

Indigenous Women and the RCIADIC – Part II

by Dr Elena Marchetti

In the previous issue of the *Indigenous Law Bulletin*, I discussed the extent to which the official reports of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') addressed the problems of Indigenous women.¹ I concluded that although the official RCIADIC reports did not completely ignore Indigenous women, they did not sufficiently discuss the topics that had the most harmful impact on Indigenous women, namely family violence and police treatment of Indigenous women.

In this paper, I explain *why* the inquiry itself did not focus more on the problems concerning Indigenous women.² The explanation relies on interview data collected from 48 people who either worked in the six main offices of the RCIADIC and Aboriginal Issues Units ('AIUs') established for the inquiry, or who were involved in some other capacity with the RCIADIC.³ It is important to consider the reasons why the problems confronting Indigenous women were not fully explored by the RCIADIC inquiry since it informs 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 homogeneous; that is, they fail to consider the different experiences of Indigenous men and women. 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 notes, without a race and gender analysis, any solutions offered will 'only create venues for further oppression, of both Aboriginal men, and women'.⁴

The RCIADIC's Establishment and Structure

The RCIADIC was established on 16 October 1987 to inquire into and report on the deaths of 99 Indigenous people which occurred in custody or detention between 1 January 1980 and 31 May 1989.⁵ The RCIADIC established six offices under the control of five commissioners according to the following groupings: Queensland (headed by Commissioner Wyvill); South Australia and the Northern Territory (headed by the National Commissioner, Elliott Johnston); Western Australia (located in Perth and headed by Commissioner O'Dea); Western Australia (located in Broome and headed by Commissioner Dodson); New South Wales, Victoria and Tasmania (headed by Commissioner Wootten); and an office in Canberra (which was where the National Secretary and the Criminology Research Unit ('CRU') were based). The main work of the regional Commissioners, particularly in the first half of the inquiry, was in relation to investigating the deaths. The CRU conducted the RCIADIC's criminological research. Other research related to social, cultural or legal matters was left to the regional offices and the Aboriginal Issues Units. AIUs were established in each of the six states and in the Northern Territory to access the views and experiences of Indigenous people in the communities where the deaths had occurred. The AIUs operated as autonomous units but ultimately reported to the regional Commissioners.

Although the original terms of reference contained in the Letters Patent were framed in a way that limited the inquiry to investigating the custodial deaths, they were extended in 1988 to include a consideration of the underlying social, cultural and legal issues that may have had a bearing on the deaths.⁶ This shift to a wider sociological inquiry provided a broader platform to raise questions about why it was that so many Indigenous people ended up in custody. Considering that a textual analysis of the death reports produced by the RCIADIC found that 55 per cent of the 88 deceased males investigated had been convicted of a physical or sexual assault, often against other family members, it would have been within the ambit of the terms of reference for the inquiry to explore why such offending occurred and how it impacted on Indigenous communities.⁷

Reasons Given by Interviewees for the RCIADIC's Focus

In order to determine why the RCIADIC was unable to take a gendered approach in its investigations, I analysed interview data collected for my PhD,⁸ from people who had either worked for, or had in some other way been closely associated with the RCIADIC. Ethical clearance was obtained from the Griffith University Human Research Ethics Committee before commencing the interviews. Of those interviewed 20 were Indigenous, nine of whom were female and 11 male; and 28 were non-Indigenous, eight of whom were female and 20 male. Twenty-three interviewees were legally trained; only three of the Indigenous people interviewed had such qualifications. A purposive or strategic sampling approach was used to select people who would be an authoritative source on the workings of the RCIADIC and its various sub-units. Other criteria used for selecting people to be interviewed were that they be representative of the different positions created within the RCIADIC and that a sufficient number of people be selected from each office.

The interview questions were semi-structured and open-ended. The questions asked related to a person's perceptions of the work conducted by the RCIADIC, the process used to carry out the investigations into the deaths and underlying issues, and the types of problems that were uncovered by the RCIADIC. In particular, each interviewee was asked whether they thought the RCIADIC had sufficiently focused on the problems concerning Indigenous women and if not, why they thought such an omission had occurred. Each person had the opportunity to give one or more reasons when answering this question and, in fact, most people offered more than one reason for the RCIADIC's failure to take a gendered approach.

In reaction to the question of whether the RCIADIC had 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 a race and gender approach in its investigation. As mentioned in Part I of this paper, 21 of the people interviewed echoed three of the regional reports and the *Royal Commission into Aboriginal Deaths in Custody National Report* ('the *National Report*') in claiming that, ultimately, the disadvantage and marginalisation of young Indigenous *males* was the primary concern of the inquiry.

My research found that there were two main categories for the reasons why a race *and* gender approach was not adopted. The first related to the struggle between race and gender politics, while the second related to procedural reasons. Table 1 summarises the various reasons given by the interviewees for why the RCIADIC did not take a gendered approach in its investigation, according to whether the person interviewed was Indigenous or non-Indigenous. Since most people offered more than one reason, the total numbers in the final row add to greater than 48 (which is the total number of interviewees).

Table 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: Majority were male deaths	10 (50%)	9 (32%)	19	40%
Procedural Reasons: Terms of reference narrowly interpreted	4 (20%)	9 (32%)	13	27%
Procedural Reasons: Legal inquiry rather than sociological inquiry	1 (5%)	10 (36%)	11	23%
Procedural Reasons: Lack of understanding of Indigenous cultural protocols	4 (20%)	6 (21%)	10	21%
Procedural Reasons: Senior people appointed had particular interests	2 (10%)	6 (21%)	8	17%
Procedural Reasons: Time and resource constraints	3 (15%)	2 (7%)	5	10%
Totals	35	59	94	

The overwhelming consensus amongst the people interviewed was that the RCIADIC was unable to focus on gendered problems because the focus of the inquiry was on race and collective rights and on Indigenous people as a whole. A non-Indigenous lawyer said that

[t]he *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.⁹

This person went on to say that the recommendations focused on ‘shared problems’ and not on a particular group of people. Although Indigenous women were present at consultation meetings and contributed to submissions made to the RCIADIC, most interviewees pointed out that the concerns expressed by Indigenous women were on community concerns such as racism in the police force, housing, employment,

education and substance abuse. There was little focus on problems such as family violence for a number of reasons:

- At the time, it was not discussed as openly as it is now;
- The people employed by the RCIADIC did not specifically ask about specific gendered problems; and
- There was a reluctance to encourage any line of inquiry that would reflect poorly on communities and, in particular, on Indigenous men.

Having said this, as was pointed out in Part I of this paper, the AIU reports did highlight the problem of family violence in various communities yet this was not adequately reflected in the official RCIADIC reports. The reason for this is possibly best explained by the procedural constraints imposed upon and experienced by the RCIADIC inquiry, as outlined below.

The fact that the majority of deaths investigated by the RCIADIC were male also influenced the focus of the research conducted for the investigation into underlying issues, which ultimately supported the assumption that young Indigenous males were more disadvantaged than Indigenous females. The impact of colonisation on Indigenous people was considered more detrimental for Indigenous men, rather than Indigenous females, because of their loss of status in the public sphere from not being able to earn an income. As an administration officer noted:

the focus was on men because most of the deaths were men... [T]he young men in these communities were, in a sense, particularly disenfranchised or they had no kind of useful social function.¹⁰

In drawing these conclusions, the RCIADIC minimised the impact colonisation had had on Indigenous women despite the fact that there was evidence to show that Indigenous women had experienced atrocities including the removal of children, rape, domestic servitude and institutionalisation.

The main procedural reason referred to by the interviewees for the RCIADIC's lack of focus on problems concerning Indigenous women was that the Commissioners were constrained by the terms of reference. 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. The terms of reference were ultimately interpreted narrowly by requiring that an underlying issue be directly relevant to the question of deaths in custody. Although this is, in fact, a reasonable requirement, it does not fully explain why family violence, which was a common type of offence committed by the deceased males who were investigated, was not considered to be relevant to the question of why so many Indigenous people were in custody. 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.¹¹ Indeed the initial objective of the RCIADIC, to investigate deaths in custody, and the legal procedures adopted to achieve this, ultimately influenced the investigation into underlying issues, even though this latter inquiry called for a different approach. The dominance of the legal inquiry, which supported a factual rather than sociological analysis, left little scope for the inclusion of other important questions, such as how life was different for Indigenous men and women.

The lack of sociological expertise also affected the ability of non-Indigenous RCIADIC staff to understand Indigenous cultural norms, which in turn affected the information collected by the RCIADIC. The methodologies used by the RCIADIC to research the deaths and underlying issues, which were based on non-Indigenous legal processes and knowledge, ultimately operated to silence Indigenous female voices. For example, one Indigenous woman who was interviewed thought that it would have been ‘disrespectful’ or ‘inappropriate’ to ‘actually put the focus on the women’ because so many men had died.¹² Had RCIADIC staff been aware of such views and beliefs, they could have altered the focus of their investigations and consciously considered whether gendered issues should or should not have been explored further. Similarly, although family violence was acknowledged by many of the interviewees as having been raised by Indigenous women at the time, an Indigenous female research officer said that Indigenous women may not have had the language to fully articulate and explain their circumstances, particularly when talking to non-Indigenous male lawyers. These types of cultural restrictions prevented full and frank discussion about the life of the deceased and about the lives of the female family members.

The two final procedural reasons given for the RCIADIC’s lack of focus on gendered problems related to the research interests of the senior people appointed to head the inquiry, in addition to time and resource constraints. The most senior people appointed were mainly non-Indigenous men who had a professional background in law. Their research interests were aligned with their professional expertise and this affected their ability to comprehend the gendered nuances which emerged from the legal inquiry. 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 have a marked affect on their efficacy and final recommendations.¹³

Conclusion

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 Canadian Public Inquiry into the Administration of Justice and Aboriginal People (or as it is commonly known, the Aboriginal Justice Inquiry of Manitoba (‘AJI’)),¹⁴ that have been able to see beyond the concept of race and adopt an approach that included a gendered perspective. This raises questions about why it was that an inquiry such as the AJI, which occurred at the same time as the RCIADIC, for a similar amount of time, and 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 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 paper 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 processes and it would identify more appropriate research methodologies. It would explain why, despite there having been more Indigenous women murdered in the Northern Territory during the period of the RCIADIC than men having died in custody,¹⁵ the RCIADIC did not make this a focus of the inquiry. Most importantly, however, Indigenous women would be guaranteed a greater chance of having their experiences heard in future inquiries and legal processes.

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¹ Elena Marchetti, 'Indigenous Women and the RCIADIC', (2007) 7(1) *Indigenous Law Bulletin* 6.

² A more detailed and expanded version of this paper, titled 'Intersectional Race and Gender Analyses: Why Legal Processes Just Don't Get It', will appear in *Social & Legal Studies* (2008) 17(2).

³ There were between 120 and 135 people employed by the RCIADIC at its peak. The number of people who were employed by the RCIADIC is impossible to determine accurately since access to archived administrative records of the RCIADIC is prohibited. There were another six people who participated in informal discussions about the RCIADIC but who refused for various reasons to give an interview for this study. Therefore, together with the people who were formally interviewed, almost half of the people who had at some point worked for the RCIADIC participated in the study.

⁴ Judy Atkinson, 'Violence against Aboriginal Women: Reconstitution of Community Law – the Way Forward' (1990) 2(46) *Aboriginal Law Bulletin* 6, 9.

⁵ 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. Initially it was assumed that there would only be 44 deaths to investigate. There were in fact 124 deaths during the relevant time period; however, of those, 25 fell outside the RCIADIC's Letter's Patent. 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: Chris Cunneen, *The Royal Commission into Aboriginal Deaths in Custody: An Overview of Its Establishment, Findings and Outcomes* (1997) 2.

⁶ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody: National Report ('National Report')* (1991) vol 5, 157 and 158.

⁷ Elena Marchetti, *Missing Subjects: Women and Gender in the Royal Commission into Aboriginal Deaths in Custody* (PhD thesis, Griffith University, 2005).

⁸ *Ibid.*

⁹ Interview with NIML14 (Face-to-face, 29 April 2003). Throughout this paper I have used a code for direct quotes to maintain the anonymity and confidentiality of the interviewees. The code consists of three categories and a number. The first category indicates whether the interviewee is Indigenous (I) or non-Indigenous (NI); the second category indicates whether the interviewee is male (M) or female (F); the third category indicates whether the person had legal training (L) or no such training (NL); and the number is a random number allocated to each person interviewed (1 to 48).

¹⁰ Interview with NIML15 (Face-to-face, 17 October 2003).

¹¹ It was pointed out by some interviewees that the use of evidence which the Commissioners had not themselves tested would have left the Commissioners open to legal challenge as happened in the case of *Mahon v Air New Zealand* (1984) AC 808.

¹² Interview with IFNL41 (Face-to-face, 14 April 2003).

¹³ 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.

¹⁴ Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991).

¹⁵ *National Report*, above n 6, vol 5, 285.