

CRITICAL REFLECTIONS UPON AUSTRALIA'S ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

ELENA MARCHETTI*

Over a decade after the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) tabled its *National Report*, the report and its 339 recommendations are still cited whenever suggestions are made or policies are introduced which target the over-representation of Indigenous people in custody. It is therefore timely and relevant that its appropriateness in dealing with Indigenous over-representation, and with Indigenous marginalisation generally, be critically reassessed. In particular, there is a need to consider whether the investigative procedures undertaken by the RCIADIC and the political constraints surrounding its inception resulted in non-orthodox information and perspectives being excluded. This paper uses data collected from interviews with 48 people associated with the RCIADIC in order to critically reflect upon the way in which the inquiry was established and conducted to determine whether it was constrained in its ability to fully consider the problems confronting Indigenous Australians when dealing with the Australian justice system.

I INTRODUCTION

Royal commissions¹ are frequently used in Australia, Canada and Great Britain to investigate political wrongdoing and to make recommendations regarding policy

* BCom LLB LLM PhD. Senior Lecturer, Griffith Law School, Griffith University. I would like to sincerely thank all those who participated in this research by generously giving their time and sharing memories of their experiences of working for the RCIADIC. The feedback and comments provided by Professor Chris Cunneen and Dr Nick James were extremely helpful and much appreciated.

¹ 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 from a text. The word 'commissioner' has in this paper, been capitalised only when it is used in conjunction with a person's name. In the same way, the word 'unit' when referring to the Aboriginal Issues Units

reform. In Australia there have been 127 royal commissions since 1902, investigating matters including the butter industry, the Constitution, customs and excise, the building industry and taxation. Royal commissions have even been described as being 'as Australian as meat pie'.²

Royal commissions do not and cannot, of course, satisfy everybody. Certain perspectives on the problem being investigated are privileged while others are marginalised or excluded entirely. This paper endeavours to explore this privileging and exclusion by investigating the process, context and outcomes of one royal commission in particular: the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC).

Although there has been considerable debate about the use of royal commissions to investigate wrongdoings and to make public policy recommendations,³ few scholars have considered the extent to which the quasi-judicial processes are appropriate for investigating the affairs of marginalised others. Those that have critiqued royal commissions from this perspective have focused on the processes used by the RCIADIC.⁴ The RCIADIC is widely acknowledged as the most thorough legal inquiry ever conducted into the lives of Indigenous Australians. Even though more than a decade has passed since the publication of the final report, it continues to

(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 from a text.

² Richard Hall, *Disorganised Crime* (1986) 244.

³ For general critiques of royal commissions see for example: Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001); Leonard Arthur Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982); 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 University, 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 Janet Ransley's thesis for a detailed discussion of how these two terms are related. Unless quoting directly from an author, this paper uses the terms 'royal commission', 'commission' or simply 'inquiry' interchangeably to include references to commissions of inquiry.

⁴ Ron Brunton, *Black Suffering, White Guilt? Aboriginal Disadvantage and the Royal Commission into Deaths in Custody* (1993); 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; Kate Kerley and Chris Cunneen, 'Deaths in Custody in Australia: the Untold Story of Aboriginal and Torres Strait Islander Women' (1995) 8 *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; Kathy Whimp, 'The Royal Commission into Aboriginal Deaths in Custody' in Weller, above n 3, 80.

significantly influence Indigenous social and justice policy in Australia. According to the 1997 *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 in general terms still provide a blue print for reforming key aspects of criminal justice administration'.⁵ 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.⁶

A critical assessment of whether royal commissions are the most appropriate legal processes to investigate highly political and controversial topics such as Indigenous deaths in custody is both timely and desirable.⁷ In particular, the extent to which such processes include or exclude non-orthodox (or non-legal) knowledge needs to be explored, because without such critical reflection there is a significant risk that future royal commissions will be unable to fulfil the expectations of marginalised groups such as Indigenous Australians.

The information in this paper regarding the actual processes and contexts of the RCIADIC is drawn largely from a series of interviews conducted by the author with 48 people who worked on or were associated with the RCIADIC.⁸ This paper substantially expands upon previous scholarly critiques of the RCIADIC. Although some published critiques have been based on the experiences of people who had worked for the RCIADIC, none of them systematically surveyed a large number of persons that had worked on the RCIADIC, nor has there ever been a detailed analysis of what both Indigenous and non-Indigenous people who worked for the RCIADIC thought of the processes undertaken by the inquiry. This paper endeavours to remedy this important oversight.

This paper is not intended to disparage or undermine the importance of the work conducted and the recommendations made by the RCIADIC. Indeed, all of the persons interviewed supported the work of the RCIADIC in some form or another, regardless of any criticisms made. The primary aim of this paper is, rather, to explore the reasons for the RCIADIC's apparent privileging of orthodox (legal) perspectives and exclusion of non-orthodox (non-legal) perspectives, and to suggest

⁵ 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 On Aboriginal Deaths in Custody* (1997) 7.

⁶ See for example *R v Scobie* [2003] SASC 85; *Gray v Police* [2004] SASC 109; *R v Tjami* [2000] SASC 311.

⁷ The death in custody in 2004 of Cameron Doomadgee in Palm Island, Queensland has sparked calls for another royal commission.

⁸ Throughout this paper, unless a direct quote is used, interview data has been relied upon without attributing it to a specific source. A code is used for direct quotes to maintain the confidentiality and anonymity of each person who was interviewed. 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 whether they are male (M) or female (F); the third category indicates whether the person had legal training (L) or no such training (NL); and finally a number was randomly allocated to each person (1 to 48).

ways in which future quasi-judicial inquiries that not only act as a fact-finding investigation but also as an advisory one, might be made more inclusive.

Part II of this paper describes the way in which the RCIADIC was established. Part III summarises the law and politics literature critical of royal commissions generally. Part IV presents the results of the 48 interviews; these results reveal the many problems faced by the RCIADIC and by the Aboriginal Issues Units (AIUs) during the inquiry, including the procedural and political constraints which hampered the ability of the RCIADIC to include non-orthodox perspectives and knowledge.⁹ The paper concludes with a description of the lessons which emerge from this critical analysis of the RCIADIC.

II ESTABLISHING AND CONDUCTING THE RCIADIC

The RCIADIC was established on 16 October 1987.¹⁰ Its mandate was 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 catalyst for its inception was public agitation by members of the Indigenous community about the large number of Indigenous deaths in custody that were occurring during the 1980s.¹¹ The campaign by Indigenous activists began with the death of John Peter Pat in 1983 but gained 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.¹²

The campaign attracted international attention after a representative of the National Committee to Defend Black Rights (CDBR) presented their case to the United Nations in July 1987.¹³ Soon after returning from the United Nations and shortly before the commencement of the Bicentenary celebrations (which were to begin in

⁹ The extent to which the RCIADIC adopted practices that may have led to the further colonisation, rather than the decolonisation, of Indigenous people is considered in another paper: 'The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody' (2006) 33 *Journal of Law and Society* 451. This paper focuses specifically on the extent to which the RCIADIC incorporated Indigenous voices and culturally appropriate investigative practices.

¹⁰ The RCIADIC was initiated at both Commonwealth and State and Territory levels, through a fairly complex system of the issue of Letters Patent by the Governor-General of Australia and the Governors of New South Wales, Victoria, Queensland, South Australia and Tasmania, and by the issue of Commissions by the Governor of Western Australia. The Administrator of the Northern Territory issues Letters Patent under the *Commission of Inquiry (Deaths in Custody) Act 1987*: see the footnote at Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, 161.

¹¹ Kerley and Cunneen, above n 4; Whimp, above n 4.

¹² 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.

¹³ Richard W Harding, 'Prisons Are the Problem: a Re-Examination of Aboriginal and Non-Aboriginal Deaths in Custody' (1999) 32 *Australian and New Zealand Journal of Criminology* 108.

1988), the federal government announced that it would establish a royal commission to investigate the large number of Indigenous deaths in custody.¹⁴ The primary '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'.¹⁵

A prominent Federal Court judge, Justice James Henry Muirhead, was appointed as the sole commissioner. Only one commissioner was initially appointed because it was assumed that there would only be approximately 44 deaths to investigate.¹⁶ There were in fact 124 deaths during the relevant time period; however, of those, 25 fell outside the RCIADIC's Letters Patent.¹⁷ Upon discovering the large number of deaths requiring investigation, five other commissioners were appointed to conduct inquiries in the six Australian States and the Northern Territory.¹⁸ Two of the five 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 Commissioner Muirhead (who had retired) as the national commissioner on 28 April 1989.

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.¹⁹ These extended powers enabled the RCIADIC to investigate

not only how people died, but why they died. ... [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

¹⁴ For an explanation of the reasons why the federal government took such an action see Corbett and Vinson, above n 12; Harris, above n 4, 210.

¹⁵ Interview with NIML14 (Face-to-face interview, 9 May 2003).

¹⁶ Chris Cunneen, *The Royal Commission into Aboriginal Deaths in Custody: an Overview of Its Establishment, Findings and Outcomes* (1997) 2.

¹⁷ 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.

¹⁸ No deaths had occurred in the Australian Capital Territory during the relevant period. Three commissioners were appointed on 6 May 1988: Elliott Frank Johnston, to conduct inquiries in Western Australia, South Australia and the Northern Territory; John Halden Wootten, to conduct inquiries in New South Wales, Victoria and Tasmania; Lewis Francis Wyvill, to conduct inquiries in Queensland. Daniel John O'Dea was subsequently appointed on 27 October 1988 to assist with the inquiries in Western Australia since there were so many deaths in that State. Patrick Lionel Dodson was also 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 10, vol 1, 157-60.

¹⁹ The Letters Patent were extended on 6 May 1988. The *National Report* noted, 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': *National Report*, above n 10, vol 1, xlvii.

many Aboriginals unemployed, poorly housed, poorly educated? Why is their health poor? Why is their life expectancy shorter than other Australians?²⁰

The inquiry was established at a time when Indigenous-police relations were at their most fragile.²¹ The RCIADIC was conscious of the animosity and distrust that existed and it set out to subdue those feelings by ensuring that a thorough investigation was carried out in relation to each death. The belief was that this would uncover any foul play on the part of police and custodial officers.²²

The investigation of the 99 deaths was therefore performed in a quasi-judicial manner, and included the use of formal public hearings and the examination of files maintained by agents of the State.²³ The files 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.²⁴

Commissioner Wootten made a similar observation in his regional report when he noted that '[o]ften 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'.²⁵

In investigating the deaths, the RCIADIC also conducted interviews with, and received submissions from, family members, governments, government agencies, Indigenous organisations and community members. 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.²⁶ The use of local courtrooms for the hearings in rural or regional towns was avoided because of the negative

²⁰ *National Report*, above n 10, vol 1, 103.

²¹ The rate at which new deaths were occurring, the failure of regulatory authorities in finding any police or prison officers accountable for the deaths, and the historically negative relationship that existed between Indigenous people and police, resulted in the organisation of national rallies and protests calling for police accountability: Alan Campbell, 'Interview' (1989) 2(36) *Aboriginal Law Bulletin* 11; Corbett and Vinson, above n 12; Alice Dixon, 'Interview' (1989) 2(36) *Aboriginal Law Bulletin* 10; Duncan Graham, *Dying Inside* (1989).

²² However as David McDonald and Kathy Whimp point out, this belief was not realised: McDonald and Whimp, above n 4.

²³ For a more detailed discussion of the methodology used by the RCIADIC when investigating the deaths see *National Report*, above n 10, vol 5, 240-4.

²⁴ *National Report*, above n 10, vol 1, 4-5.

²⁵ Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) 12.

²⁶ 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; *National Report*, above n 10, vol 5, 243; *Regional Report*, above n 25, vol 1, 15.

connotations courts hold for Indigenous people.²⁷ Prior to the RCIADIC arriving in a town to conduct a hearing, 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 its investigation of the underlying issues the RCIADIC relied upon sociological and criminological research, public meetings and the submissions received from a number of individuals and organisations in order to understand the way Indigenous people lived and to fully appreciate the way colonisation had affected and continued to affect Indigenous Australians.²⁸ A Criminology Research Unit (CRU) was established to conduct quantitative research about Indigenous people in police and prison custody and to compare the results with information about non-Indigenous people in custody.

In March 1989, almost a year and a half after the RCIADIC was established, the commissioners resolved to establish AIUs in each of the six States and the Northern Territory. This was done to address concerns, which were originally expressed by Gary Foley, a prominent Indigenous activist, that there was no avenue for direct input into the investigations into underlying issues from the Indigenous community.²⁹ The AIUs were established as semi-independent research units, with the expectation that they organise meetings and interviews with Indigenous people and organisations, and then report their findings to each regional commissioner.³⁰

The RCIADIC concluded that the deaths were not the result of any system defect per se. There were no successful prosecutions of police or prison officers as a result of the inquiry. Only two commissioners (Commissioner Wootten³¹ and

²⁷ As well as from interview data, this information was obtained from *Regional Report*, above n 25, 38.

²⁸ For a more detailed discussion about the methodology used in conducting the investigation into the underlying issues see: *National Report*, above n 10, vol 5, 244-50.

²⁹ *National Report*, above n 10, vol 5, 248; Whimp, above n 4.

³⁰ *National Report*, above n 10, vol 1, 248-49.

³¹ Commissioner Wootten recommended that the reports on Shane Kenneth Atkinson, Lloyd James Boney, Arthur Moffat 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 Moffat* (1991); Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Bruce Thomas Leslie* (1991); 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* (1991);

Commissioner Wyvill³² in the case of Charlie Kulla Kulla) made strong recommendations that the conduct of certain police officers be further investigated by disciplinary and prosecutorial authorities.

The *National Report*, consisting of five volumes, was tabled on 15 April 1991 and made 339 recommendations regarding the underlying issues surrounding the deaths. One of the commissioners interviewed 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'.³³ The predominant finding was that Indigenous people were vastly over-represented in custody. The RCIADIC concluded that it was because of the over-representation of Indigenous people in police and prison custody that so many deaths had occurred.

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; managing alcohol and substance abuse; improving police relations 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.

Over a decade after the RCIADIC tabled its recommendations, many of the people who were interviewed noted that there has been little improvement in the lives of Indigenous people. Comments containing sentiments similar to the following were not uncommon: '[The royal commission] had all the skills, that's fair enough, we don't deny that. But for all those skills and all that education, our people are still sitting in the same status.'³⁴

As evidenced by the recent Redfern and Palm Island Riots, little has changed regarding the relationship between police and Indigenous people in some parts of Australia.³⁵ The degree of suspicion surrounding the deaths of Thomas Hickey and

Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Shane Kenneth Atkinson* (1991).

³² 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: Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Charlie Kulla Kulla* (1991).

³³ Interview with NIML14 (Face-to-face interview, 9 May 2003).

³⁴ Interview with IMNL43 (Face-to-face interview, 8 May 2003).

³⁵ The stories that have been reported by the news media illustrate that many Indigenous people still view police suspiciously and still believe the justice system is imbued with racism. See for example: Australian Broadcasting Corporation, 'Riot in Redfern', *Four Corners* 29 March 2004, <<http://www.abc.net.au/4corners/content/2004/transcripts/s1077026.htm>> 2 September 2004; Roberta Mancuso and Steve Connolly, 'Islanders Riot over Death in Custody', *The Age* (Melbourne), 27 November 2004, <<http://www.kooriweb.org/foley/news/age27nov04.html>> 4 March 2005. The catalyst of the Redfern riots was the death of Thomas Hickey, a 17-year-old

Cameron Doomadgee indicates that Indigenous people still harbour feelings of distrust and animosity towards police.

Why, after such an extensive inquiry, are these problems and negative perceptions still present? When answering this question, some scholars point to the lack of commitment by federal, State and Territory governments to fully implementing the recommendations made by the RCIADIC.³⁶ Other scholars blame the RCIADIC itself, stating that as an entity it was constrained by its powers and mandate and it could therefore never have achieved the reforms required to change the marginalisation of Indigenous people.³⁷

Although the view espoused by the first group of scholars is undeniably valid, this paper falls within the considerations espoused by the latter group. As former Canadian Supreme Court justice Frank Iacobucci warns:

[t]here inevitably will be a tendency to conclude that the final measure of the effectiveness of a commission is the degree to which its activities and recommendations are accepted by the other institutions of society and by the public. One must be cautious in employing such a measure.³⁸

This paper is concerned primarily with the ways in which royal commissions and other such quasi-judicial inquiries appear to exclude non-orthodox perspectives and are to that extent inappropriate instruments for investigating matters as important to

Indigenous boy, who was allegedly being chased by police when he became impaled on a fence after falling from his bike. The police deny these allegations, and claim they were searching for another suspect and were not at all interested in Thomas Hickey. In Palm Island, 36 year old Cameron Doomadgee died hours after his arrest while being detained in the Palm Island Watchhouse. A post-mortem examination revealed that Doomadgee had died from fractured ribs and a ruptured liver. Palm Island police maintain that the injuries were incurred when Doomadgee fell during a scuffle with police while being transported from a police van. The Palm Island community does not accept this version of events.

³⁶ See for example: Richard W Harding et al, *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody* (1995); David McDonald and Chris Cunneen, 'Aboriginal Incarceration and Deaths in Custody: Looking Back and Looking Forward' (1997) 9 *Current Issues in Criminal Justice* 5; Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody 1989-1996* (1996).

³⁷ For example, Kerry Carrington and Michael Wearing both believe that the RCIADIC was unable, due to the lack of cooperation on the part of various agencies, to uncover the truth of how the deaths occurred. As a quasi-judicial forum, the inquiry could only ever really achieve the construction of a legally authoritative account: Kerry Carrington, 'The Death of Mark Quayle: Normalising Racial Horror in Country Towns and Hospitals' (1991) 4 *Journal for Social Justice Studies, Special Issue Series, Politics Prisons and Punishment – Royal Commissions and 'Reforms'* 161; 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.

³⁸ Frank Iacobucci, 'Commissions of Inquiry and Public Policy in Canada' in Pross, Christie and Yogis, above n 3, 21, 28.

marginalised groups as Indigenous deaths in custody and the underlying issues.³⁹ The critical reflections of people who worked for the RCIADIC are used to support this claim. Their reflections are placed within the context of literature that considers the limitations of royal commissions generally.

III ROYAL COMMISSIONS AND THEIR CRITICS

Much of the literature that critiques the processes and outcomes of royal commissions focuses on problems that are specific to a particular inquiry.⁴⁰ Such work provides an informative framework within which to reflect critically upon the RCIADIC by identifying procedural constraints that have affected the ability of royal commissions to gather, evaluate and incorporate information which could be considered pertinent to the inquiry.

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 royal commissions.⁴¹ Their concern stems from the belief that by being appointed as commissioners judges become embroiled in political controversy.⁴² 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.⁴³

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'.⁴⁴ This does depend on the type of inquiry conducted, that is, whether the inquiry is primarily inquisitorial or investigative.⁴⁵ It is not difficult to imagine investigative inquiries crossing disciplinary boundaries that are foreign to commissioners who are solely

³⁹ Indeed, Innis Christie and A Paul Pross note that, in his dinner address at a Canadian conference to discuss commissions of inquiry, Iacobucci says that this is one of two important questions that need to be addressed in relation to any commission. The other question concerns how to assess their effectiveness: Innis Christie and A Paul Pross, 'Introduction' in Pross, Christie and Yogis, above n 3, 1.

⁴⁰ See for example Mike McConville and Lee Bridges (eds), *Criminal Justice in Crisis* (1994); Pross, Christie and Yogis, above n 3; Weller, above n 3.

⁴¹ Leonard Arthur Hallett, 'Judges as Royal Commissioners' (1987) 61 *Law Institute Journal* 811; Hallett, above n 3; George Winterton, 'Judges as Royal Commissioners' (1987) 10 *UNSW Law Journal* 108.

⁴² For example see Winterton, above n 41, which summarises the case for and against judges being appointed as royal commissioners.

⁴³ Hallett, above n 3, 73.

⁴⁴ Ibid. See also the discussion by Patrick Weller in 'Royal Commissions and the Governmental System in Australia' in Weller, above n 3, 259.

⁴⁵ 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 41, 117.

legally trained, resulting in the exclusion of pertinent information that cannot be properly acquired or understood.

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 when Commissioner Dodson was appointed to solely investigate the underlying issues. The appointment of an additional commissioner in that State, however, occurred mainly because of the large workload associated with investigating such a large number of deaths rather than as an effort to address any inadequacy of skills.⁴⁶ Hallett notes that the establishment of an inquiry that has more than one commissioner may itself cause problems. In particular, there may be delays in delivering reports and recommendations,⁴⁷ and this may result in the exclusion of information due to time and resource constraints. Hallett acknowledges that the executive government should have the benefit of a range of differing opinions, but that in the end this may create more confusion rather than a clarification of the issues.⁴⁸

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.⁴⁹ Innis Christie and A Paul Pross suggest that many of the problems associated with royal commissions can be avoided if governments use other forums (eg ombudsman offices 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.⁵⁰

However, it is acknowledged that this dichotomy may not be maintainable because the giving of policy advice may require the conducting of a fact-finding inquiry in order 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.⁵¹

⁴⁶ Western Australia had the largest number of deaths: 32 of the 99 deaths. There were 27 deaths in Queensland; 21 deaths in total in South Australia and the Northern Territory; and 19 deaths in total in New South Wales, Victoria and Tasmania.

⁴⁷ Hallett, above n 3.

⁴⁸ Hallett, above n 3, 73-4.

⁴⁹ For a general discussion of the problems that can occur when a commission is required to perform dual investigative roles, see Christie and Pross, above n 39.

⁵⁰ *Ibid* 17. The word 'investigative' is used in this quote to refer to a fact-finding or inquisitorial inquiry.

⁵¹ *Ibid*.

The RCIADIC started out as a quasi-judicial fact-finding inquiry but its Letters Patent were later amended so that it also conducted a sociological or advisory investigation about why it was that so many Indigenous people were being incarcerated. Whether combining these two approaches inhibited the RCIADIC's ability to fully incorporate both legal and non-legal knowledges and perspectives is considered below.

According to Liora Salter, the ability of royal commissions to make radical recommendations that more aptly satisfy and reflect the expectations of victims is impossible because the process of a royal commission itself inhibits such a thing from happening.⁵² Royal commissions are 'oriented to the quite limited highly pragmatic and, indeed, reformist goal of producing specific recommendations for policy', which will ultimately constrain their potential for radicalism.⁵³ Salter uses the Berger inquiry as an example of an inquiry that was able to engage in a radical debate. It was able to do so because it adopted extensive investigative procedures, which included wide-ranging consultations and close attention being paid 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 radically inclusive.⁵⁴ As mentioned previously, many of the people interviewed noted that the RCIADIC recommendations have not radically improved the lives of Indigenous Australians. Some scholars have blamed this outcome on the types of recommendations made.⁵⁵ Whether or not the RCIADIC could have made more radical recommendations which more appropriately reflected the views of Indigenous people is considered below.

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.⁵⁶ 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

⁵² Liora Salter, 'The Two Contradictions in Public Inquiries' in Pross, Christie and Yogis, above n 3, 173.

⁵³ Ibid 177.

⁵⁴ Richard Simeon, 'Inside the Macdonald Commission' (1987) 22 *Studies in Political Economy* 167.

⁵⁵ See for example: Judy Atkinson, 'Violence against Aboriginal Women: Reconstitution of Community Law – the Way Forward' (1990) 2(46) *Aboriginal Law Bulletin* 6; Brunton, above n 4; Harding, above n 13; Luke McNamara, 'Aboriginal Human Rights and the Australian Criminal Justice System: Self-Determination as a Solution?' (1992) 21(3) *Manitoba Law Journal* 544; Luke McNamara, 'Autonomy-Based Solutions and Criminal Justice Reform' (1992) 2(54) *Aboriginal Law Bulletin* 4; 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; Marina Paxman, 'Women and Children First' (1993) 18(4) *Alternative Law Journal* 153.

⁵⁶ Ransley, above n 3, 184, 222.

being a legitimate method of investigating misconduct.⁵⁷ 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.⁵⁸ Management of the media is difficult, however, if the victims of the misconduct being investigated lack public sympathy. These concerns would have been most pertinent to the RCIADIC because it was dealing with a controversial and complicated topic. This would have arguably made it difficult to manage the various stakeholders involved, and ultimately to reflect the views of all concerned.

IV THE RCIADIC'S ABILITY TO BE FACTUALLY AND IDEOLOGICALLY INCLUSIVE

This part of the paper summarises the results of interviews with 48 people who either worked in the six main offices and AIUs established for the inquiry or were involved in some other capacity with the RCIADIC.⁵⁹ Twenty Indigenous people were interviewed, nine of who were female and 11 male, and 28 non-Indigenous people, eight of who were female and 20 male. 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 of the Indigenous people interviewed had such qualifications.

At the time the inquiry was established, there was a mixed reaction to the RCIADIC amongst Indigenous people. According to a number of those interviewed, many Indigenous people saw the RCIADIC as a futile exercise. Others, however, supported its establishment, believing it would lead to change. Indigenous people wanted to voice their opinions about the deaths and it seemed they had finally been given an outlet in which to do so. Unfortunately, many of these supporters were left disappointed by what the RCIADIC was able to achieve.

I do know that there are many Aboriginal people whose hopes have been deferred time after time after time and the royal commission was just another time where hope was being deferred.⁶⁰

⁵⁷ Scott Passer, 'Royal Commissions and Public Inquiries: Scope and Uses' in Weller, above n 3, 1.

⁵⁸ Ransley, above n 3, 221-2.

⁵⁹ Five of the main offices (two in Western Australia, one in Queensland, one in New South Wales and one in South Australia) were under the control of the five commissioners, with a sixth being established as a national office (in Canberra). AIUs were established in South Australia, the Northern Territory, Western Australia, Queensland, New South Wales, Victoria and Tasmania. There were nine people interviewed from the New South Wales, Victorian and Tasmanian offices; 12 from the South Australian and Northern Territory offices; 11 from the Queensland office; 11 from the Western Australia offices; and five from the national office. 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 outcomes achieved by the inquiry.

⁶⁰ Interview with IFNL3 (Face-to-face interview, 30 June 2003).

Most of the non-Indigenous people who worked for the RCIADIC earnestly strived to satisfy the expectations and hopes held by Indigenous people. Ultimately, no successful prosecutions resulted from their efforts and they, like many Indigenous people, were left feeling frustrated and disillusioned by the process.

A number of problems emerged as a result of the procedures used by, and the constraints imposed upon, the RCIADIC. These problems ultimately limited the scope of the information the RCIADIC was able to consider. What follows is a description of these problems and how they affected the information collected and relied upon, as remembered by those that worked on the RCIADIC. These problems relate to the processes and procedures undertaken by the RCIADIC that were within its or the government's power to alter without requiring any statutory change. Although many royal commissions commonly experience some of the problems identified, other difficulties were particular to the RCIADIC inquiry and the subject matter that it was investigating. While the problems are clearly delineated, they are certainly not unrelated and there is considerable overlap between them.

A The Tension Between Legal and Sociological and Criminological Perspectives

The largest obstacle experienced by the RCIADIC related to the management of the vast amount of information generated by the investigations into the deaths and underlying issues. Such a problem is not uncommon with royal commissions that are given unusually broad mandates. Christie and Pross note in relation to the Canadian MacDonald Commission that 'the mass of documentation was beyond the capacity of the commissioners to absorb ...'.⁶¹

Despite the support from Indigenous people in the general community to investigate not only the deaths in custody but also the underlying issues, within the RCIADIC there was a great deal of dissent amongst staff regarding what material should be included in the reports that were produced and the recommendations that were made. More than a third of the Indigenous people 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. As one might expect, certain units and staff members within the RCIADIC, such as the CRU and the AIUs, wanted to embrace a more criminological and sociological (ie a non-legal) perspective and focus on the underlying issues, such as institutional racism, but many of the lawyers working for the RCIADIC wanted to investigate the deaths. This struggle was a result of the initial structure and development of the RCIADIC.⁶²

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

⁶¹ Christie and Pross, above n 39, 11.

⁶² Whimp, above n 4, 83.

members of the AIUs who called for a broader inquiry which incorporated marginalised perspectives. One of the lawyers 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 Lionel Dodson) and his focus was purely 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'.⁶³

Many thought that the investigation of underlying issues should have been proposed from the outset but since it was not, it limited what the RCIADIC could consider in relation to the non-legal aspects of the inquiry. For example, there was little focus on the ways in which Indigenous women experienced racism differently to Indigenous men. 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'.⁶⁴ According to the commissioners and most of the lawyers, the RCIADIC was about the investigation of the deaths because underlying issues was not what they were originally set up to investigate. 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 that much more difficult.

At another level, the commissioners could not agree on what should go into 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 you know in the writing and so on'.⁶⁵ As is discussed in more detail below, the conservatism of some of the commissioners ultimately affected what material was included.

Both Indigenous and non-Indigenous people who were interviewed said that if they were to have another royal commission into Indigenous deaths in custody they would probably 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'.⁶⁶

⁶³ Interview with NIML31 (Face-to-face interview, 19 September 2003).

⁶⁴ Interview with NIFNL42 (Face-to-face interview, 24 June 2003).

⁶⁵ Interview with NIFNL30 (Face-to-face interview, 12 June 2003).

⁶⁶ Interview with NIML17 (Face-to-face interview, 2 October 2003).

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.⁶⁷

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 [the deceased] to that point'.⁶⁸ The RCIADIC focused too much on prolonging life rather than on the quality of life. However, some observed that, if such an inquiry 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 inquiry they might have done a better job for Indigenous people.

B *The Impact of 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.⁶⁹ Forty per cent of the Indigenous people 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, influenced the scope of the RCIADIC's work to a large extent.

Both administrative and professional staffing resources were often scarce and inadequate.⁷⁰ Typically the police and prison officers unions had more legal staff appearing at the death hearings than the RCIADIC. Because the inquiry was 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.

Those who had worked for the RCIADIC (including staff employed with the AIUs) thought they had been given insufficient time to complete their respective tasks. Many of those working for the AIUs felt that they were 'behind the eight ball' since the RCIADIC had already started when the units were established and because they had a very short time within which to achieve their goals.⁷¹ This affected their ability to adhere to cultural protocols, such as interviewing Indigenous men and women separately, which in turn influenced the degree to which Indigenous women in particular were able to discuss gendered problems. As one might expect, the

⁶⁷ Interview with NIML31 (Face-to-face interview, 19 September 2003).

⁶⁸ Interview with NIMNL15 (Face-to-face interview, 17 October 2003).

⁶⁹ 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: Iacobucci, above n 38.

⁷⁰ 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 39, 7-8.

⁷¹ Interview with IFNL41 (Face-to-face interview, 14 April 2003). The AIUs were only in existence for approximately 18 months.

commissioners were 'working under enormous pressure all the time'.⁷² Legal and informal challenges made by governments and by police and prison officers unions against the RCIADIC's powers of investigation created enormous delays for the commissioners and the lawyers.⁷³

The lack of time, the vast amounts of information collected and the complexity of the issues 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 these texts depended ultimately on 'how knowledgeable the draft person was, what their particular interest was, their ideology, all of those other sorts of factors'.⁷⁴ This is not an unusual occurrence with royal commissions. For example, Simeon's critique of the MacDonald Royal Commission attributes the outcomes of that commission to the political and disciplinary predispositions of those who were involved in conducting the investigation.⁷⁵ One of the lawyers viewed the compilation of the *National Report* as an unrealistic and overly ambitious goal due to the impediments they faced. Instead of recognising the constraints that were placed upon the RCIADIC, Duncan Graham notes that

[i]t 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.⁷⁶

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 methodology 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. Some lawyers strongly 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

⁷² Interview with NIML14 (Face-to-face interview, 9 May 2003).

⁷³ For a detailed discussion of the challenges mounted by governments and by police and prison unions see Elena Marchetti, *Missing Subjects: Women and Gender in the Royal Commission into Aboriginal Deaths in Custody* (PhD Thesis, Griffith University (2005), ch 4. The legal challenges related to whether a deceased was Indigenous; whether the deceased was in a place of detention when they died (the investigate into the death of David John Gundy raised such a challenge); whether 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; whether legal professional privilege could be claimed against subpoenaed documents in the hearing into the death of Robert Joseph Walker; and whether the hearing into the death of John Peter Pat should be conducted in private and not be published. The informal challenges related to the focus of the inquiries (whether they should be about the deaths or the underlying issues) and to the extent to which police and prison officers had to cooperate with the RCIADIC's requests for evidence and testimony.

⁷⁴ Interview with NIML13 (Face-to-face interview, 27 May 2003).

⁷⁵ Simeon, above n 54.

⁷⁶ Graham, above n 21, 160.

sessions with various members of the community and other institutions, rather than having separate hearings for each deceased.⁷⁷

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. ... 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.⁷⁸

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 federal government to determine what parameters, if any, should be placed on the investigations. Indeed, the RCIADIC was appointed without the government having a complete understanding of how many deaths needed investigating and what challenges might arise. When referring to the initial establishment of the RCIADIC, a lawyer recalled that

[t]here 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.⁷⁹

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 officer 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.⁸⁰ Commissioner Muirhead noted in the *Report of the Inquiry into the Death of Kinsley Richard Dixon* 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'.⁸¹ Muirhead then stipulated that the RCIADIC had no obligation to make a factual finding of fault:

⁷⁷ Indeed attempts were made in some jurisdictions to shorten the length of the some of the hearings. Having said this, it is important to acknowledge that a number of people interviewed emphasised the fact that all deaths were thoroughly investigated. See also the reassurance given in the *National Report: National Report*, above n 10, vol 1, 59.

⁷⁸ Interview with NIFL21 (Face-to-face interview, 29 May 2003).

⁷⁹ Interview with NIML13 (Face-to-face interview 27 May 2003).

⁸⁰ 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); *Evidence Act 1958* (Vic); *Royal Commissions Act 1968* (WA)

⁸¹ Australia, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Kinsley Richard Dixon* (1991) 4.

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. ... This does not mean that ... I am required to make a finding of some sort or the other merely because such a finding is important, perhaps vital. ... In some cases Commissioners may find it necessary to observe that they can make no findings.⁸²

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'.⁸³ He did not do so, however, because he acknowledged that other commissioners had already made such recommendations and because he believed it would be inappropriate to come to any such conclusion about investigations which he did not conduct. As previously mentioned, only two of the commissioners recommended that the reports be sent to disciplinary and prosecutorial authorities for further consideration.

The Indigenous people who were 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 interviewed were aware that the RCIADIC could not make any findings of guilt, they 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.⁸⁴

The tension over how much blame should be placed on certain individuals was present throughout the inquiry. This tension existed because the inquiry 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 interviewed thought that Indigenous communities had not been adequately informed about what the RCIADIC was doing and what powers it

⁸² Ibid 6.

⁸³ *National Report*, above n 10, vol 1, 106.

⁸⁴ Interview with IMNL25 (Face-to-face interview, 24 October 2003).

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*⁸⁵ case had influenced the way that the commissioners made their rulings. The case considered the personal liability of a commissioner in recommending prosecutions (in a 1981 royal commission report) against Air New Zealand in an Antarctic crash. Air New Zealand was successful in proving that Mahon had made the recommendations without any substantial evidence. This case had been decided in the mid 1980s, so the commissioners of the RCIADIC are 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 are 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 way they weighed the evidence and ultimately to way they allocated blame.

One Indigenous person felt that because of its caution the RCIADIC had become 'a very soulless exercise'.⁸⁶ 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'.⁸⁷ 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.

Six non-Indigenous people 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 and social justice policies. For example, there were no recommendations that specifically focused on the problem of family violence although it was raised repeatedly as a problem in the Northern Territory and in some States. 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

⁸⁵ [1984] AC 808.

⁸⁶ Interview with IMNL32 (Face-to-face interview, 4 April 2003).

⁸⁷ Interview with IMNL32 (Face-to-face interview, 4 April 2003).

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.⁸⁸

As Liora Salter and Simeon note, however, the ability of a royal commission to make radical recommendations depends significantly upon the availability of resources and the pressures that are exerted upon the inquiry by external agencies.⁸⁹

V CONCLUSION

This paper has demonstrated the ways in which the process adopted by the RCIADIC and the procedural constraints imposed upon it by governments affected the degree to which certain information was included and other information was excluded, as well as the types of recommendations that were made.

The problems and tensions identified by the people who were interviewed are not entirely surprising. One would expect that the enormity of the task and the controversial nature of the investigations would have made conducting the inquiry a difficult and complex undertaking. The information collected from the interviews, however, points to a number of lessons that, if acknowledged, may prevent future royal commissions or inquiries that are required to deal with politically sensitive matters such as Indigenous affairs from excluding certain information and perspectives.

One such lesson is the importance of the government acquiring a clear understanding of the problem prior to the establishment of a royal commission. As is the case with any research project, a preliminary examination of the problem is needed before establishing an inquiry and before expecting the inquiry to start the main part of its investigation. This would assist with the early identification of unanticipated outcomes and would ultimately inform the manner in which the terms of reference are framed. This is particularly important with investigative inquiries (as opposed to inquisitorial ones) since the topic needing to be researched can turn out to be unexpectedly broad, as was the case with the RCIADIC. Related to this is the possibility that someone with both legal and social science research skills may need to be appointed to head the inquiry.

Another lesson relates to the inappropriate use of multi-member commissions. As Hallett notes, there are both advantages and disadvantages to the multi-member structure.⁹⁰ 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 that needed investigating resulted in five other commissioners being appointed. The inquiries into the deaths were conducted using a single member approach in each of the jurisdictions, including Western

⁸⁸ Interview with NIML20 (Telephone interview, 17 September 2003).

⁸⁹ Salter, above n 52; Simeon, above n 54.

⁹⁰ Hallett, above n 3, 73.

Australia.⁹¹ This was not the case, however, in relation to the making of the recommendations. Although the government did not require the consensus of all the commissioners in making recommendations, this was the approach the commissioners decided to adopt.⁹² In doing so, it ensured that the government received well-informed advice, since the recommendations made did not depend on the view of only one person. Nevertheless many of those that 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, particularly an Indigenous one, from emerging. If a multi-member commission is used, the silencing of particular views needs monitoring and circumventing.

One of the more important lessons to be learned from the RCIADIC is that educating the people most affected by the outcome of a commission about the reason for the inquiry and the parameters of its powers is necessary for engendering a supportive and trusting environment. Without such an environment, collection of information relevant to the inquiry becomes difficult. Educating and consulting with the people who will be most affected needs to begin prior to the establishment of the commission. Ransley concludes that maintaining public support is one of the requirements for a 'successful' royal commission:

[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.⁹³

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. This was, however, done on an ad hoc basis as each hearing was prepared and was not something that occurred prior to the RCIADIC being established. Later, when the AIUs were set up (about 18 months after the RCIADIC was first established) further community consultations were conducted. 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 stage futile.

Despite the enormous problems with and shortcomings of the RCIADIC, over half of those interviewed believed that the inquiry managed to achieve some positive outcomes. Many of these outcomes, however, are a reflection of the extent to which governments have implemented the recommendations made, rather than a reflection of the suitability of the investigative procedures.

⁹¹ Although Western Australia had two commissioners, only one focused on the deaths.

⁹² *National Report*, above n 10, vol 1, xx.

⁹³ Ransley, above n 3, 221.

Despite its limitations 'it was an important thing to have done'.⁹⁴ 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; and the administration of Indigenous affairs was restructured, which led to improved coordination between departments.⁹⁵

A 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.⁹⁶

The prevailing view amongst the Indigenous people who were interviewed was that they now have 339 recommendations to 'hang their hat on'.⁹⁷ When requesting policy reforms, they can use the recommendations to support their requests. 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.

One Indigenous person referred to the *National Report* as 'compulsory reading' for anyone dealing with Indigenous people.⁹⁸ Another called it the 'biggest history lesson in Australia'.⁹⁹ It is a resource that provides a foundation upon which other dialogues can be generated. Despite its many flaws - including the fact that legalistic perspectives were generally privileged at the expense of the more non-orthodox points of view - the RCIADIC remains the most comprehensive investigation ever undertaken into the deep disadvantage experienced by Indigenous people as a result of colonisation.¹⁰⁰

⁹⁴ Interview with IMNL12 (Face-to-face interview, 26 May 2003).

⁹⁵ The future, however, is unclear after the dismantling of the Aboriginal and Torres Strait Islander Commission in March 2005.

⁹⁶ Interview with NIFL23 (Face-to-face interview, 8 November, 2003).

⁹⁷ Interview with IFNL41 (Face-to-face interview, 14 April 2003).

⁹⁸ Interview with IMNL37 (Face-to-face interview, 30 June 2003).

⁹⁹ Interview with IFNL16 (Face-to-face interview, 1 July 2003).

¹⁰⁰ The RCIADIC's reports are available at <<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic>>, 10 September 2006. The RCIADIC's records are available in the National Archives of Australia, <http://www.naa.gov.au/Publications/Research_Guides/guides/rciadic/introduction.htm> at 10 September 2006.