information about the extent to which the government of each State cooperated with the RCIADIC inquiry; includes information about any legal challenges initiated regarding the powers of the RCIADIC (by the government or police or unions etc).
- Indigenous community and individual views about the RCIADIC – what did the Indigenous community or particular individuals in each region think of the RCIADIC; did they support it.
- RCIADIC problems – what were some of the problems the RCIADIC faced in establishing each office and conducting its investigation; comments regarding challenges or treatment by government may be included if it is stated in a general problematic way (eg ‘it was really hard to conduct the inquiry initially because of the lack of cooperation by government’).
- Relationship with the media – how did the media react to or portray the RCIADIC.

Topics to do with women (WT)

- Who agitated for women to be considered – were there meetings or consultations where people agitated for problems relating to Indigenous women to be a consideration; if so, who were the people who agitated; were there powerful Indigenous females involved with the RCIADIC and did they push for a focus on women.
- Problems with police treatment – information relating to police treatment of Indigenous women in custody or in the community.
- Women running communities – information relating to the fact that women run communities and are often the only ones left to look after the family.
- Violence against women and children – information about any physical or sexual abuse against women by Indigenous men and knowledge that that was occurring at the time of the RCIADIC.
- Communication with families – information regarding the fact that family members needed to be informed about a death and needed to be kept informed of the investigation carried out by the police or the coroner.
- Visitation of person in custody – information regarding the ability of family to visit their family member in custody.

Why the Focus on Men (WM)

- Indigenous views – did the Indigenous person I interviewed think that problems relating to Indigenous women were considered; if not, why not; why was there such a focus on Indigenous men.
- Non-Indigenous views – did the non-Indigenous person I interviewed think that problems relating to Indigenous women were considered; if not, why not; why was there such a focus on Indigenous men.

- Topics to do with men – topics that were discussed during the consultations or referred to in the reports that were specifically attributed to Indigenous men.

Topics of Interest (TI)

- Indigenous respondents – what did the Indigenous people I interviewed say were the main concerns of the Indigenous people they consulted.
- Non-Indigenous respondents – what did the non-Indigenous people I interviewed say were the main concerns of the Indigenous people they consulted.

Retrospective Thoughts (RT)

- What should have been done – thoughts about how the RCIADIC should have been set up or if it was set up now, how would they want to see it set up; was the focus of the RCIADIC too broad or too narrow; should there have been stronger recommendations made about the behaviour of individual police and correctional officers; includes positive comments about how the RCIADIC conducted its inquiry.
- How has the RCIADIC affected policy – has the RCIADIC had any effect on policy relating to deaths in custody, problems facing Indigenous women, the situation of Indigenous people etc.
- Current problems with the criminal justice system – current problems identified by the people I interviewed with the criminal justice system and the way it treats Indigenous people.

APPENDIX 5: INDIGENOUS MALE DEATHS INVESTIGATED BY THE RCIADIC

Although the *Interim, National* and regional reports contain a number of tables which list various details of the deceased, none solely concern all 88 males who died.

Name	Age	Place of Detention and Death	Cause of Death
Anderson, Robert	27	Wiluna Police Station, WA	undetermined - likely to be due to epilepsy; other possible causes were alcohol withdrawal, or a combination of both (natural cause)
Atkinson, Shane Kenneth	23	Griffith Police Station, NSW	hanging
Barney, Walter James	39	HM Townsville Prison, Qld	haemorrhaging in the lungs due to chronic lung disease (natural cause)
Bates, Bobby	33	Eastern Goldfields Prison, Boulder, WA; died in Charles Gairdner Hospital	viral respiratory tract infection and mild bronchitis (natural cause)
Betts, Edward Frederick	49	Port Lincoln Police Station, SA	heart failure (natural cause)
Boney, Lloyd James	28	Brewarrina Police Station, NSW	hanging
Booth, Patrick Thomas	17	Rockhampton Prison, Qld	hanging
Brown, Stanley	42	Broome Police Station, WA	hanging
Burrurangi	33	Darwin Prison; died in Royal Darwin Hospital, NT	acute heart failure (natural cause)
Buzzacott, Malcolm	31	Port Augusta Gaol, SA; died while travelling back from work to goal.	heart failure (natural cause)
Cameron, Edward	24	Geraldton Police Station, WA	hanging
Campbell, Peter Leonard	33	Long Bay Gaol, Sydney, NSW	cut his own throat
Carr, Thomas	17	Minda Remand Centre, Sydney, NSW	heart failure (natural cause)
Chatungalgi, Donald	27	Halls Creek Police Station, WA	suffered a fit (natural cause)
Clark, Glenn Allan	23	Glenorchy Police Station, Tasmania	hanging
Day, Harrison	41 or 42	Echuca Police Station; died in Echuca District Hospital, Victoria	epileptic fit (natural cause)
Dixon, Kingsley Richard	19	Adelaide Goal, SA	hanging
Dooler, Wayne John	19	Carnarvon police lockup, WA	acute alcohol poisoning
Dougal, Albert	25	Broome Police Station; died in Derby Regional Hospital, WA	skull fractured when head hit the ground after being hit prior to incarceration
Dunrobin, Gregory Michael	30	Cherbourg Watchhouse, Qld	hanging

Farmer, Paul	33	Albany Regional Prison, WA	cut his own throat
Garlett, Darryl Horace	26	Wooroloo Prison Farm; died in Wooroloo District Hospital, WA	coronary occlusion - chest/heart problems (natural cause)
Gollan, Stanley John	33	Mt Gambier Police Station; died in Mt Gambier Hospital, SA	fatal head injury suffered a couple of days before his arrest and death
Gollan, Michael Leslie James	17	South Australian Youth Training Centre, SA	hanging
Green, Dixon	25	Broome Regional Prison, WA	ischaemic heart disease (natural cause)
Gundy, David John	29	Marrickville (at his home), NSW	police shot him during an unlawful police raid on his home
Harris, Donald	29	CW Campbell Remand Centre (Canning Vale Prison); died in Fremantle Hospital, WA	acute pancreatitis (natural cause)
Highfold, John Clarence	30	Adelaide Goal, SA	epilepsy (natural cause)
Hyde, Richard Frank (Charlie)	42	Yarrabah Watchhouse, Qld	hanging
Jabanardi	44	dirt track near Ti Tree, NT	shot dead while in a motor vehicle that was stopped by police
Jambajimba	24	Alice Springs Prison, NT	hanging
Johnson, Bernard Matthew	41	Townsville Prison, Qld	fatal heart attack (natural cause)
Karpany, Craig Douglas	23	Darlington Police Station, SA	hanging
Karpany, Keith Edward	60	City Watchhouse; died in Royal Adelaide Hospital, SA	blood clot on the surface of the brain due to head injury
Kearney, Paul Lawrence	36	Darlinghurst Police Station, NSW	ingestion of large quantity of alcohol and doxepin
Koowoatha, David Mark	19	Yarrabah Watchhouse; moved to Yarrabah Hospital; died in Cairns Base Hospital, Qld	hanging
Kulla, Kulla, Charlie	40	Coen Watchhouse, Qld	lobar pneumonia (natural cause)
Lacey, Daniel Alfred	40	Brisbane Prison, Qld	heart attack (natural cause)
Leslie, Bruce Thomas	46	Tamworth Police Station; died in Royal North Shore Hospital, St Leonards, NSW	brain injuries due to fractured skull.
Lorroway, Daniel Raymond Joseph	31	HM Prison Townsville; died enroute to Townsville General Hospital, Qld	shot while trying to escape
Mau, Nikira (also known as William Kim Tabipa and William Kim Moore)	55	Brisbane City Watchhouse, Qld	heart attack (natural cause)
McGrath, Bernard Albert	20	Kalgoorlie Lockup, WA	hanging
Michael, Charles Sydney	31	Barton's Mill Prison, WA	suffered a serious heart attack (natural cause)
Michael, Steven Glenn	29	Canning Vale Prison, WA	heart disease – suffered a heart attack (natural cause)
Misi, Patrine	39	Townsville Watchhouse, Qld	bronchopneumonia (natural cause)

Moffatt, Arthur	51	Warragul Police Station, Victoria	hypoglycaemic reaction due to the combination of diabetes, heavy drinking and failure to eat (natural cause)
Moore, James Archibald	58	Swan Hill Police Station; died in Swan Hill District Hospital, Victoria	massive pontine haemorrhage (natural cause)
Morrison, Benjamin William	55	Fremantle Police Station, WA	hanging
Murray, Edward James	21	Wee Waa Police Station, NSW	hanging
Murray, Thomas William	19	Berrima Training Centre; died in Bowral Hospital, NSW	overdose of doxepin tablets – self-administered
Nean, Clarence Alec	33	Walgett Police Station; died in Dubbo Base Hospital, NSW	brain haemorrhage due to head injury
Njanji, Jimmy	about 60	Port Hedland Police Station; died in Port Hedland Regional Hospital, WA	asphyxia due to laryngeal oedema - consequence of uncontrolled, severe, streptococcal infection from a wound inflicted by a fellow prisoner
Nobel, Perry Daniel	20	Yarrabah Watchhouse, Qld - was pronounced dead shortly after arriving at Yarrabah Hospital	hanging
Pat, John Peter	16	Roebourne Police Station Lockup (juvenile cell), WA	closed head injuries incurred during fight before arrest
Pilot, John Raymond	33	Brisbane City Watchhouse, Qld	asphyxia due to fit from complete alcohol withdrawal
Polak, Kim	28	Kalgoorlie Lockup, WA	undetermined - likely to have been related to the alcoholism
Price, Kwementyaye	about 44	Alice Springs Police Station Lockup, NT	subdural haematoma - bleeding between the dura and the arachnoid due to head injury
Quayle, Mark Anthony	22	Wilcannia Police Station, NSW	hanging
Revell, Mark Wayne	27	Grafton Police Station, NSW	hanging
Riversleigh, Alistair Albert	34	Doomadgee Watchhouse, Qld	hanging
Ryan, Vincent Roy	39	Townsville Prison, Qld	heart attack (natural cause)
Salt, Monty Charles	39	Laura Police Station; died in police vehicle en route to Cooktown Hospital, Qld	pneumonia (natural cause)
Sampson, Ginger	44	Roebourne Police Station, WA	epilepsy resulting from closed head injury and excessive alcohol consumption
Saunders, Maxwell Roy	27	Goulburn Training Centre, (Goulburn Gaol), NSW	myocardial infarction - was in the advanced stage of heart disease (natural cause)
Semmens, Gordon Michael	26	Port Augusta Gaol, SA	brain haemorrhage due to head injury
Smith, Malcolm Charles	29	Malabar Assessment Unit of the Metropolitan Reception Prison at Long Bay, Sydney; died in Prince Henry Hospital, NSW	drove an artists' paint brush through his left eye
Ugle, Ronald Mack	53	Broome Regional Prison; died in Broome District Hospital, WA	heart attack (natural cause)

Vicenti, Ricci John	19	CW Campbell Remand Centre in Canning Vale; died in Royal Perth Hospital, WA	shot in the head while trying to escape
Waigana, Misel	39	East Perth Lockup, WA	delirium tremens
Walker, Roy Norman	62	Kalgoorlie Police Lockup; died in Royal Perth Hospital, WA	serious head injury suffered when falling from being drunk
Walker, Robert Joseph	25	Fremantle Prison, WA	asphyxia - caused by compression on chest from being held to the ground by 4 prison officers and by their weight during struggle to point that he could not breath
Walley, Graham Trevor	21	Greenough Regional Prison	hanging
Wells, Milton	30	Kalgoorlie Police Station Lockup; died in Kalgoorlie Regional Hospital, WA	lobar pneumonia and acute meningitis (natural cause)
West, Edward Stanley	18	Cherbourg Watchhouse, Qld	hanging
Williams, Peter Wayne	25	Grafton Gaol, NSW	hanging
Wodulan, Hugh	30	Broome Police lockup, WA	hanging
Wouters, Darren Steven	17	Brisbane City Watchhouse, Qld	hanging
A man who died at Oodnadatta on 17 December 1983	54	Oodnadatta Police Station, SA	heart failure due to advanced coronary artery disease (natural cause)
The death of an Aboriginal man on 25 February 1983 at Sir Charles Gairdner Hospital	25	Fremantle Prison; died in Sir Charles Gairdner Hospital, WA	tuberculosis meningitis (natural cause)
The man who died at Katherine on 21 November 1984	25	Katherine Police Station, NT	alcohol withdrawal syndrome
The man who died at the Royal Darwin Hospital on 2 April 1987	29	Berrimah Police Watchhouse; died in Royal Darwin Hospital, NT	intracerebral haemorrhage - bleeding within the brain (natural cause)
The man who died in Brisbane Prison on 4 December 1980	42	Brisbane prison, Qld	hanging
The man who died in the Darwin Prison on 5 July 1985	26	Darwin Prison, NT	hanging
The young man who died at Aurukun on 11 April 1987	18	Aurukun Watchhouse, Qld	hanging - deceased had tried to hang himself with a blanket and had fallen and cut his tongue and then drowned in his own blood because he was unconscious

The young man who died at Beatrice Hill Prison Farm on 21 September 1988	21	Beatrice Hill Prison Farm, NT	died of poisoning after inhaling the contents of a fire extinguisher which he had emptied into a plastic bag
The young man who died at Elliott on 21 March 1985	30	Police Station at Elliott, NT	cardiomyopathy - heart disease (natural cause)
The young man who died in custody at Geraldton on 31 December 1988	28	Geraldton Police Station Lockup; WA	asphyxiation by tying bandage around neck
The young man who died at Wujal Wujal on 29 March 1987	22	Wujal Wujal Watchhouse, Qld	hanging

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