

Aboriginality and Identity



Perspectives, Practices and Policies

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Background

The issue of Aboriginality and Identity is one of the most critical issues in contemporary Aboriginal affairs. Growing community concern and uncertainty about who is and who is not an Aboriginal and how Aboriginality is defined and determined, usually by non-Aboriginal people to serve non-Aboriginal purposes is a constant source of debate and dialogue in various community settings.

The question of what constitutes Aboriginality and identity, as defined by non-Aboriginal people, is not new. History shows that from the earliest days of invasion and colonisation white people have grappled with the issue and constructed and applied definitions of Aboriginality to primarily serve their own purpose and to marginalise and oppress Aboriginal peoples.

During the early days of invasion and colonisation the concept of “race”, defined by physical characteristics and now an outmoded and scientifically discredited concept, was the pivotal point upon which most colonial constructs turned. The “race” constructed identity defined the “relationships” that colonial forces imposed on the people whose land they invaded and usurped. Prior to 1788 Aboriginal nations across the country knew who they were and their relationship with other Aboriginal nations who shared the broader Australian landscape.

Aboriginal Breast Plates



During the early years of colonisation in Australia the British struggled to understand Aboriginal people and the relationships that defined Aboriginal existence, not only with other Aboriginal nations, but also with the land.

Image courtesy of National Museum of Australia,

http://www.nma.gov.au/exhibitions/aboriginal_breastplates/history_of_king_plates/

The British adopted a number of methods in an endeavour to create understanding and meaning between the colonising forces and Aboriginal peoples. One method involved the attempt to develop a “relationship” with Aboriginal people by using the practice of assigning

colonized people a “status” thus enabling the colonizer to create the illusion of “trust and respect” between equals. The tool of illusion was usually the presentation of a Breast Plate¹ to an Aboriginal man, a designated leader who could assist the colonising forces to pacify and facilitate the encroachment and usurpation of Aboriginal lands by the colonisers.

Breast plates were also used by colonising forces in North America by both the British and French colonial forces in the 1700s primarily as a gift to Indian warriors who supported the British and French war efforts during the period of the Seven Year War (1755-1762).

Australia has no legally binding treaties or any other similar instrument that have been negotiated with Aboriginal or Torres Strait Islander peoples. Public policies have been developed and imposed as a form of “master-subject” control. During the early years of colonization Aboriginal people were considered pests, impediments and irritants to the spread of colonization and settlement.

Prior to 1967 when historic amendments were made to the Australian Constitution, the various states and territories had the responsibility for Aboriginal affairs including the issuing of identity cards and the application of other policies and processes dealing with the definition of Aboriginality.

For instance in Western Australia a person was considered Aboriginal if he/she had more than a quarter of Aboriginal blood whilst Victoria took a more liberal view recognising any person of Aboriginal descent.

In NSW, where the initial wave of invasion and colonial contact first occurred, a number of policies or programs have operated to address the vexed question of Aboriginal need including Protectionism, Assimilation, Welfare, Self Determination and Reconciliation.

In NSW the position of Protector of Aborigines was established in 1881 following the appointment of George Thornton MLC, as the first NSW Protector of Aborigines. The Aboriginal Protection Board was established in 1883 and Aboriginal people soon became subject to the provisions of Board’s legal powers following the adoption of the NSW Aborigines Protection Act in 1909. The adoption of the *NSW Aborigines Protection Act (1909)* heralded in a draconian process of control over Aboriginal people including the forced removal of Aboriginal people from their traditional lands, the forced removal of Aboriginal children from their families, forced assimilation and an assortment of other human rights abuses that positioned Aboriginal people at the margins of mainstream society and the impact of this period continues to cripple many Aboriginal communities and their people two centuries later.

In New South Wales (NSW) one of the more pernicious elements of forced assimilation involved the awarding of infamous Certificates of Exemption (see below) which also became infamously known in Aboriginal communities as “Dog Tags”. The Certificates gave those who were considered suitable, certain exemptions under the *Aborigines Protection Act (1909)*.

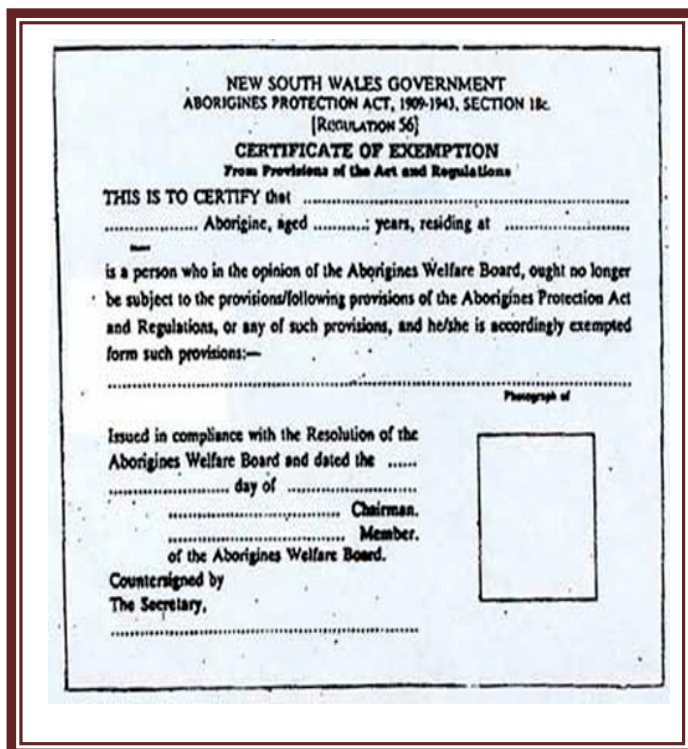
In 1967 a watershed in Aboriginal affairs occurred following the overwhelming support of Australian voters for a referendum to change key sections of the Australian Constitution, specifically how the Constitution dealt with Aboriginal peoples. Interestingly a number of myths have emerged following the 1967 Constitutional amendments including that the success of the referendum afforded Aboriginal people the right to vote. Voting rights for Aboriginal people actually came into effect in 1962 following Federal Cabinet approval for proposed amendments to the *Commonwealth Electoral Act (1918)*.

The 1967 referendum essentially asked Australian voters, at the federal level, to answer yes or no to amend section 51 and 127 of the Australian Constitution. Section 51 and 127 read:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

...(xxvi) The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.



Following the success of the referendum, at which more than 90% of voters voted yes, section 51 was amended by removing the words “other than the Aboriginal people in any state” and section 127 was completely removed from the constitution.

Since the 1967 Referendum a number of policy initiatives have been initiated to regulate the critical issue of Aboriginality and identity. In the 1980s the Commonwealth government developed its three pronged definition and it is still applied a generation later. The definition reads:

“An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives.”

It is important to note that as far as this administrative public policy definition is concerned (it is argued that the definition is not a legal definition) anyone identifying as an Aboriginal or Torres Strait Islander person is expected to meet **all three** components of the definition, that is that the person must be able to demonstrate descent, identifies as an Aboriginal or Torres Strait Islander person, and the person must be accepted as an Aboriginal or Torres Strait Islander people in the community which they live.

The issue of Aboriginal identity is complex and illusive and fraught with a myriad of definitions with no simple remedy or panacea. However the initiative of the NSW AECG Inc to fund research to explore the complexities and challenges of the issue is a long overdue and courageous undertaking. This report serves to identify some of these complexities and challenges and provide policy advice to the NSW AECG Inc so that it can continue to advocate the need for improving the learning experiences and outcomes of Aboriginal people within the context of cultural awareness and affirmation.

Executive Summary

In the latter half of 2009 the NSW AECG Inc became increasingly concerned about the increased level of community concern regarding the issue of Aboriginal identity. Of particular concern to the NSW AECG Inc were allegations of possible fraudulent claims to Aboriginality by some applicants for the former NSW Department of Education and Training's (DET) targeted teacher training scholarships. Concerns were also evident relating to the veracity of some applicants for teaching positions and/or for promotions and transfers within the teaching service administered by the former NSW Department of Education and Training's (DET).

As part of its response to these concerns the NSW AECG Inc, at its 1st State Meeting of 2010 at Campbelltown and again at its 2011 Annual General Meeting (AGM) at the Novotel, Brighton Le Sands in February 2011, decided to commission a project to gauge Aboriginal community views on Aboriginality and identity and to receive recommendations relating to how the NSW AECG Inc could more effectively respond to the complex issue and challenge of Aboriginality and identity. The precise terms of reference for the project are provided below.

To assist with this process, the NSW AECG Inc decided to contract *Bob Morgan Consulting* to conduct a project of issues associated with the current definition of Aboriginal Identity and the current procedures by which individuals can claim or confirm their status as Aboriginal people.

Terms of Reference and Project Objectives

The terms of reference and objectives were to:

1. Identify the level of community awareness and satisfaction with the existing definition of Aboriginality as defined in the *NSW Aboriginal Land Rights Act 1983*;
2. Determine the nature and level of any community concerns relating to the procedures currently used by individuals, particularly within the DET system to confirm ones Aboriginality;
3. Investigate the nature of alleged abuses of the definition and current procedures associated with it, particularly within the NSW DET;
4. Define possible new processes and procedures to address alleged abuses;
5. Prepare a position paper on the issue of Aboriginal identity for the NSW AECG Inc;
6. Frame and submit recommendations to address any significant issues for the NSW AECG Inc to consider

The Project Team:

The NSW AECG Inc commissioned *Bob Morgan Consulting* to conduct the project and a multidisciplinary project team comprised of the following members was established:

- **Professor Bob Morgan** — team leader and specialist in research evaluation, research impact, governance, cross-cultural management and educational studies
- **Mr Bill Harrison** — specialist in Aboriginal education research, strategic planning and policy development
- **Dr. Paddy (Pat) Cavanagh** — specialist in Aboriginal education and curriculum and in Aboriginal history and cultural studies.

Whilst Professor Morgan was the designated Project Team Leader; both the President of the NSW AECG Inc, Ms Cindy Berwick and the Executive Officer, Mr Raymond Ingrey served as Joint Project Managers. Both officers were crucial to the conduct of the project and the Project Team members liaised with them throughout the term of the project and deferred to them on all matters of significance during the conduct of the project.

Project Scope

This project was conducted within the context of the principles of community action research. The project was limited in its scope and funding however it is a credit to the NSW AECG Inc that it took the initiative to commission the conduct of the project which was essentially designed to focus on community consultations seeking community member's responses to the vexed question of Aboriginality and identity.

The scope of the project required initial desktop research to establish current approaches to defining identity in terms of race, ethnicity, nationality and Aboriginality both in Australia and internationally particularly in post-colonial societies. In addition, the project team consulted individually with a range of local and international academics, legal experts, and public sector administrators of Aboriginal programs with expertise relating to the issue of Aboriginality.

On the basis of this research an initial set of research questions were developed by the project team and they were refined in consultation with the President, Executive Officer and staff at the NSW AECG Inc Secretariat. These preliminary research focus questions were then tested with a small focus group of NSW AECG Inc Life Members and were subsequently further refined.

A community network through which community consultations could be conducted was established in consultation with the NSW AECG Inc. The NSW AECG Inc regional network was utilised as a means of advertising and promoting Aboriginal community focus group meetings across NSW. It should be noted that these meetings were intended to be general

community meetings rather than NSW AECG Inc member meetings and that, in practice this was in fact the case.

With the assistance of NSW AECG Inc members and delegates across the State community meetings were held in the following centres:

- Dubbo;
- East Maitland;
- Lismore;
- Griffith;
- Mount Druitt (Emerton);
- Campbelltown; and
- Walgett

It was soon apparent from the outcomes of these meetings that there was a significant level of concern over current procedures and practices relating to the confirmation of Aboriginality in NSW. These concerns were recorded and analysed by the project team and are the basis of the research findings and recommendations outlined elsewhere in this report.

The Project Team delivered a project progress report to the State Committee of the NSW AECG Inc at its 1st State Meeting 2011, Lake Macquarie. The final report, including recommended actions, was due for presentation to the NSW AECG Inc State Committee at its 2nd State Meeting 2011, scheduled for October and to be held at Yamba on the north coast of New South Wales.

Project Timeframe

The Project commenced in March 2011 and the final report was submitted to the NSW AECG in September 2011.

Given the nature of the project and circumstances beyond the control of the Project Team, changes to project planning and scheduling were both inevitable and unavoidable. Notwithstanding these changes, the Project Team reached agreement with the President and Executive Officer of the NSW AECG Inc on the following schedule.

- **March-April:** Preliminary Research of Definitions and Issues including desktop research and consultation with individuals with expertise in legal, academic and/or administrative issues relating to Aboriginal identity.
- **April – July:** Focus Group Meetings and community consultation
- **June:** Preliminary Report to State Meeting of AECG
- **June-July:** Detailed analysis and refining of data

- **July-August:** Writing of Final Report and Recommendations
- **September:** Submission of Final Report

Key Findings and Recommendations

The findings of the project clearly illustrated that there is widespread community concern with the current method utilised to deal with the complex issue of Aboriginality and identity. This concern was manifest in all community visits and consultation gatherings and was present across the spectrum of concern ranging from the need for greater clarity and understanding at one level to overwhelming distain for those who fraudulently claim Aboriginality and identity for the purposes of claiming a perceived benefit.

Notwithstanding the degree of community concern there was however general support for the current three pronged administrative definition. It was accepted that a definition was necessary to regulate the process of identification but the majority of respondents and stakeholders were concerned with both the lack of consistent application of the definition and the level of apparent indifference that some non-Aboriginal people applied during their involvement in applying the three pronged definition.

There was an overwhelming view that non-Aboriginal people had no role in determining Aboriginality and that government and their agencies should immediately move to adopt a policy position to reinforce this view.

There was also a general consensus that the special circumstance of Aboriginal people who

“There's nothing wrong with the definition. It's how it's applied.”

“The problem is with the process, the procedure, not with the definition the process and the decision (on confirming Aboriginality) is often left to one person, sometimes even a white person.”

were denied their Aboriginality and identity such as those who are members of the “Stolen Generation” requires careful and compassionate consideration. The various key positions on this matter are dealt with in greater detail in other sections of this report.

The notions of purpose and intent were identified as critical in determining Aboriginality and identity. A distinction between those who search for affirmation, whereby a claimant is simply seeking to have their Aboriginality and identity affirmed for the primary purpose of celebrating heritage and ancestry and those who seek confirmation of their Aboriginality and identity for the purpose of a perceived benefit should be a clearly defined component of the process of determining Aboriginality and identity.

Concern was expressed by many respondents that an ever increasing number of people who are “late identifiers” or who have recently “discovered or claim” their Aboriginality are being employed by governments to inform and shape Aboriginal specific policies and programs. Most respondents were totally against this situation because they argue that such people have little knowledge, understanding,

experience or lived awareness of being Aboriginal and the circumstances that most Aboriginal peoples continue to combat in their daily lives.

Put another way this concern relates to Aboriginal people who can perhaps demonstrate Aboriginal ancestry or heritage but who lack personal experience or cultural knowledge of what it means to be Aboriginal and therefore their role in shaping Aboriginal public policies and programs is seen as misleading, ill informed and problematic.

Recommendations

The following set of recommendations is submitted to guide the NSW AECG Inc in its critical work of attempting to bring clarity and a greater degree of understanding to the complex issue of Aboriginality and identity. The recommendations are listed here but also appear at various points throughout the report aligning them with the issue that they are designed to address.

Recommendation 1: That in the absence of a more suitable and effective definition that the NSW AECG Inc supports the current definition of Aboriginality as defined in the *NSW Aboriginal Land Rights Act (1983)* which states that:

An Aboriginal person means a person who:

- a) is a member of the Aboriginal Race of Australia, and**
- b) identifies as an Aboriginal person, and**
- c) is accepted by the Aboriginal community as an Aboriginal person**

Recommendation 2: That the NSW AECG Inc negotiates with the NSW Department of Education & Communities (DEC) a complete review of its policies and procedures relating to the confirmation of Aboriginality. Such a review should focus on issues including school enrolment procedures, applications for scholarships, applications for employment, promotions and transfer, and applications for identified positions.

Recommendation 3: That the NSW AECG Inc negotiate with the Director General of the NSW Department of Education & Communities (DEC) the adoption of a policy to exclude Principals from the process of confirming Aboriginality at the point of enrolment. Furthermore, that in circumstances where the issue of identity is uncertain or tenuous that Aboriginal Education Officers (AEOs) or Presidents of either Local or Regional AECGs in NSW are directly involved in resolving this matter.

Recommendation 4: That the NSW AECG Inc seek an urgent meeting with Link Up to negotiate and collaborate on the development of a set of protocols to assist with the processing of claims to Aboriginality by members of the Stolen Generations who seek to re-establish or reconnect with their Aboriginal culture and identity.

Recommendation 5: That the NSW AECG Inc reconsider its decision to issue Certificates of Aboriginality to its members.

Recommendation 6: That the NSW AECG Inc, in conjunction with the NSW Coalition of Aboriginal Peak Organisations (CAPO) negotiate and develop a process to standardise the procedures for establishing Aboriginality and identity in NSW.

Recommendation 7: That the NSW AECG Inc, negotiate with other members of the NSW Coalition of Aboriginal Peak Organisations (CAPO) the drafting of a clear and unambiguous public statement of intent to initiate and pursue legal action against those individuals considered responsible for making false and fraudulent claims to Aboriginality and identity.

Recommendation 8: That the NSW AECG Inc advise the Director General of the NSW DEC of its grave concern regarding the extent of reported abuses relating to the perceived fraudulent claims of Aboriginality and the inadequacy of existing departmental procedures for verifying and applying all 3 criteria of the test of Aboriginality.

Recommendation 9: That the NSW AECG Inc request that the Director General of the NSW DEC immediately amend all departmental forms that require a statement of Aboriginality by:

- including a warning that false claims render the claimant liable to prosecution and penalties;
- replacing the simple *Yes/No, tick the box* format with a requirement and space for a written supporting statement for each of the 3 criteria;
- including a statement that additional information may be sought to verify the claims in relation to each of the 3 criteria; and
- declaring that *letters of confirmation of Aboriginality* may be submitted in support of a statement of claim to Aboriginality but that a Statutory Declaration supporting the claim may also be required.

Recommendation 10: That the NSW AECG Inc request the Director General of the NSW DEC to formally delegate to the department's Aboriginal Employment

Unit (AEU) the authority to seek additional information as required regarding claims to Aboriginality in respect to the processing of applications for scholarships, employment, promotion and transfer in circumstances where Aboriginality is in doubt.

Recommendation 11: That the NSW AECG Inc, in conjunction with DEC, develop a training module on the issue of *Aboriginality and Identity* and that this module becomes a compulsory part of the merit selection training for both departmental and NSW AECG representatives serving on DEC Selection Panels.

Recommendation 12: That the NSW AECG Inc work with the Coalition of Aboriginal Peak Organisations (CAPO) to convene NSW forums on Aboriginality and Identity with the express aim of developing a unified set of standards, policies, procedures and practices relating to the processing of claims to Aboriginal identity.

Recommendation 13: That the standards referred to in Recommendation 12, once established, form the basis of negotiations between CAPO and the National Congress of Australia's First Peoples regarding the development of a national uniform position on the definition of Aboriginality and identity.

Recommendation 14: That following the development and adoption of a nationally agreed Aboriginality position, as referred to in Recommendation 13, that it is used as the basis of negotiation with all Australian governments through the Coalition of Australian Governments (COAG) and other government agencies.

Community Consultations: Emerging Themes and Key Outcomes

As outlined above a number of Aboriginal community consultations/meetings were held to canvass community perspectives relating to the concept of Aboriginality and identity. The following provides a general overview of the key themes and outcomes emanating from these consultations.

The Adequacy of the Current Definition of Aboriginality

There was overwhelming community awareness and acknowledgement of the current definition of Aboriginality which came into use in the 1980s and, at least in NSW, is embedded in legislation in the *NSW Aboriginal Land Rights Act (1983)*.

This definition effectively establishes 3 criteria all of which must be met to establish an individual's Aboriginality. In order for the test of Aboriginality to be met an individual is:

- (a) is a member of the Aboriginal Race of Australia, and*
- b) Identifies as an Aboriginal person, and*
- c) is accepted by the Aboriginal community as an Aboriginal person.*

The consultative process clearly confirmed that the community is quite conversant with this definition and are aware of the expectation that all 3 criteria must be met to establish Aboriginality.

Moreover, there is overwhelming approval for the definition as it stands and an appreciation of its inclusivity which was regarded as being particularly advantageous for individuals seeking to reclaim and/or reconnect with their Aboriginal identity after it had been suppressed or denied as a result of historical experiences during colonial and post colonial periods.

Indeed, it was suggested that the nature of the current Australian definition made it probably the most progressive and most inclusive of any such definition in the contemporary world.

“You've got to have lived it, and not just come on the bandwagon.”

“As a young person I just felt, just KNEW I was Aboriginal - it's something that comes from my heart, from my mind. I just know I'm Aboriginal”

“It's who I am; where I'm from; who my mob is -and I'm proud of it.”

“It's Land, Language and Family that are important -they're all linked up in identity.”

“It's the Language Area where you find the real meaning of origins and identity.”

“It's the nuances, the body language, the way you talk and think the first thing we use to connect with people is asking: Where's your mob from?”

“Growing up I just knew I grew up in La Perouse community but I also always knew I had family connections with the North Coast.”

“It's not something you can learn as an adult you get it as a child. If you've missed out on it growing up you don't get it any later.”

“How big a problem is this? If this is pushed too far it will inhibit people from identifying. It will make it harder for people to identify and increasingly marginalise them.”

Such was the support for the current definition that initially there was some suspicion that the research project was part of a government initiative to change the definition. It was, for instance, suggested that the Federal Government wanted to rein in potential budgetary blow outs as increasing numbers of people identified as Aboriginal and that the State Government may be using the NSW AECG Inc to discredit and disempower the NSW Aboriginal Land Council. This led to some apprehension that any debate about possible weaknesses in the definition, and abuses associated with it, may be counter-productive and a degree of caution was expressed that *we need to be careful that we don't do the*

“There's nothing wrong with the definition. It's how it's applied.”

“The problem is with the process, the procedure, not with the definition the process and the decision (on confirming Aboriginality) is often left to one person, sometimes even a white person.”

“(What I'm worried about is) When is the Government going to start putting a percentage on it again? We've got to be careful that we don't help the Government go this way again ... go back to the old system of half castes, quarter castes and so on.”

Government's business for them.

A small number of participants were concerned that the current debate about Aboriginality may even lead to a return to greater government involvement in the determination of Aboriginality and a return to the days of the infamous ‘dog tags’.

Initially there was also a suggestion from one or two individuals that instances of abuses of the definition may be vastly exaggerated. The extent of possible abuse is discussed in more detail in the section dealing with alleged abuses associated with the current definition and application procedures.

Despite the virtually unanimous acceptance of the contemporary definition there was some disquiet at the bureaucratic and legalistic expression of the definition.

A handful of those consulted were explicit in criticising the definition as being formulated by non Aboriginal people and expressed in non Aboriginal terms.

A very small number of individuals expressed resentment at being required to *state* or *prove* their Aboriginality. There was even some suggestion that current procedures requiring people to acknowledge their Aboriginality, for instance when applying for employment, were discriminatory and should be tested in law.

Interestingly there is no equivalent identity test that applies to other Australians.

“Why do I have to prove it (Aboriginal identity) no-one else does.”

“I know I'm a blackfella. Why do I have to sign a piece of paper to say I am?”

"We didn't label ourselves we got labelled as `Abos' by others!"

"I live with my Aboriginality. I don't clock on at 9.00 and clock off at 5.00."

"It's something we do as family, as community and as a nation. It's just part of me and I object to being questioned as an Aboriginal woman and having to prove it."

"I know myself that I am Aboriginal - I have the right to say that myself. I'm black from the womb, I know where I'm from but now governments are putting up a lot of obstacles and red tape and I've got to prove it."

Most people distanced themselves from the formulaic nature of the definition by defining their Aboriginality in far more personal terms, terms that speak to the issue of culture, language and country rather than those that apply under the current definition. The comments that are depicted in the text box and the body of the text generally were repeated in various forms at every community meeting, revealing a consensus that for most Aboriginal people Aboriginality is a *lived experience, an experience tied to culture, language, tradition and country* rather than acquired or learnt through what one respondent referred to as "textbook knowledge".

The importance of being an integral part of a community, the sense of communal connectedness were also repeatedly recognised, argued and acknowledged. The following respondent comments reinforced the imperative of language, culture and country in respect to their identity and Aboriginality.

"It's got to be part of belonging and being connected, you have to be part of a community."

"It involves responsibilities and obligations to family and community."

"Being a blackfella is being part of a community, and getting stuck in even if it's not your home community. So it's important to begin by defining just what we mean by `community."

"Look, it comes from the family, from the community, your sense of Aboriginality and who you are."

"People have the right to identify if they want to - that's their right. But they are not Aboriginal if they don't have a real community connection and if you don't have that you should not be able to access Aboriginal services or programs."

Ultimately, however, it was recognised that there were good, pragmatic reasons for having a definition and that the current definition was perhaps as good as could be hoped for.

Indeed, there was a widespread view that any problems were not a result of the definition but rather of the way in which the definition was being applied and processed.

Recommendation 1: That in the absence of a more suitable and effective definition that the NSW AECG Inc supports the current definition of Aboriginality as

defined in the *NSW Aboriginal Land Rights Act (1983)* being that an Aboriginal person means a person who:

(a) is a member of the Aboriginal Race of Australia, and

(b) identifies as an Aboriginal person, and

(c) is accepted by the community as an Aboriginal person.

Concerns involving current procedures for confirming Aboriginality

A further interesting finding from the research was that, although there were few concerns about the current definition, there were significant concerns over the current procedures used in applying the definition. These concerns fell into 3 main categories:

- Concerns with the policies and procedures of the NSW DEC;
- Concerns with the relatively disadvantaged and ambiguous positioning of members of the *Stolen Generations* in the application of the definition; and
- Concern with the legitimacy and effectiveness of *Certificates of Aboriginality*

“People on panels need more guidelines and intensive training on what their responsibilities are. We have no right to challenge the confirmation certificates that applicants increasingly submit with their applications but, at the point of interview, we should be able to ask them: “Who’s your mob?””

Concern regarding the NSW Department of Education and Community (NSW DEC) procedures relating to the Confirmation of Aboriginality.

There were many expressions of concern regarding current NSW DEC policies and procedures used by the Department to confirm Aboriginality. Of major concern was a perceived inconsistency in policy and practice across by different sections and regions of the Department and the use of imprecise interpretations of the definition in official Departmental documents.

For instance, a number of community respondents argued that the current *Application to Enrol in a NSW Government School* ignores the complexities inherent in the definition by simply asking for a box to be ticked in answer to the question: *Is the student of Aboriginal or Torres Strait Islander origin?* (Project Team's emphasis)

Other departmental documents fail to emphasise the crucial importance of meeting all 3 criteria in order to establish one's Aboriginal identity. This is graphically illustrated for instance, in the section of the Department's website devoted to careers, where it is stated

that, when applying for an Aboriginal identified position *there are three things that are **important** being of Aboriginal descent; identifying as an Aboriginal person; (and) being accepted by the Aboriginal community as an Aboriginal person.* Rather than merely being **important**, the document should, of course, explicitly state that each of the 3 criteria are **essential** and that anyone claiming to be Aboriginal **must** meet all 3 criteria. (Project Team's emphasis)

Similarly, the relevant section (Section 3) of the current application for Aboriginal teacher training scholarships leaves considerable room for the adoption of a flexible interpretation of one's identity. It adopts a *tick the box*, self-identification format and focuses on the perceived rewards associated with identification rather than the responsibilities of being Aboriginal when it states that the Department:

“will award at least 80 scholarships to applicants who are Aboriginal or Torres Strait Islander. An Aboriginal person or a Torres Strait islander is a person of Aboriginal descent or Torres Strait Islander descent who identifies as such and is accepted as such by the community in which he or she lives. Place an X in the box if you are an Aboriginal person or Torres Strait Islander as defined above”

There were also concerns involving the apparent inconsistencies in the procedures adopted by NSW DEC at the regional and school level and at different points of the student's school experience. For instance, it was reported that if students identify as Aboriginal by *ticking the box* at the time of enrolment in a NSW DEC school, their status as Aboriginal is accepted without question. However, if the same students enrolled without nominating as Aboriginal but subsequently want to identify, the OASIS computer system asks for **proof** of Aboriginality not simply a requirement to *tick the box*.

A number of concerns were also expressed regarding the reluctance of NSW DEC school officials to challenge any individual's claim to Aboriginality or to seek additional information about it. Aboriginal school staff argued that they were rarely involved in the process of determining Aboriginality and that some school administrators seemed to like the power of deciding who and who wasn't Aboriginal. This perceived attitude of school administrators was seen as encouraging those with only tenuous or even fraudulent claims to an Aboriginal identity to simply *tick the box*. Additionally, there were repeated claims that the Aboriginal staff members of NSW DEC and Aboriginal community representatives are often disempowered when decisions on a claimant's Aboriginality were made. It was claimed that in most instances these decisions are made by non Aboriginal officers rather than by Aboriginal community representatives including Aboriginal staff employed by NSW DEC.

Several people suggested that, at the school level, Principals or for that matter, any non-Aboriginal staff should never be involved in determining or *signing* off on an applicant's Aboriginality. It was argued that responsibility for this should be recognised and respected as being that of to the local AECG which was seen as *a perfect vehicle, with (its) access to members of the Aboriginal community, AEOs, ACLOs etcetera*. It was thought that claims of

Aboriginality which were considered fairly well established could be made on the advice of the AEO, while claims that were seen as problematic and *'more difficult could be made by involving the Regional AECG President or his/her delegate'*.

Recommendation 2: That the NSW AECG Inc negotiates with NSW DEC an agreement for a complete review of its policies and procedures relating to the confirmation of Aboriginality. Such a review should focus on issues including enrolment procedures, applications for scholarships, applications for employment, promotions and transfer, and applications for identified positions.

There was also widespread and quite strong views expressed by respondents that staff or community members who participate in staff selection panels (it was felt this should be compulsory for all Aboriginal identified positions) were almost always inadequately trained and experienced and because of this it increased their reluctance or ability to challenge potentially fraudulent claims. Moreover, it was felt that training for selection panels should focus particularly on how to ensure that the Aboriginality criteria are effectively monitored and applied.

Recommendation 3: That the NSW AECG Inc negotiate with the Director General of the NSW DEC a policy to exclude Principals from the process of confirming Aboriginality at the point of enrolment. Furthermore, that in circumstances where the issue of identity is uncertain or tenuous that Aboriginal Education Officers (AEOs) or Presidents of either local or regional AECGs are directly involved in resolving this matter.

Concerns involving the disadvantaged position of members of the *Stolen Generations*

There was genuine concern for the plight of people from the *Stolen Generations* who were seen as the blameless victims of past government policies. The problems and challenges faced by Aboriginal people from the "Stolen Generation", or more commonly their children and grandchildren, had in confirming their Aboriginal identity was particularly noted during community focus group meetings.

There was considerable sympathy for those in this situation and it was acknowledged that compassion needed to be shown in dealing with such cases.

However, it was also recognised that the issue was complex, that each case needed to be dealt with on an individual basis, and that the absence of many records meant that it was often an area open to potential abuse. Indeed, it was suggested that the natural sympathy of the Aboriginal community for the plight of the *Stolen Generations* was a factor in opening the door to fraudulent abuse of the inclusive definition of Aboriginality that is currently in use in Australia.

“The experience of the Stolen Generations is an important and sensitive issue that we, as a community, need to come to terms with and we do need to give special consideration to those who are genuinely members of the Stolen Generation. But this is now being used by a whole lot of people who now think it's fashionable or advantageous to be identified as Aboriginal.”

“We need to be careful; it's murky waters. How do we deal with stolen generation people when they come into an area and no one knows them?”

“People who think they've been ‘stolen’ should be able to go to the records to prove it. Governments need to make it easier for them to access the documents. They shouldn't be locked away somewhere in archives for 40 or 50 years.”

On several occasions it was also noted that, in the past, some people had denied their

“They didn't have a choice. It was taken away from them at birth. Who are we to say: ‘You're not Aboriginal’

“The Stolen Generation people were in effect segregated by the Government. Is it fair to say to them they have to prove their Aboriginality? Who are we to say they are or they're not?”

Aboriginality, preferring to “pass” as a member of another cultural group. It was acknowledged that this was sometimes *done for love* when people *married out* and that it was sometimes done out of a sense of fear by people who felt *safer* when they were not identified as Aboriginal and who did so in an attempt to ensure that their children were not removed. It was generally argued that some compassion needed to be shown and that such cases needed to be treated with great sensitivity and in a non-emotive and objective way:

“(too often) we do say things that are hurtful that can be quite damaging to the individual. We do need to show some compassion and take the individual circumstances into account.”

“...the one thing I've learnt is not to assume anything but to listen to their story - how can we judge,

particularly with kids?”

The complexity of these cases meant that there was no simple solution and the need to treat each case with great sensitivity was illustrated at one meeting by an example of a

"The dog tags were about people opting out of being Aboriginal. This is about allowing us to be Aboriginal - to decide who or what is Aboriginal."

"I feel really uncomfortable as an individual sitting in judgement on someone else's Aboriginality. How can we sit in judgement on people and use derogatory expressions like "five-minute blackfellas" and so on?"

young 6th class student in this situation for whom admitting her Aboriginality was a huge step and one that required considerable courage:

"She was a fair-skinned girl and it had been safer for her not to identify. But when she was in 6th class she decided to do so quite publicly. This is difficult for these kids. Should they be blamed for the actions of their parents or grandparents when they want to connect and take the very difficult step of doing so publicly? What are we doing as a community to help these kids who are feeling lost?"

Notwithstanding the acknowledgement of the special circumstances of people from the "Stolen Generation", it was nevertheless argued that, in each case of self - denied Aboriginality and identity an individual choice had been made - *the decision was theirs to retain or forego their culture and their identity; some of us with dark skins couldn't pass or hide.* This situation has resulted in considerable suspicion and little sympathy for those who now wish to reclaim their Aboriginality and family

heritage simply in order to access perceived benefits.

"They just want the benefits, they don't really want to identify. If you were really ashamed of being Aboriginal and rejected it and then now want to claim the benefits - it's just not on."

"We have to recognise the impact of racist policies, but that term "Stolen Generations" is sometimes used very loosely.

At several meetings it was suggested that identity could not be automatically reclaimed once it had been severed or broken and a gap created - for whatever reason, of more than a generation.

"It's not something you can learn as an adult; you get it as a child. If you've missed out on it growing up you don't get it any later."

"Descent can only go so far - you can't go in some moon shaped arc to someone way back there."

"At the moment we've made the bar too low - all of a sudden confirmation has been given when someone says I'm related to so and so it's not good enough."

To address these issues it was suggested on several occasions that the reclaiming of Aboriginality by people whose families are part of the Stolen Generations or victims of other

policies of removal should not expect to claim their Aboriginality immediately but should have to undergo a process that, overtime, would allow them to reconnect with culture and community.

“People need to work their way into a community. They cannot just turn up and say: I'm black; I'm here; Accept me.”

“People all of a sudden become Aboriginal so as to use AMS services. If they want to become Aboriginal they should have to become involved with the community and demonstrate this. People who want to come in need to go through a process and (through this) we can gradually bring them into the community.”

“It's about the community accepting you and you knowing the roots of your ancestral background. People should have to show that they have worked for the community for 2 or 3 years before they can claim Aboriginality for the purposes of a job application or a promotion or a scholarship.”

Recommendation 4:

That the NSW AECG Inc seek an urgent meeting with Link Up to negotiate the development of a set of protocols to assist with the processing of claims to Aboriginality by members of the Stolen Generations who seek to re-establish or reconnect with their Aboriginal culture and identity.

Concern at the legitimacy and effectiveness of *Certificates of Aboriginality*

There was a range of opinions about the value of the *Certificates of Aboriginality* that have come into common use over the past decade or more. Some participants who attended community forums believed that the *Certificates of Aboriginality* were a return to the discriminatory practices of the Assimilation and Aboriginal Protection eras:

“Why are we debating this issue? To me this is the same practice as the old people had to do with the “dog tags”. Why are we allowing this to happen? Don't take us back to the '40s and the dog tags.”

“I wonder how some people get their Aboriginality. I don't have to pull out a piece of paper to prove this.”

“It's just part of me and I object to being questioned as an Aboriginal woman and having to prove it.”

It was also suggested that the requirement of some organisations and government departments that individuals applying for identified positions submit these Certificates of Aboriginality was in fact discriminatory. They argue that this requirement is only imposed on Aboriginal people and no other group is ever required to assert or document their identity in this way. Furthermore it was pointed out that this procedure is not in fact a government policy but merely a practice that has come into common use in recent years. It was suggested that it is time to legally challenge this practice.

However, whilst acknowledging the difficulties inherent with the issuing of Certificates of Aboriginality others saw them in a different light. There was a common view that if Certificates of Aboriginality were to continue, the Aboriginal community must take control of the process.

There were also concerns expressed about the confidentiality and objectivity of the processes used by some organisations issuing “Certificates” leading to some people saying that they were reluctant to participate in the process.

Another interesting point raised at most community focus group meetings was the claim that it was too easy to establish an organisation and gain a common seal that could be used to legitimise Certificates of Aboriginality. The practice of *organisation hopping* or *common seal shopping* in order to gain a Certificate of Aboriginality was often cited as a source of concern and that the problem needed to be urgently addressed.

The question was also raised of whether individuals who were obviously Aboriginal in appearance needed to go through the process of confirming their Aboriginality. There were different opinions on this with some people thinking that, in such circumstances, the process was unnecessarily intrusive. However, others argued that the certificates were a practical response to a difficult issue:

“It's only being realistic. It's the wider society that wants the evidence and the documentation. Somehow we [Aboriginal people] need to have a system ourselves to meet these requirements for documentation and evidence.”

Some concern was expressed at the involvement of the NSW AECG Inc, particularly at the State level, in issuing Certificates of Aboriginality. It was suggested that the proliferation of organisations issuing Aboriginality Certificates was encouraging the practice of *shopping around for a Certificate*. It was further suggested that that this was not the core role of the NSW AECG Inc and a level of suspicion was expressed that the NSW AECG Inc may be being manipulated, but by whom was not identified, as part of a broader agenda to discredit, strew or negate the role of the NSW Aboriginal Land Council.

“Why is the AECG having this discussion? Couldn't all this stuff be handled by a Memorandum of Understanding with the State Land Council and get them to cover it?”

Recommendation 5: That the NSW AECG reconsider its decision to issue Certificates of Aboriginality to its members.

Alleged abuses associated with the current definition and procedures

A disturbing finding of the research was that there exist a very high number of allegations of abuse of the current definition and an ever increasing reporting of fraudulent claims to Aboriginality. These allegations were consistently raised at each of the community focus group meetings across the state and the volume of allegations suggest that there is a major problem that needs to be urgently addressed.

However, the extent of claims of identity fraud is difficult to quantify and certainly not possible at the community focus meetings of the sort undertaken during this project. Nevertheless, it was often asserted that the numbers of people lodging claims for Aboriginality has reached remarkable levels and that many of these claims appeared opportunistic and problematic at best and in some cases fraudulent.

The Aboriginal Employment Unit AEU of the NSW DEC Staffing Services Division reported that up to 3 or 4 such claims were brought to the attention of the Division's staff each week and that the volume of such claims had increased dramatically over the past 12-18 months.

The issue has also become a significant source of concern for Local Aboriginal Land Councils (LALCs) which, it was claimed, are being *inundated* with apparently opportunistic applications for *Certificates of Aboriginality* many of which appear motivated by the access to perceived benefits rather than by a genuine wish to reclaim identity or take pride in a family's Aboriginal heritage or the affairs of LALCs:

"We're inundated with phone calls saying: "I've just found out I'm Aboriginal what can I get?"

"There was a lady in Tweed who wrote to the Land Council she was 70 years old but she wanted a letter of Aboriginality. She had never identified. All she wanted was a housing loan."

"We get people coming in who are Pacific islanders but say they are TSI all they want is scholarships."

The reported volume and persistence of the allegations and claims of abuse is difficult to ignore as is the claim that it was often *too easy for non-Aboriginal people to simply 'tick the box' to establish Aboriginality*. Several people predicted that the temptation to do this would become even greater as the trend to online applications for employment, scholarships and other benefits are accelerated.

“It's a sad reality, what's happening. We need to develop a process that eliminates the risk of fraud and we (Aboriginal people) need to control the process.”

“It's a very serious disease that's going around. And those people who are falsely claiming Aboriginality are actually selling their own identity - it's weird!”

Numerous motives were suggested for the making of false claims to Aboriginality. As well as the desire for personal gain that was said to motivate so-called *gammon blackfellas* or *five-minute blackfellas*.

There were also disturbing allegations that false claims were sometimes being made or encouraged by institutions such as schools and universities and even at the level of government and bureaucracy. Individuals making this claim suggested that this practice helps to create an illusion of progress against government equity and social inclusion targets and that a more stringent and rigorous process and procedure is needed, one that involves members of the Aboriginal community at all levels.

“I've seen people walk in white into (Aboriginal Land Council) meetings and they come out black. And the next day they're lining up for their home loans and scholarships to university like the medical school at Newcastle.”

Some respondents saw the motivation of individuals to false claims to Aboriginality as merely a means of accessing perceived benefits. In education these benefits were seen as mainly gaining eligibility for the:

- enrolment in and reduced fees at State Pre-Schools
- Abstudy benefits (often imaginary rather than real)
- a range of scholarships, traineeships and cadetships
- the wavering of the TAFE administration fee payments
- accessing of Departmental Aboriginal Teacher Training Scholarships
- priority in appointment to teaching service positions
- accessing of accelerated priority transfer, and/or
- promotion or transfer to identified positions

Similar motivations for *fraudulent* claims to Aboriginality were also seen to apply in relation to perceived benefits in other parts of the public sector. Additionally, there were repeated allegations of false claims of Aboriginality being made so as to access services and benefits provided by Aboriginal community organisations including:

- Accessing medical services provided through the Aboriginal Medical Services (a claim was made of a person gaining \$4000 worth of orthodontic treatment in this way);
- Obtaining Aboriginal housing and/or cheap Aboriginal housing loans; and
- Accessing Aboriginal business loans.

It was also suggested that some people falsely claimed Aboriginality because of the status it gave them in the broader community. On several occasions reference was made to newly

identified, elderly people suddenly assuming the status of “Elders” and being accepted as such by NSW DEC and other public sector officials.

“I know a 73 year old man in my community who has only identified as Aboriginal in the last year or two but he now also assumes the position of an “elder”. He does “welcomes to country” at \$300 a pop but everything he knows he has only learnt out of a book.

Feedback was also received to suggest that fraudulent claims to Aboriginality were sometimes encouraged by non-Aboriginal departmental officials so as to gain access to funding or resources that would otherwise not be available. The suggestion was made that some School Principals, TAFE personnel and other administrators were *ticking the box* (or encouraging parents and students to do so) in order to gain access to designated Aboriginal program funding or benefits for their institution or agency.

“Parents (at a Pre-school) are being told to “tick the box’ so as to ensure funding and the funding body has told the school that they don’t even need to have the Aboriginality forms. When we object we’re told that: “we are all happy people here and we’ve got to get on together.”

“In some TAFE programs funding is based on how many Aboriginal people are enrolled.”

“If I don’t challenge the doubtful ones then enrolments increase and I get more funding. But that means that program is not achieving much in terms of ‘Closing the Gap’.”

“Though colour and class are not part of the way identity should be defined, we have to admit that the majority of Aboriginal people are not part of the middle class. Most of us are severely disadvantaged and if we have gammon blackfellas ticking the box it distorts the statistics on Aboriginal disadvantage”

It was also suggested at several focus group meetings that this type of *fraud* at the departmental level was both stimulated by and fed into government and policy demands that Key Performance Indicators be met to demonstrate that the *Closing the Gap Policy* was working. This practice was seen as resulting in a distortion of the data because it erroneously demonstrated rapid improvements in outcomes in areas such as health and education for Aboriginal people and contributed to an overstatement of progress against the Federal Government's *Closing the Gap* agenda.

It was also argued that this practice undermined the intent of almost every targeted Aboriginal program to address community disadvantage. Targeted scholarships, identified positions, designated health and housing services are intended to both address disadvantage and promote community capacity building. Though these programs have encouraged the development of a small Aboriginal professional class and have, it could be

argued, given rise to the development of a growing Aboriginal middle class, the focus of the programs should remain, as was originally intended, on community capacity building and addressing social and political marginalisation rather than on personal benefits that was enjoyed by a small minority.

The disregard of community capacity building and strengthening by failing to more strictly apply the 3 part Aboriginal identity criteria was also seen as resulting in the appointment of some individuals to Aboriginal identified positions ranging from the humble AEO to the most senior policy-making positions who in fact had little understanding of community issues or the day to day reality and experience of Aboriginal people:

“Look at these people in the Public Service who are now designing policies and supposed to be representing us. But they have no idea of what it's like because they have never lived in the community, never been with the grass roots like us.”

“We are seeing the effects every day of people claiming Aboriginality and getting into these positions and making decisions for us. But they know nothing about us there's so many wannabes in the universities they're leading the way and they know nothing about Aboriginality.”

“I know colour has nothing to do with Aboriginality but, look, it is an issue!!!”

“Around here in the schools with jobs like AEA. if you've got fair skin you get a job; if you've got dark skin, you don't”

“I don't want people taking a job on my behalf or getting to work with my kids and making decisions about me and them who have newly discovered that she's Aboriginal just because of some record, some piece of paper that she's found.”

One cause of this disregard of the need for community capacity building as the *raison de être* for Aboriginal targeted programs was that an assimilationist ideology continued to drive public policy. Essentially, most public sector bureaucrats are more at ease with Aboriginal people who are like them and so they encourage the appointment of people seen to be more assimilated and are sometimes prepared to overlook whether these people genuinely meet the 3 part Aboriginal identity criteria.

In recent years this approach has been accentuated by the establishment of quotas and the setting of *benchmarks* for Aboriginal employment and other outcomes in universities and the public sector. It was suggested that a more honest and more realistic policy approach needs to be developed because, when it is simply a matter of meeting quotas or benchmarks, it is often convenient to ignore the authenticity of the claims to Aboriginality of those applying for identified positions.

“They don't care because it's good for them to demonstrate that they have a whole lot of black faces in the university”

The disappointing outcomes that result were unfortunately noted by the late Nugget Coombs in the early 1980s when he bitterly concluded that, though the intent of many of the policies of the Whitlam era was to Aboriginalise the bureaucracy, they had unfortunately only succeeded in bureaucratising a small Aboriginal middle class.

This assimilationist ideology is also encouraged by some media commentators who adopted an almost eugenics zeal in their reporting but intriguingly they are ever ready to ridicule policies that, in their opinion, seem to benefit *white* or *middle class* Aboriginal people.

Recommendation 6: That the NSW AECG Inc, in conjunction with the CAPO negotiate and develop a process to standardise the procedures for establishing Aboriginality and identity in NSW.

Recommendation 7: That the NSW AECG Inc, negotiate with other members of the CAPO the establishment of a clear and unambiguous public statement of intent to initiate and pursue legal action against those individuals considered responsible for making fraudulent claims to Aboriginality and identity.

Recommendation 8: That the NSW AECG Inc advise the Director General of the NSW DEC of its concern at the extent of the reported abuses relating to the perceived fraudulent claims of Aboriginality and the inadequacy of existing procedures for verifying and applying all 3 criteria of the test of Aboriginality.

Recommendation 9: That the NSW AECG Inc request that the Director General of NSW DEC to immediately amend all NSW DEC forms requiring a statement of Aboriginality by including a warning that false claims may render the claimant liable to prosecution and penalties; replacing the simple Yes/No, tick the box format with a requirement and space for a written supporting statement for each of the 3 criteria; a statement that additional information may be sought to verify the claims in relation to each of the 3 criteria; indicating that *Certificates of Aboriginality* may be submitted in support of statement but that these should also be accompanied by a Statutory Declaration supporting the claim.

Recommendation 10: That the NSW AECG Inc request the Director General of NSW DEC to formally authorise the Aboriginal Employment Unit (AEU) to seek additional information as required regarding claims to Aboriginality in applications for scholarships, employment, promotion and transfer in circumstances where Aboriginality is in doubt.

Recommendation 11: That the NSW AECG Inc, in conjunction with NSW DEC, develop a training module on the issue of *Aboriginality and Identity* and further that this becomes a compulsory part of the merit selection training for NSW AECG Inc representatives on NSW DEC staffing Selection Panels.

Recommendation 12: That the NSW AECG Inc work with the Coalition of Aboriginal Peak Organisations (CAPO) to sponsor state and national community forums on Aboriginality and Identity with the aim of developing a unified set of standards, policies, procedures and practices relating to the processing of claims to Aboriginal identity.

Possible new processes and procedures to address alleged abuses

The research for this project revealed mounting community anger at the impact of the increasing numbers of *fraudulent claims* to Aboriginality. However, community responses to the issue also included a range of practical suggestions for new procedures to regulate and address the problem.

“It’s fraud! Simple! Fraud! I’m fed up with it because it’s a waste of time and resources helping people who aren’t Aboriginal. Genuine Aboriginal people are missing out, are not getting the jobs or scholarships. The people who get these jobs and then don’t identify don’t help the Aboriginal kids.

There was a persistent demand for criminal prosecution of any cases of blatant fraud and the imposition of penalties for those found guilty of the offence. It was also suggested that pre-emptive action should be taken by including a standardised warning of the potential penalties for making false claims on all departmental forms where a statement of Aboriginality is required.

The volume of concern about the effectiveness and authenticity of *Certificates of Confirmation of Aboriginality* documents, led some respondents to suggest that it should become a requirement that all such official statements of Aboriginality be accompanied by a Statutory Declaration. This approach was seen as a significant deterrent for those tempted to make false claims of Aboriginality.

Additional suggestions were also made for improving the process of establishing claims to Aboriginality. Essentially these involve:

- establishing processes that placed the onus of proof on the applicant for Aboriginal identity;
- establishing purpose by creating a distinction between the *confirmation of Aboriginal identity* and the *affirmation of Aboriginal identity*
- removing the process of merely ticking the box and insisting that each of the criteria are always overtly demonstrated;
- in particular, requiring a clear demonstration of the requirement of *belonging to a community*;
- empowering the Aboriginal community and/or Aboriginal officers in community or public sector agencies by giving them the authority to challenge potentially fraudulent claims;
- standardising the current processes and practices for the processing of claims to Aboriginality

Placing the onus of proof on the applicant for Aboriginal identity

There was a consistent demand that the onus of proof be placed on the applicant for Aboriginality to prove this, rather than for those challenging the claim to disprove it. In particular, it was argued that it should be the right of any organisation issuing Certificates of Aboriginality or of any agency requesting a statement of Aboriginality for the purpose of employment or the granting of any other benefit, to request documented evidence in support of such an application. Moreover, people should be able to challenge unconvincing or problematic claims for Aboriginality without fear of reprisal.

“The onus has to be on the individual. The individual has to go and get the evidence.”

“If you tick the Aboriginal box then the policy should be that you have to produce some sort of document to prove it; the onus should be on the person ticking the box.”

“The policy should be that people have to have evidence.”

The need for a distinction between the confirmation of Aboriginal identity and the affirmation of Aboriginal identity

Throughout the consultation process there was clear recognition that the identity of any individual is a very sensitive and personal issue.

Because of this it was recognised that concern about authenticating Aboriginality only arose in the case of individuals seeking this status for the purpose of obtaining a perceived or real benefit. In this circumstance it was suggested that a clear distinction should be made between the concepts of *confirming* and *affirming* Aboriginality.

It is argued that this distinction is important because it establishes a primacy of purpose and intent.

Individuals who seek to have their Aboriginality *confirmed* usually do so because they seek to take advantage of a perceived benefit such as a scholarship, housing, targeted and identified employment opportunities etc. Whereas individuals who seek to have their Aboriginality *affirmed* do so primarily because they want to celebrate their ancestry but do not seek any perceived benefit.

Any challenge to an individual's claim to Aboriginality should only be made if the individual is thought to be falsely claiming Aboriginality in order to fraudulently claim a benefit.

“If you don't want any benefit then it's not anyone's business but yours. So maybe we've got to look at the intent in applying for Aboriginality.”

Removing the process of merely ticking the box

A recurring theme throughout the consultation was that the process of simply *ticking a box* to identify as Aboriginal was too simple, too formulaic and too easy to subvert by anyone intent on falsely claiming Aboriginality.

It was strongly recommended that this process be replaced by a requirement that claimants address each of the criteria separately and, in writing, to document how they believe they meet or satisfy each of the criteria. To establish, Aboriginal ancestry, for instance, it may be necessary to present a family tree documenting this relationship over several generations. To establish community links, it was suggested that it would be necessary to establish the claimant's involvement (or that of the claimant's immediate family) in the Aboriginal community and community based organisations over several years.

Demonstrating the requirement of *belonging to a community*

Another recurring theme that emerged during the consultation was that the essence of proving one's Aboriginality was in being able to demonstrate a meaningful sense of *belonging*. On one essential level *this involved* simply being part of a family and community and knowing where one belongs and to whom one is connected. But also implicit in this suggestion was the idea that a person seeking to have their Aboriginality either affirmed or confirmed needed to be able to actual demonstrate that they are a part of a community and not just simply aware of it:

“Aboriginality is of course based on descent -but you've got to be amongst it.”

“A lot of people I grew up with, all of a sudden they're Aboriginal -you've got to be known. You've got to be amongst it!!!”

“It's the importance of our family groups, our community groups -the mob! That's what gives us our identity.”

“You need to go back to where your mother or father came from and get the people there to verify your Aboriginality”

“You've got to have a connection to the land and history, knowing who your mob is and where you belong.”

“It's about the community accepting you and you knowing the roots of your ancestral background.”

One participant suggested that this connection to the community needed to be explicitly demonstrated in any formal application for Aboriginality. It cannot just be claimed.

“People should have to show that they have lived in and worked for the community for 2 or 3 years before they can claim Aboriginality for the purposes of a job application or a promotion or a scholarship.”

Empowering the Aboriginal community and/or Aboriginal officers in community or public sector agencies with the authority to challenge potentially fraudulent claims

There was overwhelming agreement that the final decision in determining claims to Aboriginality must rightly rest in the hands of Aboriginal communities. It was further agreed that for this process to be effective that it is applied at the local level where people have extensive and well established knowledge and history about family and kinship structures. There were serious concerns and total opposition for any move that would allow governments or bureaucracies to again have or exercise a role in this process.

“We can't delegate our rights to decide on an individual's Aboriginality to anyone else we must decide these issues ourselves.”

“It's the community who must decide, not the courts and not the Director General”

“We need to assert our sovereignty on this issue. It's only the Aboriginal community that can do this it's the families, the organisations, our own mob.”

“We must not move to a system where Government departments determine Aboriginality for the purpose of deciding who gets a particular job or who gets access to services and resources.”

“We need to be cautious in this process and be aware of the bigger picture which is that the mechanisms we might want will become formalised and the processes will go through THE SYSTEM.”

“In Tasmania now everything goes through the DAA. There may be Aboriginal people making the decisions, but those people are just the Government's gatekeepers. If what we're doing moves us towards that you'll get the situation, like in Tasmania, where one family member might get access to services but his brother wont because they don't like him.”

The need for support structures to meaningfully empower those responsible for making decisions on claims, particularly at the local level, were clearly recognised. In particular, there was widespread and a particularly strong view that those participating in selection panels often felt disempowered and resulted in their reluctance to challenge potentially fraudulent claims. Consequently, it was argued that training for selection panels should focus particularly on how to ensure that the Aboriginality criteria are effectively demonstrated and tested.

“People on panels need more guidelines and intensive training on what their responsibilities are. We have no right to challenge the confirmation certificates that applicants increasingly submit with their applications but, at the point of interview, we should be able to ask them: “Who’s your mob?”

It was also recognised that localising the process could be disruptive and contentious, particularly in small communities. It was therefore argued that those placed in a position that might require them to challenge problematic claims needed to be supported by clearly defined policies and processes.

There needs to be some process to take the onus off the individual challenging someone’s claim. You may need to go to a range of organisations and not just one. It doesn’t need to be just one thing, there needs to be a range of checks.”

“There is privacy issues involved in this and it shouldn’t just be the role of the AECG or the AEA to go and investigate it. You’re going to find the AEA put under a lot of pressure if you go that way.”

Possible processes to more effectively deal with this issue at the local level included the formation of Committees of Elders, possibly including nominees from all local or regional community organisations with the sole responsibility of assessing applications for dealing with claims to Aboriginality.

Standardising the current processes and practices of claiming Aboriginality

Finally, there was widespread agreement for the need to standardise policy, procedures and practices relating to the processing of claims to Aboriginality.

On several occasions during the consultation process the NSW AECG Inc was praised for having had the courage to begin addressing the issues which are a source of considerable community concern throughout the State and, indeed, throughout the country. However, it was realised that this was a nation-wide problem and, though the research the NSW AECG Inc had commissioned was leading the way, there was a need for State-wide and nation-wide action to identify particular remedies and solutions to the problem.

Recommendation 13:	That the standards referred to in Recommendation 12, once established, form the basis of negotiations between CAPO and the National Congress of Australia’s First Peoples regarding the development of a national uniform position on the definition of Aboriginality and identity.
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Recommendation 14:	That following the development and adoption of a nationally agreed Aboriginality position, as referred to in Recommendation 13, that it is used as the basis of negotiation with all Australian governments through the Coalition of Australian Governments (COAG) and other government agencies.
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Desktop Research & Analysis

The Project Team conducted a literature search utilising a desktop research method of available online resources pertaining to the question of Aboriginality and identity. The Project Team also utilised a number of 'hard' documents that were provided by a range of interested participants during Stages 1 & 2 of the project. The key findings of this research are listed below.

The desktop research and analysis revealed the presence of a vast amount of relevant literature on *Aboriginality and Identity* in a number of countries around the world, including (among others) Australia, United States America (USA), Canada and New Zealand. Concentration on the Australian context was paramount, with particular emphasis on the NSW situation but, certainly, the whole of Australia and relevant procedures, definitions and developments in other countries were taken into account.

The desktop research and analysis showed that the current administrative definition, though not initially chosen by Aboriginal peoples, has been widely accepted by Aboriginal peoples and all federal, state and territory governments, notwithstanding the various differences in interpretation under law that exist in each of these jurisdictions.

However, in both the general Australian society and indeed within the Aboriginal community conflict and division continues to exist about the vexed question of Aboriginality and identity. There are many suggestions as to how identification may be refined, and there are just as many arguments against pursuing avenues that could create even greater legal difficulties.

The following analysis is comprised of the identifying of the particular focus and the various websites that were visited pertaining to the particular focus.

Defining Aboriginality in the Australian Context

(<http://www.aph.gov.au/library/pubs/cib/2002-03/03cib10.htm#problems>)

This site explains how the definition of Aboriginality has a long and contentious history in Australia, and that two very different definitions are concurrently in use. One,

predominating in legislation, defines an Aboriginal as 'a person who is a member of the Aboriginal race of Australia'. The other, predominating in program administration but also used in some legislation and court judgements, defines an Aboriginal as someone 'who is a member of the Aboriginal race of Australia, identifies as an Aboriginal and is accepted by the Aboriginal community as an Aboriginal'. It shows that in the 1980s a new definition was proposed in the Constitutional Section of the Department of Aboriginal Affairs' *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders* (Canberra, 1981). The section offered the following definition:

An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he (she) lives.

Soon, this three-part definition (descent, self-identification and community recognition and acceptance) was adopted by all Federal Government departments as their 'working definition' for determining eligibility to some services and benefits. The definition also found its way into State legislation (e.g. in the *NSW Aboriginal Land Rights Act 1983* where 'Aboriginal person means a person who: (a) is a member of the Aboriginal race of Australia, and (b) identifies as an Aboriginal person, and (c) is accepted by the Aboriginal community as an Aboriginal person') and was accepted by the High Court as giving meaning to the expression 'Aboriginal race' within s. 51 (xxvi) of the Constitution and it was also used by the Federal Court when it found that the Royal Commission into Aboriginal Deaths in Custody had no jurisdiction to inquire into the death of an Aboriginal man, as the community did not identify him as Aboriginal nor did he identify himself as Aboriginal.

The Gulf between Aboriginal Policies and Aboriginal People in Australia

<http://www.bennelong.com.au/articles/chile/GaryJohnsChile.pdf>

Although dated (2001) and from a Chilean source, this article exposes a view on Australian reaction to increasing numbers of people identifying as 'Aboriginal':

"Indeed, the tide of people wishing to be identified as Aboriginal has caused an adverse reaction to such identification. The accusation of 'over-identification' has occurred in disputes over eligibility to vote for Aboriginal and Torres Strait Islander Commission elections (the 'Aboriginal parliament'). A number of legal challenges have been mounted to keep 'late-identifiers' off the roll and out of contention. These challenges are a cruel irony given that the 1962 Commonwealth Electoral Act ensured

Aborigines the right to vote regardless of state registration, and the 1967 Referendum ensured that Aborigines would be counted in the Census. One such case produced the following definition of an Aboriginal person.

The less the degree of Aboriginal descent, the more important cultural circumstances become in determining whether a person is "Aboriginal". A person with a small degree of Aboriginal descent who genuinely identifies as an Aboriginal and who has Aboriginal communal recognition as such would be described as an "Aboriginal person" .But where a person has only a small degree of Aboriginal descent, either genuine self-identification as Aboriginal alone or Aboriginal communal recognition as such by itself may suffice.

The three elements of identification; descent, self-identification and communal recognition assist in the definition of an Aborigine, but as proof of descent sometimes relies on communal recognition it places some power in the hands of those who are inside the system, much like a political party or a club. People of Aboriginal descent may be excluded under such a 'sociological' definition. It may intensify the political nature of the proof, particularly as Aboriginal separatism needs a significant, and preferably, a growing number of followers".

Kinship and Identity - Legal Definitions of Aboriginality

(<http://www.alrc.gov.au/publications/36-kinship-and-identity/legal-definitions-aboriginality>)

John McCorquodale (legal historian) reported that since the time of white settlement, governments have used no less than 67 classifications, descriptions or definitions to determine who is an Aboriginal person.

This site provides a good coverage of legal definitions, as they have been handed down in courts in recent years:

In *Commonwealth v Tasmania*, the High Court considered the definition of an 'Aborigine' for the purpose of s 51(xxvi) of the Constitution, in relation to laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. Justice Deane applied the three-part test, stating:

By 'Australian Aboriginal' I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as Aboriginal.

Justice Brennan supported this approach in his leading judgment in *Mabo v Queensland (No 2)*, in relation to native title:

Membership of the Indigenous people depends on biological descent from the Indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

Justice French commented that the three-part definition should not be seen as representing the contemporary content of the word 'Aboriginal', irrespective of context or purpose. The better view was that Aboriginal descent alone is a sufficient criterion for classification as Aboriginal for the purposes there in question.

Justice Drummond commented that Justice Deane's three-part test should not be regarded as containing an exhaustive description of the meaning in ordinary speech of the term 'Aboriginal'. His Honour held that a person must have some degree of Aboriginal descent to satisfy the definition of an 'Aboriginal person'. A small degree of Aboriginal descent coupled with genuine self-identification or with communal recognition may be sufficient for eligibility; alternatively, a substantial degree of descent may by itself be sufficient. *Gibbs v Capewell* (1995)

Justice Merkel held that if a person has no Aboriginal descent then he or she cannot be an Aboriginal person for the purposes of the Act. However, evidence about the process by which self-identification and communal identification occurs can be probative of descent. He referred to the lack of documentary records and to the reticence of some families of Aboriginal descent to publicly acknowledge that fact due to actual or perceived racism from the rest of the community.

"In these circumstances Aboriginal identification often became a matter, at best, of personal or family, rather than public, record. Given the history of the dispossession and disadvantage of the Aboriginal people of Australia, a concealed but nevertheless passed on family oral 'history' of descent may in some instances be the only evidence available to establish Aboriginal descent. Accordingly oral histories and evidence as to the process leading to self-identification may, in a particular case, be sufficient evidence not only of descent but also of Aboriginal identity. Shaw v Wolf" (1998)

In summary, the Commonwealth government appears to apply the three-part test of Aboriginal descent, self-identification and community recognition for determining eligibility for certain programs and benefits. The courts, in interpreting statutory definitions in federal legislation, have emphasised the importance of descent in establishing Aboriginal identity, but have recognised that self-identification and community recognition may be relevant to establishing descent, and hence Aboriginal identity, for the purposes of specific legislation.

Benchmark Project Chapter 1.6 Introduction

<http://www.aija.org.au/online/ICABenchbook/BenchbookChapter1.pdf0>

This article also provides a number of definitions of 'Aboriginality' that have been imposed over the last two centuries, but closes with the following statement:

"The decisions of the Federal Court briefly discussed above indicate that genetic descent, albeit small, is essential to a person being considered "Aboriginal" where that term is defined in very broad terms⁶¹. The extent to which self-identification and communal affiliation might also need to be established depends upon the facts of each case, and the legal context in which the question of Aboriginality arises."

Racial Identity Cannot be Determined by Casual Bystanders.

(<http://www.feministe.us/blog/archives/2010/11/04/racial-identity-cannot-be-determined-by-casual-bystanders/>)

One blogger's interpretation of how an Australian Aboriginal person's looks does not determine her identity.

Andrew Bolt, Wajin-looking Koori, Aboriginality, and comments full of lies.

(<http://hoydenabouttown.com/20090502.4743/andrew-bolt-wajin-looking-koori-aboriginality-and-comments-full-of-lies/>)

Similar to the arguments cited above. An 'Indigenous' blogger takes issue with Andrew Bolt's interpretation of who is an Aborigine.

Aboriginality Under the Microscope: The Biological Descent Test in Australian Law

(<http://www.law.qut.edu.au/ljj/editions/v3n1/pdf/deplev.pdf>)

This article infers that there is no way to prove Aboriginality using genetic techniques. The approaches sometimes suggested by judges do not work, but not for lack of technological sophistication. What they are looking for is a 19th century misconception called race. They are trying to find something that is not there. However, it also explains a little about how, in an effort to redress the disadvantage of the past, equal opportunity legislation has been passed to provide certain statutory rights and privileges for the exclusive benefit of indigenous people. These Acts offer the opportunity to claim native title, stand for election to particular Aboriginal organisations, have indigenous cultural heritage protected, apply for specified government-funded jobs and receive financial assistance while studying. However to access these legislative benefits Aboriginal people must prove their Aboriginality by means of a test devised not by the legislatures, but by judges.

This right of indigenous peoples to belong to an indigenous community or nation in

accordance with their own traditions and customs is recognised as a fundamental exercise of self-determination in Article 9 *Draft Declaration on the Rights of Indigenous Peoples, 1994*. Non-indigenous Member States in the United Nations, including Australia, have also endorsed this right. Australia is signatory to the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*. Article 1(1) of both Covenants provides:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

Genetic research has shown that classification of the peoples of the world into ‘genetically distinct’ races on the basis of their external features is spurious. Only a small number of the genetic differences between people are responsible for the very obvious external differences. Indeed at the DNA level there is more genetic difference between any two individuals within a ‘race’ than there are group differences between two ‘races’. The nineteenth century hypothesis of genetically segregated racial groups has no basis in reality there is no such thing as a genetically differentiated ‘race’, we are all one species. The inference is that Aboriginality cannot be determined by genetic differences, but may be determined by a specifically applied, Aboriginal accepted, definition.

[Outline of the Tasmanian policy with regards to demonstrating eligibility to be accepted as an Aboriginal person.](http://www.dpac.tas.gov.au/divisions/cdd/oaa/eligibility_policy)

http://www.dpac.tas.gov.au/divisions/cdd/oaa/eligibility_policy

For example:

Descent

A person must be able to demonstrate that s/he is of Aboriginal or Torres Strait Islander descent. A person should provide documentary evidence that shows a direct line of descent linked back through an identifiable family name to traditional Aboriginal or Torres Strait Islander society. Documentary evidence will usually take the form of a verifiable family tree, archival or verifiable historical documentation which links a person to a traditional Aboriginal or Torres Strait Islander family or person. In circumstances where documentary evidence is not available, other relevant evidence (refer below) can be considered, however, this will need some form of verification and where possible will be checked against available archival information.

An applicant can provide other evidence that they consider relevant. Examples of this can be personal statements (oral or written) and statements from other people. However, it should be noted that this type of evidence might not provide

conclusive evidence of ancestry and will have a lesser weight than documentary evidence.

Identity

In addition to demonstrating descent, a person must be able to demonstrate self-identification as an Aboriginal person or Torres Strait Islander.

Acceptance

In addition to demonstrating descent and self-identification, a person must be able to demonstrate communal recognition or acceptance by members of the Aboriginal community in which he or she lives or has lived. In practical terms a person will generally be required to:

- *obtain three signatures from recognised members of the Aboriginal community in which he or she lives or has lived*
- *demonstrate that these three community members are able to acknowledge that person's or family's identification as Aboriginal or Torres Strait Islander*
- *demonstrate that the signatories are not from the immediate family group of the person seeking confirmation and are from family groups who are accepted members of the Aboriginal community in which he or she lives or has live and/or*
- *provides a fully completed Confirmation of Aboriginality or Torres Strait Islander Descent form.*

The weighting given to a Confirmation of Aboriginality or Torres Strait Islander Descent form will vary depending on the organisation's eligibility threshold.

The Registrar of Aboriginal Corporations does not require evidence of Aboriginality from members of a corporation established under the Aboriginal Councils and Associations Act (1976). Given this, it would not usually be sufficient for confirmation of communal recognition to come from an Aboriginal organisation alone, without separate support from members of the Aboriginal community in which he or she lives or has lived. However, evidence of communal recognition may be considered from one or more Aboriginal organisations alone, if the basis of the evidence can be properly demonstrated.

Where a person claims Aboriginal or Torres Strait Islander descent from outside Tasmania, proof of that descent and communal recognition must be demonstrated.

Checking eligibility

Agencies will be required to seek a determination from the Office of Aboriginal Affairs (OAA) on the eligibility of applicants seeking Aboriginal and/or Torres

Strait Islander specific programs or services. OAA will consider any existing available evidence of eligibility for applicants. If the applicant is unknown or there is insufficient or conflicting information to support a decision on the eligibility of an applicant, the agency will be advised and OAA will request the applicant to provide evidence of their eligibility.

Request for information from applicants

OAA will write to the applicant requesting evidence to support their claim. The applicant will also be provided with a copy of this Policy. The applicant will be given 21 days to provide the information to OAA. An extension to this timeframe may be granted if the applicant is having difficulty in obtaining additional information and has applied for an extension in writing.

Consideration of the evidence provided

OAA will consider all of the evidence presented and any other information, such as archival information, that is available when making its decision. A decision will be made on the balance of probabilities.

OAA will advise the relevant Agency and the applicant as to whether or not the applicant meets the eligibility criteria.

The applicant must meet the eligibility criteria proving descent, providing evidence and meeting communal recognition requirements.

A paper by Frances Peters-Little that explores the concept of community and looks at identity in communities around Walgett in north-west NSW.

<http://www.aiatsis.gov.au/research/docs/dp/DP10.pdf>

Peters-Little argued:

“Their identities were rooted in their ability to survive mission and station life, as opposed to identifying with a traditional life, history, site and experience denied to them.”

“While some may believe that the definition of the government’s three criteria for Aboriginal identification must be restricted to criteria one alone, this notion is problematic, however, particularly for those Aboriginal people objecting to the large numbers of people who seemingly lay claim to Aboriginality as a means of gaining status or benefits. Since they lack the experience of being Aboriginal, it is understandable why so many Aboriginal people would object to this. Proof of ancestry is also problematic, as is identifying with a community, particularly when that community no longer exists, or is an introduced white boundary such as Redfern, Eveleigh St or ‘Vegemite City’. For not only is it difficult to do, it also opens several

opportunities for 'whites' to make claims to things which are essentially Aboriginal by necessity or nature, such as native title, government funding and service programs, or becoming representatives of Aboriginal issues. Perhaps a solution would be for Aboriginal people to define their own terms of identity and culture as distinct from non-Aboriginal Australians followed by a declaration of Aboriginality, discussed and defined at the community level, as opposed to the present criteria which is the result of government bureaucrats in consultation with a handful of Aboriginal 'leaders'. Having a sense of one's own Aboriginality depends very much upon the community with which they identify."

An example where provision of a Certificate of Aboriginality was contested and the Anti-Discrimination Board took up the case:

http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_cases#indigenous

An Aboriginal man applied to his housing provider for a larger house, for reasons relating to his Aboriginality. His application was rejected on the grounds that he did not provide a 'Certificate of Aboriginality' (see definition below) to prove that he was Aboriginal. The man made a complaint of race discrimination to the Board. He explained that although he did not have a Certificate of Aboriginality, he had legal documents relating to his removal from his Aboriginal family as a child. At conciliation, the housing provider said that the man had not provided the legal documents when he made the original application, and they would have accepted these as proof of Aboriginality if he had have provided them.

The man said the housing provider had not told him that he had the option of providing other documentation apart from the Certificate of Aboriginality.

The complaint was resolved when the housing provider agreed to transfer the man to a larger house near where he was receiving medical treatment and to provide him with a statement of regret and pay him \$3,000 compensation.

Certificates of Aboriginality

The current definition of an Aboriginal person (for example, as defined by the *NSW Aboriginal Land Rights Act 1983*), (a) is a member of the Aboriginal race of Australia, and (b) identifies as an Aboriginal person, and (c) is accepted by the Aboriginal community as an Aboriginal person'.

As a result of such (legal) definitions of Aboriginality, government departments now require Aboriginal people to provide 'proof of Aboriginality' to be eligible for any financial or other assistance (E.g. public housing).

Aboriginal people can approach their Local Aboriginal Land Council, or an Aboriginal community organisation to apply for a 'Confirmation of Aboriginality' or a 'Certificate of Aboriginality'. Essentially, such documents state that the person is known to identify as an Aboriginal person and is accepted by the community where the organisation is based as an Aboriginal person. It is debatable that the acceptance and recognition by one Aboriginal community is automatically transferable to another Aboriginal community.

Example from Human Services – Housing NSW: Evidence of Aboriginality.

(<http://www.housingpathways.nsw.gov.au/NR/rdonlyres/8DE&C37F5-8244-4369-A7BE-FD026FAC953D/0/DH3000.pdf>)

This site provides a comprehensive example of how such a document might look, and one that obviously covers the accepted definition of Aboriginality in depth.

Current Issues Brief No. 10 2002–03. This paper was prepared for general distribution to Senators and Members of the Australian Parliament. 'Defining Aboriginality in Australia', Dr John Gardiner-Garden, Social Policy Group, 3 February 2003.

(<http://www.aph.gov.au/library/pubs/CIB/2002-03/03cib10.pdf>)

The entire paper needs to be read *in toto*, but reveals some contentious issues with regard to Identity and Aboriginality. One quote, from historian Peter Read's research, demonstrates the difficult situation Aboriginal people had to contend with in regard to the inconsistencies in Laws:

"In 1935 a fair-skinned Australian of part-indigenous descent was ejected from a hotel for being an Aboriginal. He returned to his home on the mission station to find himself refused entry because he was not an Aboriginal. He tried to remove his children but was told he could not because they were Aboriginal. He walked to the next town where he was arrested for being an Aboriginal vagrant and placed on the local reserve. During the Second World War he tried to enlist but was told he could not because he was Aboriginal. He went interstate and joined up as a non-Aboriginal. After the war he could not acquire a passport without permission because he was Aboriginal. He received exemption from the Aborigines Protection Act—and was told that he could no longer visit his relations on the reserve because he was not an Aboriginal. He was denied permission to enter the Returned Servicemen's Club because he was."

The paper gives a stark view to the difficulty that Australian politicians and public servants were having with the situation:

"It was soon apparent, however, that the three-part definition was itself open to different interpretation. When it came to the test, which of the three criteria was the

most important? Which criteria, if satisfied, could carry an identification in the event that meeting the others proved problematic?”

With regard to Tasmania and the impact of court decisions on the rest of Australia, Aboriginal Torres Strait Islander Commission (ATSIC) legislation was shown to be lacking:

“It was soon pointed out that the three-part criteria for eligibility and the evidence requirements which followed were nowhere to be found in the ATSIC Act itself, so on 27 March 2002 the Government Gazetted *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Amendment Rules 2002 (No.2)*, in which the above mentioned sub rules would be replaced with the following:

The submission must provide evidence that the applicant is an Aboriginal person or a Torres Strait Islander.

A possible indicator of changing government policy in the Howard era:

“The resulting broadening of the indigenous-identifying group may mean that in urban Australia—the area today where the broadening-of-group dynamic is most at play—there is likely to be a narrowing of the gap between the geographic-specific socioeconomic indicators of the two groups. The policy implications of this may be that there is merit in moving away from indigenous-specific services or benefits in urban areas. The present Federal Government appears to be moving in this direction. Thus the convergence of some benefits' eligibility criteria and payment levels and thus the Government's recent commitment in the context both of the May 2002 Budget 'to continue improving Indigenous people's access to mainstream services and to better target Indigenous-specific programs to areas of greatest need'.”

How the Australian definition compares with other international models:

“...it is clear there are many ways of defining Aboriginality. By including self-identification in its most commonly used definition, Australia has been closer to Norway or Sweden than to countries such as Canada and the United States where definitions for the purpose of accessing to programs centre on registered descent. In trialing an indigenous electoral roll in Tasmania, Australia may be interpreted as doing no more than Sweden does when it requires registering to vote in Sami Parliament elections. The emphasis, however, which the IIAC had placed on proof of descent may be seen as a diversion towards the Canadian and US system—a system not without problems in Canada and the US even though in those countries there has been a longer history of federal government involvement in indigenous affairs and a longer history of federally recognised classifications.”

Legal interpretations are also interpreted as part of this paper:

“If it is your task to interpret and apply existing laws, it is certainly reasonable to say, as Justice Merkel did in *Shaw v Wolf & Ors (1998)*, that 'Aboriginal persons' needs to be defined because laws have been enacted for the benefit of 'Aboriginal persons' and to say, as Justice French did in the 1989 *Wouters Case*, that the purpose of the statute or instrument under scrutiny has a bearing on who should be included in the group described as 'Aboriginal'.

If, however, your task is to make the laws, you may consider the possibility that there is a more fundamental problem with a system of defining Aboriginality than simply who may or may not be embraced by a definition and who should or should not arbitrate on it.

There is a problem even more fundamental than making sure that the purpose of the legislation or regulation is taken into account when determining who under that legislation is an 'Aboriginal'. The fundamental problem is that the term 'Aboriginal' is effectively being used as a surrogate for something else, a poor proxy for 'people with the needs which a piece of legislation is trying to address'. Alterations to definitions or to arbitration mechanisms will not alleviate difficulties arising from a problem of this nature.

Another approach entirely may be required. Perhaps these difficulties will be alleviated only when the surrogate/proxy term is abandoned and the 'something else' is spelt out. If legislation is intended to benefit people with a particular need, why not define the need? This happens in land and native title claim assessments, for critical to such assessments is not some abstract or broad-brush 'Aboriginality' but the much more particular criteria of recognition as a descendant of a traditional owner, continued attachment to the land etc. Could it not be the same in other areas? If the purpose is to identify people in need of particular health, employment, welfare or educational benefits or with a possible interest in a particular cultural or land issue, the determining factors need not include Aboriginality, simply need, situation and/or purpose.

In short, one possible solution to the problem of defining Aboriginality for public-policy and public-money-receiving purposes may be not to require the identification of Aboriginality for these purposes.

Several objections might quickly be raised to such a policy option.

- the fact that membership of a racial group might be something which is difficult to define at law does not mean that such categorisation should be abandoned as there is hardly anything that is not difficult to define in law. Moreover, in some cases, perhaps especially to do with cultural matters, definition by ethnicity may be one of the easiest short hands for helping to

define the intended beneficiaries of a law or program.

- as has been noted in Part II above, this approach was canvassed by Pierre Trudeau's government [Canada] in 1969 but abandoned in the face of indigenous resistance. Such an approach would certainly also meet a lot of resistance in Australia from people who felt this was an attack on their personal identity and/or were concerned at the capacity for mainstream institutions and agencies to be sufficiently sensitive to indigenous needs and concerns.

- such an approach risks giving indigenous people the feeling that their inherent right to self-identify (as well as to self-government and self-determination etc) is being denied.”

Perhaps the following statement, in part, explains the situation where government agencies are perceived as not effectively ‘policing and applying’ the 3-prong definition of Aboriginality:

“Between the status quo and a policy revolution there is, as always, a possible middle way. If Aboriginality was removed from (and the specific target group made more clear in) the eligibility criteria for most funds, programs, services and benefits, then Aboriginality could possibly remain in the eligibility criteria for participating in elections to an organisation with representational, advocacy and negotiating tasks without the question of Aboriginality engendering excessive community division and litigation (though this would remain to be seen). If, as the Federal court Judges say, purpose is important in interpreting what is meant by Aboriginality, then purpose could come well to the fore of Aboriginality in most public policy areas, even if Aboriginality remains at the fore in some areas.

Whatever way forward is chosen, it is clear that the path would be smoother if there were a greater investment in ensuring that mainstream agencies were fully sensitive and responsive to the needs and aspirations of indigenous people wherever they lived. It would also be smoother if short-horizon funding and multiple-agency involvement were replaced with more streamlined lines of responsibility and if every measure possible were taken to ensure that people who do identify as indigenous are accorded full respect (e.g. addressing grievances over past injustices) and that people who don't so identify have their understanding and appreciation of indigenous ethnography (both local and national), history (ancient and modern) and culture (past and present) enhanced.”

An international example of how the 3-pronged definition is utilised in Canada, and where that sits in Law (from the Congress of Aboriginal Peoples):

<http://www.abo-peoples.org/CAPfaqAnswers.html>)

“Although the Aboriginal and Treaty rights of the Aboriginal Peoples of Canada are *identified* in Section 35 of the Canadian Constitution Act, 1982, the phrase **Aboriginal People** is *not defined* in that document. As a result there is no formal or official definition of the term Aboriginal. The constitution also *identifies* Indian, Inuit, and Metis as being "among" the Aboriginal peoples of Canada but those terms are *not actually defined*, either. However during the First Ministers' Conferences on Aboriginal Matters held between 1982 and 1992 Federal, Provincial and Aboriginal delegations agreed on (but did not formalize) the concept that to identify as an Aboriginal person an individual should meet these three basic criteria:

- Aboriginal Ancestry
- Self-declaration of identity as an Indian, Inuit, or Metis person
- Recognition or affirmation of that identity by the appropriate Aboriginal community

Given these circumstances almost anyone *could* identify themselves as an Aboriginal person, but that person would also run the risk of legal action if they attempted to benefit from that identification fraudulently.”

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) provides a good explanation to funding applicants, with a degree of direction on how to obtain evidence of Aboriginality:

<http://www.aiatsis.gov.au/fhu/aboriginality.html>)

How do I obtain proof of my Aboriginal and/or Torres Strait Islander heritage?

Perhaps you have a certificate that traces your family to a particular Aboriginal station or reserve? Perhaps you have oral history stories that link to an area or person or even a photograph? Whatever your situation, you will need to link to your Indigenous community organisation for assistance. If you have been displaced from your heritage, you can research and take your evidence to the Indigenous community organisation closest to you. You will be invited to explain your heritage to their committee.

Step 1 – Gather as much information about your family history and heritage as possible

When applying for a letter of proof of Aboriginal and/or Torres Strait Islander heritage through an Indigenous organisation, you are likely to be requested to explain your heritage to their committee. For this reason it is often useful to gather as much information about your family history as you can before you contact them. This

is particularly important if you or your ancestors have been displaced from your heritage.

Examples of useful information include birth, death and marriage certificates that trace your family to a particular Aboriginal station or reserve, oral history stories and even photographs. The AIATSIS Family History Unit is able to assist you with the family history research that you may need to undertake to demonstrate your Indigenous heritage and/or the area where your family is from.

Step 2 – Contact an Indigenous organisation

A 'letter of confirmation' is usually obtained from an incorporated Indigenous organisation and must be stamped with their common seal. It is useful to contact an organisation where your family is from, if possible, as someone in the community might know of or remember your family.

An Indigenous organisation in the area where you live may also be able to provide you with this confirmation. For instance, if you live in Canberra and your family is from the Canberra region, you could contact the Ngunnawal Land Council in Queanbeyan. If you live in Canberra but your family is from elsewhere, you would contact the Land Council in the area your family came from or were known in.

To find the contact details of a Land Council or other Indigenous community organisation, try searching the Yellow Pages online www.yellowpages.com.au. Type 'Aboriginal' in the WHAT box and the place name in WHERE. In the print version of the Yellow Pages, look under 'Aboriginal & Torres Strait Islander Associations & Organisations'

Creative Spirits Processes

<http://www.creativespirits.info/aboriginalculture/people/aboriginal-identity.html>)

This site provides an easily-read and clearly understood guide to those seeking information of Aboriginal identity and what it means in this day and age, including some first-hand quotations from Aboriginal people. It also includes some valuable insights into existing problems encountered when trying to gain recognition of Aboriginality:

“When Aboriginal people seek to have their Aboriginality confirmed they still encounter major hurdles, even 30 years after the three-part definition.

- Organisations do not recognise each other's paperwork.*
- There appears to be a lack of consistency between agencies.*
- There is no governing body regarding Aboriginality. It is left up to the individual organisations to interpret government rules.*
- No national register or directory of Aboriginal people exists.”*

A copy of Open Training and Education Network's (OTEN) (Western Sydney Institute of TAFE) Student Application Form for 2011, including the simplistic "Are you of Aboriginal or Torres Strait Islander origin?"

http://www.oten.edu.au/otenweb/1/enrol/2011_oten_enrolment%20form_CS%204.pdf

Australian Law Reform Commission (ALRC) – the Definition of 'Aborigine':

<http://www.alrc.gov.au/publications/7.%20The%20Scope%20of%20the%20Report/definition-%E2%80%98aborigine%E2%80%99>

In its paper – 'The Recognition of Aboriginal Customary Laws' (ALRC Report 31) – the Commission states that the primary purpose of the definition of Aboriginality

"...is administrative, given its use to determine eligibility for various entitlements or programs. For constitutional purposes, the question is a broader one: it is whether the particular law is one 'with respect to' the people of any race for whom special laws are deemed necessary. It is not a requirement for the validity of a law passed for Aboriginal people that the subjects or objects of the law should all be 'Aborigines' according to some definition. ¹Nonetheless whether a law meets the description contained in s 51(26) depends in part on the identification of the 'Aboriginal race', or its members as in some sense the beneficiary or object of the law. The question is whether the definition of 'Aboriginal race' for this purpose excludes persons who are, for example, 'half-caste' or who do not have 'predominant Aboriginal blood'.

Further, the paper concludes with the following:

"The Commission's View. *Experience under Commonwealth and State legislation suggests that it is not necessary to spell out a detailed definition of who is an Aborigine, and that there are distinct advantages in leaving the application of the definition to be worked out, so far as is necessary, on a case by case basis. Constitutionally this presents no difficulties, as the High Court's Decision in Commonwealth v Tasmania show. On the other hand, it has sometimes been suggested that a special and more restrictive definition of 'traditional Aborigine' should be adopted for the purposes of this Report and its implementation. There are several reasons why such a special definition is both unnecessary and undesirable. Restrictive definitions of this kind have not been adopted in other related contexts. ¹Experience so far does not suggest a need for more stringent definitions. The application of the Commission's recommendations in appropriate cases is to be achieved by the substantive requirements of the provision in question, and by related evidentiary requirements. Indeed, there may be cases where it is appropriate that provisions for the recognition of Aboriginal customary laws should apply to persons who are not Aborigines. These questions have to be considered on their merits, and cannot be resolved through the adoption of any more-or-less restrictive definition of 'traditional Aborigine'."*

<http://www.alrc.gov.au/publications/36-kinship-and-identity/legal-definitions-aboriginality>

The ALRC, on its website, under ‘Kinship and Identity’, stated that the Commission had received:

“A number of submissions commented on the appropriateness, or otherwise, of the existing legal definition of Aboriginality. The Commonwealth Attorney-General’s Department commented:

The question of whether genetic testing and information should be used to establish Aboriginal identity is an important issue given that it may determine eligibility to Indigenous-specific entitlements. Any departure from the current three-pronged test to determine whether someone is an Aboriginal or a Torres Strait Islander based on descent, self-identification and community recognition requires careful consideration.

The Inquiry was told in some consultations that the three-part definition works well enough in most circumstances. However, a number of concerns were expressed about the test. In some cases, the courts have interpreted ‘descent’ in terms of biological descent when interpreting the meaning of an Aboriginal person. This tends to undermine the role of social descent within Aboriginal communities whose traditional laws and customs might provide for adoption or other social forms of inclusion into a family or community. The emphasis on biological descent has led to some anxiety that genetic testing might increasingly be used (or even required) as a means of proving a person’s kinship relationship with another Aboriginal person.

Several submissions emphasised the difference between Western and Aboriginal definitions of kinship. The Aboriginal and Torres Strait Islander Social Justice Commissioner commented that:

“ While Aboriginal people may generally be direct descendants of the original inhabitants of a particular part of Australia, indigenous customary law does not rely on linear proof of descent in the Judeo-Christian genealogical form of ‘Seth begat Enosh begat Kenan’ in order to prove membership of the group. ... A person may have been adopted into a kinship group where there is no direct or suitable offspring to carry out ceremonial obligations. ... Genetic science should have no part to play in determining whether or not a person should be eligible for benefits. If the element of descent is to remain in Australian law as a test of Aboriginality, it should be interpreted in accordance with Indigenous cultural protocols.”

Professor Larissa Behrendt also expressed concern about the tendency of the courts to distort the three-part test by focussing unduly on descent, however defined. Professor Behrendt noted that self-identification has been recognised as the international standard for establishing indigenous identity, and she emphasised that, in talking about elections and

treaties, indigenous people need to talk among themselves about Aboriginality and what makes their Indigenous identity.

In its submission to the Inquiry, AIATSIS supported the existing definition, commenting that it should be emphasised in legal determinations, but it stressed the need for judicial flexibility to ensure Indigenous peoples were not disadvantaged.

“The legal imperative of utilising the three pronged approach to Indigenous identity should be emphasised in legal determinations. There should also be a strengthening of the three pronged test to allow judges to make this test a legal standard. AIATSIS stresses the need for judicial discretion so that Indigenous people [a]re not further disadvantaged in legal proceedings.”

The biological descent test in Australian law, QUT Law and Justice Journal 3(1):pp. 104-120: de Plevitz, Loretta R. and Croft, Larry (2003) Aboriginality under the microscope:

(<http://eprints.qut.edu.au/8765/1/8765.pdf>)

This paper looks at Aboriginality in Law and is based on lines of descent and interpretations of this, where descent has been judicially interpreted to mean genealogical descent provable by quantum of ‘Aboriginal genes’. It is argued that a test of eligibility for benefits based on proof of Aboriginality according to Aboriginal laws and customs and administered by Aboriginal people would serve the same purpose as any biological descent test without its potentially divisive effects.

“As an exercise in self-determination, the test of Aboriginal identity drafted by Parliament and interpreted by judges (neither of whom as Merkel J points out in *Shaw v Wolf*¹²³ is representative of Aboriginal people) is a signal failure. Its reference to biology is contrary to accepted international human rights principles. A genetic test of descent affects the most disadvantaged, those who will have the most difficulty asserting their Aboriginality - people taken from their parents as children and placed in welfare or adopted out, or persons whose ancestral group has been virtually exterminated - for against whom can they be genetically tested?

In the Paper’s Conclusion, the authors’ observes:

“As for redressing the wrongs of the past by providing equality of opportunity in the present, the three-part test is not applied to any other ethnic group in Australia including Torres Strait Islanders. The identity of other disadvantaged groups wanting to access government benefits for example, the unemployed, the uneducated or the disabled is not undermined by such stringent and expensive requirements of proof. Indeed generally social welfare legislation is based on the premise that it is better that a few fraudulent claims slip through the net than to deny benefits altogether.

If a test of descent is necessary, and we would suggest that cultural identification should be sufficient, then proof should be according to indigenous peoples' own customs and laws, not outdated science and offensive views of 'race'."

Clearly there are serious policy and administrative implications involving the definition of Aboriginality and its application particularly when an assertion of Aboriginality is made for the purposes of a perceived benefit.

Aboriginality in the International Context

The Desktop Research and Analysis section of this report touched upon some of the views about Aboriginal/Indigenous identity in the international context. The research for this project establishes that there is a wide range of issues concerning various Aboriginal groups around the world who are facing similar challenges to those of Australia's Aboriginal people. Many of these issues are not easily generalized as each Indigenous group has a complicated array of circumstances based on their particular history of colonisation and the relationship they had and continue to have with their respective governments. Some of these circumstances will be detailed in the following brief analysis, and it is stressed that none can be 'pigeon-holed' in such a brief summary.

The right of Indigenous peoples to belong to an Indigenous community or nation in accordance with their own traditions and customs is recognised as a fundamental exercise of self-determination in Article 9 *Draft Declaration on the Rights of Indigenous Peoples, 1994*.

Non-Indigenous Member States in the United Nations, including Australia, have also endorsed this right. Australia is also a signatory to the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*. Article 1(1) of both Covenants provides:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Linda Smith has claimed that:

"Indigenous peoples' is a relatively recent term which emerged in the 1970s out of the struggles primarily of the American Indian Movement (AIM), and the Canadian Indian Brotherhood. It is a term that internationalises the experiences, the issues and the struggles of some of the world's colonised peoples."

Smith adds that the term enables "the collective voices of colonised people "to be

expressed strategically in the international arena”. (Smith L.T., 1999, Decolonising Methodologies: Research and Indigenous Peoples. Dunedin, University of Otago Press, p.7). Ms Smith further claims that:

People now live in a world which is fragmented with multiple and shifting identities, that the oppressed and the colonised are so deeply implicated in their own oppressions that they are no more nor less authentic than anyone else.” (Smith, 1999, p.97)

Ms Smith goes on to say that while shifts are occurring with regard to having identities regulated by laws, the greater project for Indigenous peoples is about redefining Indigenous identities on a grander scale.

General Identification

In a paper published in 2003 by the federal Department of Public Library titled “Defining Aboriginality in Australia”, Dr John Gardiner-Garden has stated that:

“It is clear there are many ways of defining Aboriginality. By including self-identification in its most commonly used definition, Australia has been closer to Norway or Sweden than to countries such as Canada and the United States where definitions for the purpose of accessing to programs centre on registered descent. In trialing an indigenous electoral roll in Tasmania, Australia may be interpreted as doing no more than Sweden does when it requires registering to vote in Sami Parliament elections. The emphasis, however, which the IIAC had placed on proof of descent may be seen as a diversion towards the Canadian and US system—a system not without problems in Canada and the US even though in those countries there has been a longer history of federal government involvement in indigenous affairs and a longer history of federally recognised classifications.”

<http://www.aph.gov.au/library/pubs/CIB/2002-03/03cib10.pdf>

Canada

In 1969, Jean Chretien (then Canadian Minister of Indian Affairs), in a Government Policy Statement on Indian Policy said:

“To be an Indian is to be a man, with all a man's needs and abilities. To be an Indian is also to be different. It is to speak different languages, draw different pictures, tell different tales and to rely on a set of values developed in a different world.

Canada is richer for its Indian component, although there have been times when diversity seemed of little value to many Canadians. But to be a Canadian Indian today is to be someone different in another way. It is to be someone apart -apart in law,

apart in the provision of government services and, too often, apart in social contacts.

To be an Indian is to lack power - the power to act as owner of your lands, the power to spend your own money and, too often, the power to change your own condition.

Not always, but too often, to be an Indian is to be without - without a job, a good house, or running water; without knowledge, training or technical skill and, above all, without those feelings of dignity and self-confidence that a man must have if he is to walk with his head held high.

All these conditions of the Indians are the product of history and have nothing to do with their abilities and capacities. Indian relations with other Canadians began with special treatment by government and society, and special treatment has been the rule since Europeans first settled in Canada. Special treatment has made of the Indians a community disadvantaged and apart.

Obviously, the course of history must be changed."

<http://www.abo-peoples.org/CAPfaqAnswers.html>

Chretien's statement was made in the context of proposed sweeping changes (contained in a white paper) that the government of the day wanted to enact without however consulting the people the changes would directly affect. Many people believed that the proposed changes would have an adverse effect on "treaty" and/or other constructive relationships between Canada and the first people recognised in prior legislation.

The result of this was "a revolution" of sorts leading to the adoption of the "Indian Control of Indian Education" policy and the establishment of stronger national political organisations such as the Assembly of First Nations and the Association of Métis and Non-Status Indians—now the Metis National Council.

Although the Aboriginal and Treaty rights of the Aboriginal Peoples of Canada have since been identified in Section 35 of the Canadian Constitution Act, 1982, the phrase *Aboriginal People* is **not defined** in that document. As a result there is no formal or official definition of the term *Aboriginal*. The constitution also identifies *Indian*, *Inuit*, and *Metis* as being "among" the Aboriginal peoples of Canada but those terms are **not actually defined**, either. However during the First Ministers' Conferences on Aboriginal Matters held between 1982 and 1992 Federal, Provincial and Aboriginal delegations agreed on (but did not formalise) the concept that to identify as an Aboriginal person an individual should meet these three basic criteria:

- Aboriginal Ancestry
- Self-Declaration of identity as an Indian, Inuit, or Metis person

- Recognition or affirmation of that identity by the appropriate Aboriginal community

Given these circumstances almost anyone *could* identify themselves as an Aboriginal person, but that person would also run the risk of legal action if they attempted to benefit from that identification fraudulently.

As in Australia, the myth of race plays into the concept of “Aboriginality,” in that archaic conceptions of blood quantum defined who is, and who is not, part of the ethnic class of Aboriginal peoples. This has had a particularly negative impact on some Aboriginal peoples who have defined what being “Indians” means in Canadian society, based often on seeing “Indians” as individuals who are victimised, marginalised, and who belong to communities with a plethora of social problems. It could be argued that it is this liberal conception of Aboriginal rights that have made such rights acceptable to the majority of Canadians who find some level of misguided comfort in believing that the recognition of Aboriginal rights exist solely to help Aboriginal people become better individuals, an injudicious and benign form of assimilation.

That Aboriginal rights are derived and defended from the concept that Aboriginal peoples must suffer to be authentically “Aboriginal” is equally repugnant to a strongly egalitarian society, but has been tolerated for a long time in Canada.

The legislatively imposed definitions of what and who is “Aboriginal” has created a situation where a people are being constructed and defined by successive governments through policy and legislation (such as the Indian Act). Legal challenges to the Indian Act (by women who lost status) and to hunting rights (in the case of the Métis) have also contributed to the evolution of... who is Indian, who is Métis.

Despite this, there still exists reason to presume that Aboriginal peoples have a right to define themselves. How this right is to be implemented is seen as a major problem, as placing the control in the hands of Aboriginal communities is seen by some Canadians (both Aboriginal and non-Aboriginal) to be much the same as placing it in the hands of colonial governments.

Russia

In Russia, and counted among the other Native peoples with Republic status, are such diverse groups as the Komi and Mari, FinnoYgrian peoples of northern Russia and the Volga region; the Chuvashes and Tatars, Turkic peoples in European Russia; the Yakuts (now called the Sakha, their name for themselves), a Turkic group living in north-central Siberia; and the Buryats, a Mongol-speaking people in southern Siberia. All of these until recently did not regard themselves as indigenous and some are still debating the question.

In recent years, however, not only have cultural revival organisations and new political parties within some of these republics emphatically identified their national status as Native, but in at least one case, the Republic government has reoriented status as Native, but in another case, the Republic government has reoriented its internal and external affairs around the concepts of Indigenous status and the corresponding rights to self-determination and true self-government.

In spite of these growing initiatives, many members of these nations still reject Native status, while others seem to be in a state of indecision. It is not unusual to hear some refer to themselves as both Native and non-Native at different points in the same conversation. Still others, even high-ranking government representatives of the Native republics, are unclear as to their indigenous status and seek the opinion of foreign experts. This uncertainty reflects and process of ethnic identity transition. Those of mixed Russian and Native heritage, who previously identified themselves in official documents as Russian, could take advantage of "affirmative action" programs for university enrollment or scholarships, and federal funding from Moscow for apartments and other benefits should they choose to identify with their Native relatives. Because of special federal programs and economic development funds available to the smaller indigenous groups and a new trend toward establishing for them "ethnic territories" - which carry a certain level of autonomy from regional authorities - ethnicities long absent from the census rolls are suddenly reappearing and asking for federal recognition.

Ultimately, it is up to the peoples themselves to choose the status they deem most appropriate to their situation and needs.

<http://www.culturalsurvival.org/ourpublications/csg/article/indigenous-identity-transition-russia-an-international-legal-perspective>)

The United States of America

In the USA the “political” definition of identifying Indigenous peoples as *Indian* is generally used, and recognises those who are members of federally recognised tribes. The US government and a number of tribes prefer this definition because it allows the tribes to determine their meaning of “Indianness” when they set their own identification criteria. Others criticise this saying that the federal government's historic role in setting certain conditions on the nature of membership criteria means that this definition does not transcend federal government influence. Thus in some sense, one has greater claim to a Native American identity if one belongs to a federally recognised tribe, recognition that many who claim Indian identity do not have.

One anthropologist discussed the most common outcome for those who seek membership:

"We check and find that they haven't a trace of Indian ancestry, yet they are still totally convinced that they are Indians. Even if you have a trace of Indian blood, why do you want to select that for your identity, and not your Irish or Italian? It's not clear why, but at this point in time, a lot of people want to be Indian." (Bordewich, Fergus M., 1996, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century*. First Anchor Books)

The 1997 definition for the American Indian or Alaska Native response category includes people having origin “in any of the original peoples of North America, including Central America and who maintains cultural identification through tribal affiliation or community recognition” (U.S. Office of Management and Budget 1997). The specific inclusion of Central American Indians was new. Also, it has been the practice of the United States government to classify Canadian Indians in this category.

In the vital statistics system for the State of Hawaii, births are counted as Hawaiian if either parent is Hawaiian or part Hawaiian. The State also developed a register of individuals who can trace their ancestry back to someone living in Hawaii before Captain Cook's 1778 visit to the Hawaiian Islands.

Some critics believe that using federal laws to define "Indian" allows continued government control over Indians, even as the government seeks to establish a sense of deference to tribal sovereignty. Critics say *Indianness* becomes a rigid legal term defined by the Bureau of Indian Affairs, rather than an expression of tradition, history, and culture. For instance, some groups that claim descendants from tribes that predate European contact have not been able to achieve federal recognition. On the other hand, Indian tribes have participated in setting policy with the Bureau as to how tribes should be recognised. According to Rennard Strickland, an Indian Law scholar, the federal government uses the process of recognising groups to "divide and conquer" Indians:

"The question of who is 'more' or 'most' Indian may draw people away from common

concerns." (Brownell, Margo S., 2001, "Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law." (Michigan Journal of Law Reform 34 [1-2], p.276).

In some cases, self identification is sufficient to define one as Indian. One can often choose to identify as Indian without outside verification when filling out a Census form, a college application, or writing a letter to the editor of a newspaper. A "self-identified Indian" is a person who may not satisfy the legal requirements which define a Native American according to the United States government or a single tribe, but who understands and expresses his or her own identity as Native American. However, many people who do not satisfy tribal requirements identify themselves as Native American - whether due to biology, culture, or some other reason. In 1990, about 60 percent of the over 1.8 million persons identifying themselves in the U.S. Census as American Indian were actually enrolled in a federally recognised tribe. As Brownell (2001, p.315) noted, using self-identification allows uniformity and includes many different ideas of "Indianness". It may also avoid marginalising the nearly half a million who receive no benefits because:

- they are not enrolled members of a federally recognised tribe, or
- they are full members of tribes which have never been recognised, or
- they are members of tribes whose recognition was terminated by the government during programs in the 1950s and 1960s. (Brownell, p.299)

Identity is a very personal issue; based on the way one feels about oneself and one's experiences.

Horse described five influences on self-identity as Indian:

- The extent to which one is grounded in one's Native American language and culture, one's cultural identity;
- The validity of one's American Indian genealogy;
- The extent to which one holds a traditional American Indian general philosophy or worldview (emphasising balance and harmony and drawing on Indian spirituality);
- One's self-concept as an American Indian; and

One's enrollment (or lack of it) in a tribe. (Horse, Perry G., 2005, "Native American Identity", *New Directions for Student Services*. Volume 2005, Issue 109, p. 65)

New Zealand:

For the Indigenous people of New Zealand (the Maori), identity and aboriginality are easier to define and acknowledged than in Australia. However, similar to the Australian Aboriginal

peoples' ways of identifying, through traditional means of 'singing land into existence', and by identifying with a particular 'country', ancestors and family, Maori also make introduction by naming rivers, mountains, ancestors, tribe and family, so they can locate themselves in a set of identities "framed geographically, politically and genealogically". (Smith, L.T., 1999, *Decolonising Methodologies: Research and Indigenous Peoples*. Dunedin, University of Otago Press, p.126). Probably, the major difference between the two groups is that all Maori can identify with members of the first canoes to arrive in New Zealand from Hawaii, so they can trace their genealogy much easier than can Australians. In addition, by having only one main language, there are fewer complications when compared to Australia's vast array of traditional Aboriginal language groups.

The unfortunate reality is that (similar to the situation in Australia) blood quantum mentality has fuelled the undermining of Maori identity in their country. The New Zealand Census (also similar to earlier Australian censuses) was one forum where blood fractions were used to determine whether or not a person was Maori. By 1986 the census provided people with the opportunity to self-identify themselves without reference to blood fractions. In 1991, the census extended its section on Maori descent to include tribal affiliations. This still had its limitations. Linda Tuhiwai Smith (1995) stated:

I objected to nominate a primary iwi as I take seriously my rights to claim bilineal descent and resent the state imposing definitions through census on how our identity is shaped. In brief these external measurements of identity are significant at an ideological level because they become normative, they set the norm for what it means to be Maori (Smith L. T., 1995, Kaupapa Maori Research. Paper Presentation at Te Matawhanui Hui, Palmerston North, Massey University.)

Ethnic identity is seen as crucial to the self-concept and psychological functioning of ethnic group members. Threats to Maori identity are still current. In some ways these threats have acted to support Maori identity, but supports and threats to Maori identity are by no means mutually exclusive.

Maori people have proven that they have the capacity to survive over time and that they are very resilient. The spontaneous recovery of the Maori population from the trauma of colonisation after the turn of the century was matched by cultural revival. (Walker, R., 1989. *Maori Identity*. In Novitz and Willmott. [Eds.], *Culture and Identity in New Zealand*. Wellington: Government Printer, pp 35-52).

While some Maori chose assimilation, the vast majority rejected it. That meant commitment to cultural continuity and setting up strategies and structures that would enhance Maori wellbeing (Hohepa, P., [1978]. *Maori and Pakeha: The One People Myth*. In M. King [Ed.], *Tihe Mauri Ora*. Wellington: Hicks Smith. pp. 98-111; Walker, 1989).

The continuity of Maori identity has been assisted by the set of social services made available by Maori for Maori. Over the years, the ability to adapt the frameworks of tribal structures and cultural practices to urban living have also played a major role in maintaining the continuity of Maori identity. But the ability to set up pro-Maori institutions such as Te Kohanga Reo and Kura Kaupapa and leading into the establishment of Maori universities has encouraged and maintained the continuity of language and cultural teachings. Adapting to technological change and more education possibilities have led to more Maori professionals and very competent Maori academics.

While it might appear that Maori have been successful in providing the necessary support structures, some Maori believe that as long as the threats to Maori identity are still lurking in the background, the need for vigilance continues.

One of the fundamentals underpinning the continuity of Maori identity is the political climate in which Maori identity is embedded. Consciousness raising has led to an increased awareness of societal differences associated with Maori. Ethnic revitalisation movements coupled with that consciousness raising has assisted in the continuity of Maori identity into the 21st Century.

Conclusion

Defining individual or communal identity is a complex, contested and sensitive process. This is even more so for Aboriginal people because of the way in which decisions on their identity have been made by non-Aboriginal people and Australian governments usually for political and administrative reasons by paternalistic and culturally insensitive officials during both the colonial and post colonial eras.

The research conducted in the context of this project has found that there exists an ever increasing level of Aboriginal community concern and foreboding regarding the manner in which the test of Aboriginality is applied, the role of non-Aboriginal people in the application of the test and the apparent surge in the number of individuals who, it would appear, are making false and fraudulent claims to Aboriginality.

There is no doubt that the issue of the definition of Aboriginality and identity, how the definition is applied, by whom and for what purpose is a major political, legal, social and cultural dilemma.

This report and indeed the project itself does not purport to offer any remedies to the complex issue of the definition of who is Aboriginal, ones identity and the myriad of associated questions. Rather the report, written as a reflection of community views and concerns is designed to stimulate further debate and discourse, including the need for a far more comprehensive and empirical analysis of the subject matter.

There is no simple solution, no magical panacea or universal remedy that can be identified to define Aboriginality in the modern era, nor is there any obvious standardised process to monitor the application of the definition. Clearly there are complex cultural, policy and administrative implications involving both the definition of Aboriginality and identity and the manner in which it is applied, particularly when an assertion of Aboriginality is made for the purpose of accessing a perceived benefit.

However, these complexities notwithstanding, it is clear that Aboriginal people themselves must be more directly involved not only in the process of determining individual claims to Aboriginality but also in determining the veracity of such claims.

The initiative by the NSW AECG Inc to commission the Aboriginality and Identity research project and the level of support the organisation's leadership provided during the conduct of the research was instrumental in achieving the project's identified objectives.

If community concerns enumerated in this report are to be addressed the NSW AECG Inc will need to consider the development of a range of short, medium and long term strategies. In the short term the NSW AECG Inc should focus on the way the definition of Aboriginality is applied within the NSW Department of Education and Communities (NSW

DEC). To initiate this strategy the NSW AECG Inc may wish to consider the formation of a joint NSW AECG Inc/DEC Task Force to consider this report and its recommendations.

In the medium term, the NSW AECG Inc may wish to consider the development of strategies to ensure that Aboriginal community organisations throughout NSW adopt a united position on the definition of Aboriginality, the monitoring of its application and the processing of claims to Aboriginality. This could be initiated by circulating this report and its recommendations to Aboriginal community organisations and seeking the development of a joint position on the issues through the Coalition of Aboriginal Peak Organisations (CAPO).

A long term strategy is for the NSW AECG Inc, through its membership of CAPO to initiate negotiations with the newly established National Congress of Australia's First Peoples regarding the development of a nationally agreed position on the definition of Aboriginality. Once developed such an agreed position could form the basis of negotiations with all levels of Australian governments the urgent need to review the current definition.

The evidence emerging from this project irrefutably illustrate that there is considerable Aboriginal community concern and an increasing level of distress relating particularly to the definition of Aboriginality. This concern requires immediate Aboriginal community leadership and advocacy to begin the process of developing remedies for what is a complex and contested issue.

This report and its recommendations are dedicated to this objective.