

**Aboriginal and Torres Strait Islander Social Justice Commissioner,
Human Rights and Equal Opportunity Commission of Australia**

**Submission to the United Nations Committee on the Rights of the
Child for their Day of General Discussion on the Rights of Indigenous
Children, 19 September 2003**

Issue 1: Identity and culture

Introduction

This submission is made by the Aboriginal and Torres Strait Islander Social Justice Commissioner on behalf of the Human Rights and Equal Opportunity Commission (HREOC) of Australia. HREOC is Australia's national human rights institution established by a law of the federal Parliament and operating in compliance with the 'Paris Principles' for national institutions for the promotion and protection of human rights.ⁱ

The Social Justice Commissioner has an independent monitoring role on the impact of government activity on the exercise and enjoyment of human rights by Australia's Indigenous peoples, and reports annually to Australia's federal Parliament on the status of enjoyment of Indigenous human rights (the *Social Justice Report*) and the impact of native title legislation on the enjoyment of Indigenous human rights (the *Native Title Report*). Reports to federal Parliament, other research and activities of the Commissioner are available at: www.humanrights.gov.au/social_justice/

In recent years the Commissioner has undertaken many activities relating to the rights of Indigenous children. This submission provides an overview of key issues faced by Indigenous children relating to the recognition of their culture and identity, as expressed by Indigenous youth.

Two separate submissions have also been made which provide an overview of law and justice issues relating to Indigenous children and an overview of the inequality and discrimination faced by Aboriginal and Torres Strait Islander children in Australia.

Identity and culture

We're still here now, and our old people have the accumulation of 40,000 years of knowledge ... we must be valued for [the] contributions we make to this society on our own terms, and on our own points of view because we're not exotic and romantic or remnants of people. We're here and now and we're just human beings with a different culture and history. *Participant, HREOC Indigenous Youth Forum, August 1999*

In 1999 the Social Justice Commissioner convened a forum of approximately 60 Indigenous youth from across Australia to identify key issues that they faced. The outcomes of the Forum were reported to the federal Parliament in the *Social Justice Report 1999*.ⁱⁱ The Forum discussed a wide range of issues, but the one issue that discussion returned to time and again was the challenge faced by Indigenous youth in

coming to terms with their Indigenous identity and the recognition provided to their culture in mainstream Australian society. This submission provides an overview of some of the key challenges raised by Indigenous youth in relation to their identity.

Defining Aboriginality

An issue that is frequently experienced by many young Indigenous people today is the questioning of their integrity as an Indigenous person. Indigenous youth often face suspicion and resentment from non-Indigenous people at the assertion by Indigenous people of their status as Indigenous.

For the best part of the last two hundred years in Australia, non-Indigenous society has sought to define who is an Indigenous person. Research demonstrates that there have been no less than 67 identifiable classifications, descriptions or definitions of ‘Aborigine’ in federal, state and territory legislation in Australia.ⁱⁱⁱ Indigenous people were subject to judicial or administrative discretion as to whether they would be considered Indigenous or not, with the effect that ‘an artificial legal status could be imposed, withdrawn or re-imposed at the behest of one person in authority.’^{iv}

Control of Aboriginal people through definitions of Aboriginality, and through associated policies, historically amounted to a denial of the citizenship or equality rights of Indigenous people in Australia. The formulation of definitions of who is Aboriginal had the purpose of being used as criteria for inclusion or exclusion in the nation state. The denial of basic citizenship rights ranging from the right to vote, to access welfare continued until at least the 1970s. This was a significant restriction on the ability of Indigenous people to live as Indigenous peoples. Historically, attacks on the identity of Aborigines have taken many forms but the ultimate aim has not been the denial of identity *per se* but the denial of other associated rights.

Attempts in the past to define who is an Aborigine cannot be seen as benign or inconsequential. One participant at the Indigenous Young People’s Forum explained a dilemma she faces in coming to terms with her identity today as follows:

I may never know what its like to be black, but I know what its like to be Aboriginal. Even now I struggle with that... even with such a strong background in knowing what my culture is about I still fear that I haven’t experienced what a lot of people – say my brother, who’s very dark skinned, and my mother – have experienced, and does that take away from my validity to be able to speak as a young Aboriginal woman?

This kind of conditioning, I think, is inherent in a lot of Aboriginal people, and in our forefathers, and has come down through policies that were implemented during the times when our parents and our grandparents were on missions, because they were divided up into half-castes and quarter-castes. That was the way that they separated our communities, and people with lighter skin were treated differently. They were treated as special. They could assimilate into the non-Aboriginal community, and this has caused a lot of resentment within our own communities. This was their way of turning our communities and our families against each other, and regardless of whether this is something that we acknowledge now, its still part of our conditioning, and the way that we think when we look at other people...

The ongoing effect of such definitional control has also been demonstrated in the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families:

One principal effect of the forcible removal policies was the destruction of cultural links. This was of course their declared aim... Culture, language, land and identity were to be stripped from the children in the hope that the traditional law and culture would die by losing their claim on them and sustenance on them...^v Institutionalised Indigenous children faced a hazard over and above that experienced by institutionalised non-Indigenous children. This was the continual denigration of their own Aboriginality and that of their families... The assimilation policy seemed to demand that the children reject their families. The tactics used to ensure this ranged from continual denigration of Aboriginal people and values to lies about the attitudes of families to the children themselves... The complete separation of the children from any connection, communication or knowledge about their Indigenous heritage has had profound effects on their experience of Aboriginality and their participation in the Aboriginal community as adults.^{vi}

A problem also constantly faced by Indigenous children is the failure of the wider society to acknowledge the great diversity of lifestyles and circumstances of Indigenous Australians:

Very few Aboriginal people live 'non-Aboriginal' lives, divorced from their social and personal histories, origins, geographies, families, lifestyles, cultures and sub-cultural *mores*. This is as true of so-called 'urban part-Aborigines' as it is of tradition-oriented groups in rural and remote Australia. In short, the overall context of Aboriginal life is determined both voluntarily by themselves, and all too often gratuitously imposed by non-Aborigines.^{vii}

Perceptions of 'real Aborigines' also ignore the fact that cultures evolve and, over time, adapt to new circumstances. As the Royal Commission into Aboriginal Deaths in Custody noted, that Indigenous cultures change is a 'characteristic of nations which think of themselves as having a future as well as a past.'^{viii} However, 'they have, nevertheless, drawn the reproach of inauthenticity from those who think only of Aboriginal people in terms of the past. Similarly, it is alleged that many of those who claim to be Aboriginal are impostors, usurping the benefits intended for 'real Aborigines'.^{ix}

Different lives, different 'worlds'

One of the great challenges that many young Indigenous people face is striking a balance between their place in the Indigenous community of which they are a part and their involvement in the mainstream, wider Australian society. There are numerous indications that many young Indigenous people in Australia find themselves 'between two worlds.' These indicators include statistics on the disproportionate contact of Indigenous youth with criminal justice processes, lower levels of educational attainment, significantly higher Indigenous youth unemployment rates, as well as Indigenous youth suicide rates (which are estimated at 3-5 times higher than non-Indigenous youth suicide rates).

For example, the poor performance of young Indigenous people in the educational system may partly be explained by the lack of acceptance that they feel in that system.

As one academic has noted, 'Aboriginal students may come to the point of feeling that to achieve in school terms they have to give up their Indigenous identity and forfeit their acceptance within their Indigenous peer group'^x.

Indigenous youth may thus find themselves unable to find the 'point of balance' in that system. One of the speakers at the Indigenous Young People's Forum stated, on her experiences of the educational system:

To succeed, we have to be smarter than most white people, because we have to live in two worlds, and be proficient in a second culture; that is, western culture, but we also value and appreciate our own. This means we must work harder to achieve success in a western world, but rarely is this acknowledged. When western culture values the knowledge of our people and starts incorporating into its bastions of knowledge, like universities, books and media, only then will education be truly successful for all of us.

I believe that the failure of the western education system to adequately improve the education levels of Indigenous people... in terms of indicators, is partly due to our rejection of what it teaches us. The systems deny that Aboriginal people have a valuable contribution to make to it now and in the past...

For many others, there may be a sense of confusion in coming to terms with their place in their Indigenous community and the wider society where one of their parents is not Indigenous. The challenge of finding a point of balance between these two worlds can be exacerbated by general public attitudes concerning 'real Aborigines' and the motives for people choosing to identify as such, or by having to face the racism that often manifests in their contact with the wider society.

There has been acknowledgement of these issues within the wider Australian society. For example, a full bench of the Family Court of Australia noted the following in a custody dispute between an Aboriginal mother and non-Aboriginal father in 1995:

(A) In Australia a child whose ancestry is wholly or partly Indigenous is treated by the dominant white society as "black", a circumstance which carries with it widely accepted connotations of an inferior social position. Racism still remains a marked aspect of Australian society. Daily references in the media demonstrate this. Aboriginal people are often treated as inferior members of the Australian society and regularly face discriminatory conduct and behaviour as part of their daily life. This is likely to permeate their existence from the time they commence direct exposure to the outside community and continues through experiences such as commencing school, reaching adolescence, forming relationships, and seeking employment and housing.

(B) The removal of an Aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child, particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture.

(C) Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self-esteem and appropriate responses. Racism is a factor which Aboriginal children may confront every day. Because non-Aboriginals are largely oblivious of that, they are less able to deal with it or prepare Aboriginal children for it.

(D) Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality. This is likely to have a significant impact upon their self-esteem and self-identity into adult life.^{xi}

The past in the present

A further factor that poses a significant challenge for young Indigenous people in coming to terms with their identity is the continuing impact of the historical treatment of Indigenous peoples in Australia. Young Indigenous people continue to pay the price of systemic racism and poverty, and to suffer the effects of colonialism.

In his study of Aboriginal youth suicide in New South Wales, the Australian Capital Territory and New Zealand, Colin Tatz states that Aboriginal youth suicide ‘has different wellsprings, histories, sociologies, patterns and even rituals. It is qualitatively different, and needs to be viewed and responded to differently.’^{xii} A significant difference, and factor which partially explains current rates of Indigenous youth suicide, is the legacy of history:

The collective and individual experience of contemporary Aboriginal lives is unique. No other group has endured the panoply of laws, edicts and administrative arrangements established to target an entire people regarded as being in need of care and protection. That the protection was in their ‘best interests’ does not alter the reality that they were designated as a separate legal class of persons – minors in law – with all the attendant disabilities of that status. Accordingly, they were physically isolated, segregated, relocated and institutionalised. Their biological, cultural, political, economic and social lives were regulated by state and church ‘gatekeepers’, mostly in secret, with permit systems to keep Aborigines in and outsiders out of the areas known as reserves or missions.^{xiii}

Similarly, the Royal Commission into Aboriginal Deaths in Custody stated that:

One of the central findings of the Commission is that a multitude of factors, both historical and contemporary, interact to cause Aboriginal people to be seriously over-represented in custody and tragically to die there... So much of the Aboriginal people’s current circumstances, and the patterns of interactions between Aboriginal and non-Aboriginal society, are a direct consequence of their experience of colonialism and, indeed, of the recent past.^{xiv}

Indigenous people today often have to come to terms with the legacy of this past. There are three aspects to this legacy. First, are the consequences of the almost total control exercised by the State over the lives of many Indigenous people. As the Royal Commission into Aboriginal Deaths in Custody stated:

Aboriginal people, quite apart from being the most controlled group within the Australian community, must also have been the group most studied by non-Aboriginal people.^{xv}

The second impact of this control relates to the economic dimensions of the disempowerment of Indigenous peoples: ‘colonialism continues to survive (within Australia) by virtue of the structural inequalities between First Nations and the Crown.’^{xvi} The third way that the historical treatment of Indigenous people manifests in

the lives of young Indigenous peoples is quite simple: because Indigenous people survived. We are still here.

Relations between Indigenous and non-Indigenous people today are infused with historical overtones because of the failure of the wider society to acknowledge and come to terms with this history. Australian history is distinguished by ‘an attitude of ambivalence and inconsistency towards formally incorporating Aboriginal people into a common Australian society’.^{xvii} The situation that Australia finds itself in now is the legacy of not recognising the validity of Indigenous social structures and the failure to give appropriate weight to them within the Australian nation.

Identity and the rights of Indigenous children

Over the past twenty years there has been increasing recognition of two factors at the international level:

- that Indigenous peoples occupy a unique and distinct position within nations, and that the protection of Indigenous cultures is an enrichment of the fabric of the wider society; and
- that despite the intended universality of human rights, Indigenous peoples across the globe have remained severely marginalised and there is a need to focus on their distinct situation and circumstances so that they may equally enjoy human rights.

This recognition remains incomplete, with the continued negotiations on the Draft Declaration on the Rights of Indigenous Peoples. The UN human rights treaty committee system has, however, already played a key role in beginning to address these factors and in elaborating how the international treaties protect Indigenous culture and identity. Of particular note in this regard is the jurisprudence and general comments of the Human Rights Committee (HRC) on the content and scope of Article 27 of the ICCPR, the meaning of equality and non-discrimination in Articles 2 and 26 of the Covenant, and the application of Article 1 of the Covenant to Indigenous peoples; and various decisions, concluding observations and General Recommendations (particularly General Recommendation 26 on Indigenous Peoples)^{xviii} of the Committee on the Elimination of Racial Discrimination (CERD). Both Committees have emphasised that:

- equality does not mean identical treatment, and there will be circumstances in which the recognition of distinct characteristics of Indigenous culture will be legitimate and non-discriminatory;
- the recognition of minority group rights extends to a positive obligation on States to protect Indigenous culture^{xix}; and
- States must ensure the effective participation or informed consent of Indigenous peoples in decision-making that affects them.

The Convention on the Rights of the Child similarly contains key principles for assessing progress in protecting Indigenous identity and culture, in particular Articles 2, 3, 6 and 30.

The Social Justice Commissioner considers that the Committee on the Rights of the Child could usefully draw on its extensive experience to formulate a General Comment

on the distinct status of Indigenous children to guide States in their implementation of the Convention (particularly, but not exclusively, in relation to Article 30 of the Convention) and to request States in their periodic reports to disaggregate information about Indigenous children and identify programs specifically targeting Indigenous children. Such a general comment should build on the significant work of other human rights committees, in particular the HRC and CERD.

Endnotes

- i General Assembly Resolution 48/134, 20 December 1993, Annex.
- ii See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, Chapter 3: www.humanrights.gov.au/social_justice/social_justice/index.html#99
- iii McCorquadales, J., 'Aboriginal identity: legislative, judicial and administrative definitions' (1997) 2 *Australian Aboriginal Studies* 24.
- iv *ibid.*
- v Human Rights and Equal Opportunity Commission, *Bringing them home*, National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families, HREOC, Sydney, 1997, p202.
- vi *ibid.*, p200. Separation policies were in place until approximately 1970.
- vii *ibid.*, p10.
- viii Royal Commission into Aboriginal Deaths in Custody, *National Report, Volume 2*, Australian Government Publishing Service, Canberra, 1991, para 11.12.11, p133.
- ix *ibid.*, pp133-134.
- x Groome, H., 'Towards improved understandings of Aboriginal young people', (Summer 1995) *Youth Studies Australia* 17, p20.
- xi *B v R* (1995) 127 FLR 438, pp449-450.
- xii Tatz, C., *Aboriginal suicide is different. Aboriginal youth suicide in New South Wales, the Australian Capital Territory and New Zealand: Towards a model of explanation and alleviation, Executive Summary*, Australian Institute of Criminology, Canberra, 1999, p2.
- xiii *Ibid*
- xiv Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 2*, p1. See also paras 10.1.1-8, pp 3-8.
- xv Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 2*, para 11.12.1, p130.
- xvi Fleras, A., 'Politicising indigeneity' in Havemann, P. (Ed.), *Indigenous people's rights in Australia, Canada and New Zealand, op.cit.*, p187.
- xvii Peterson, N. and Sanders, W., 'Introduction' in Peterson, N. and Sanders, W. (Editors), *Citizenship and Indigenous Australians – Changing conceptions and possibilities, op.cit.*, p3.
- xviii Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, UN Doc: CERD/C/51/Misc.13/Rev.4, 18 August 1997.
- xix See for example: Human Rights Committee, *General Comment 23, Article 27* (1994), paras 6.1 and 6.2; Committee on the Elimination of Racial Discrimination, *ibid.*, para 4.