

from legislative interference with their human right to *own and inherit property*' as other persons in the community. The right cannot be limited or recognised to a lesser extent than the rest of the community.<sup>5</sup>

In 1988 the High Court in *Mabo No. 1* held that Queensland legislation which sought to extinguish native title and to validate the interests of all others was rendered invalid by the Act. Deane J explained that the effect of the Act was to extinguish native title "in a context where other proprietary rights ... would not be adversely affected but would be enhanced to the extent that their validity or efficiency would otherwise be impugned by surviving traditional proprietary rights and interests".<sup>6</sup> The violation of the Act consisted in the 'singling out' of native title interests for impairment or extinction while leaving other interests 'unaffected or enhanced'. The effect of the Western Australian Act is little different from the Queensland legislation. It denies any substantial content or status to the 'rights' which replace native title. Native title itself is extinguished without compensation. The Act denies genuine equality before the law with respect to native title.

A regard for 'genuine equality' must conclude that the Act violates the RDA. It is a deliberate sham to suggest the form of recognition of common law rights, when in substance it is their denial. It affords no benefits whatever to Aboriginal people.

#### Legal uncertainty and resource insecurity

The *Land (Titles and Traditional Usage) Act* ushers in a new era of legal chaos and uncertainty. The Act will be declared invalid by the High Court, but until that decision is rendered it is presumed to be valid. The Act cannot provide resource security for development and indeed will harm it. No other jurisdiction in the common law world has ever deliberately brought about the degree of resource insecurity the Act presents. Land and resource management, the proper responsibility of the State, has been poorly served by the legislation.

P.S. The Kimberley Land Council, on behalf of four Aboriginal people, lodged a High Court challenge to the WA Government's native title legislation on 3rd December 1993.

#### Endnotes:

1. *Mabo No 2* (1992) 175 CLR 1, per Brennan J at 61, per Deane, Gaudron JJ at 113; *Johnson v McIntosh* (1823) 21 US 240. Also see *Martin v Queen in right of British Columbia* [1985] 2 CNLR 58 (BCCA).
2. Bartlett, R., "Resource Development and the Extinction of Aboriginal Title in Canada and Australia" (1990) 20 UWA L Rev 453.
3. *Amadu Tijani v Secretary of Southern Nigeria* [1921] 2 AC 399, 409-410; *Calder* [1973] SCR 313, at 402 (Hall J).
4. *Mabo No 1* (1988) 166 CLR 186, per Mason J at 196, per Dawson J at 242, per Brennan, Toohey, Gaudron JJ at 218, Deane J at 231-232 Cf Wilson J at 206.
5. *Ibid*, per Brennan, Toohey, Gaudron JJ at 218.
6. *Ibid* per Deane J at 231.
7. *Ibid*, per Deane J at 231-232, per Brennan, Toohey, Gaudron JJ at 218.

# ABORIGINAL HEARING LOSS AND THE CRIMINAL JUSTICE SYSTEM

by Damien Howard, Sue Quinn\*, Jenny Blokland

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## Introduction

The issues of hearing loss and sentencing were recently considered by the Northern Territory Supreme Court in *The Queen v A.T.*<sup>1</sup> A 16 year old Aboriginal defendant pleaded guilty to 7 offences including arson which carries a maximum sentence of life imprisonment. Thomas J acknowledged the significance of the defendant's hearing impairment and consequential difficulties:

"Although a hearing problem was identified early in (the defendant's) life and identified again during his childhood, it appears he has not had access to a range of services, including the possibility of surgical intervention, amplification, speech therapy, and special education, that could have minimised the communicative, social and psychological impact of these problems and I quote one section of the report prepared by Mr Howard in which he states: 'These communication difficulties have been a major contributor to the development of serious social and psychological problems.'"<sup>2</sup>

Hearing loss can be emotionally and physically draining, interfering with effective communication and resulting in difficulties in interpersonal relationships. Hearing loss is rarely discussed in the context of the criminal justice system.<sup>3</sup> This article examines the following questions: Can hearing loss be a factor related to criminal behaviour? Does the criminal justice system adequately and fairly respond to Aboriginal defendants with communication problems resultant from hearing loss? This article does not attempt to definitively answer these questions. The authors' intention is to point to the urgent need for future research in this area.<sup>4</sup>

Hearing loss is endemic within the Aboriginal community. Between twenty and forty percent of Aborigines are affected by hearing loss which is mainly a consequence of middle ear disease (*otitis media*).<sup>5</sup> This type of conductive hearing loss fluctuates in occurrence with the disease state and is most prevalent among young Aboriginal children. Up to fifty percent of Aboriginal children at any point in time experience conductive hearing loss.<sup>6</sup> Those affected by hearing loss are themselves often not aware of

their disability, usually ascribing their communicative difficulties to not speaking English properly, cultural differences or others' antagonism to them personally or Aborigines generally.

Research indicates that hearing loss among Aboriginal school children is associated with linguistic educational disadvantage and incompetence,<sup>7</sup> social isolation and interpersonal difficulties.<sup>8</sup> Children with hearing loss comprise the majority of those students identified by their teachers as having behavioural problems in school.<sup>9</sup> *The Royal Commission into Aboriginal Deaths in Custody* noted that "the effects of hearing impairment in educational achievement is commented upon in several of the cases (of deaths in custody)".<sup>10</sup> The Royal Commission quoted the transcript of the inquiry into one of these deaths noting that hearing impairment "would have added to his problems because it has a compounding effect ... of reducing self-esteem and seeing himself very negatively ... certainly it would have been a factor in poor behaviour."<sup>11</sup> There is also strong anecdotal evidence that supports the contention that hearing loss may be a factor that is relevant to the occurrence of criminal behaviour:

- A dramatic change was noted in one adult Aboriginal male with a long criminal record after he had been identified as having a hearing loss and fitted with a hearing aid. He changed from someone who was socially isolated, uncommunicative and often violent to being a cooperative family and community member.<sup>12</sup>

- An Aboriginal youth, after being arrested for assaulting police, was placed within a psychiatric institution because of his bizarre and inexplicable behaviour while in detention. After some months it was realised that this apparently bizarre behaviour was related to hearing loss.<sup>13</sup>

- In one large, remote Aboriginal community where hearing tests have been conducted it has been noted that many petrol sniffers in the community were youths identified as having chronic hearing loss.<sup>14</sup>

Involvement in the criminal justice system may be the end product of a cumulative link, whereby hearing-related social problems contribute to low



educational standards, unemployment, alcohol and substance abuse, these being the more obvious antecedents of contact with the criminal justice system. In considering the impact of Aboriginal hearing loss in relation to the criminal justice system, it is important not to focus solely on the presence of a hearing loss at the time an offence is committed. While an individual may not have a current hearing loss, they may have a past history of chronic hearing loss that has left a legacy of linguistic and communicative incompetence, which are components of present social and psychological problems. This means that in considering the impact of hearing loss on an Aboriginal defendant, it may be important to consider current functional communication and past evidence of hearing loss, even if there is no current hearing loss.

### **Defendants with hearing loss**

A defendant with current hearing loss or a history of hearing loss requires unique consideration at each stage of the criminal justice process.

### **Arrest**

The criminal justice process commences when a defendant is either arrested or summonsed to attend court. Police Guidelines generally provide that for minor offences, summonsing is the preferred process for an offender who is 'amenable' by summons.<sup>15</sup> Communication problems associated with hearing impairment may contribute to a demeanour of diffidence, reticence or anger which could influence the opinion of the police on whether or not the person is 'amenable' by summons.<sup>16</sup>

### **Bail**

In most circumstances there is a presumption in favour of granting bail.<sup>17</sup> However, bail may be refused where the defendant is unlikely to answer bail.<sup>18</sup> The police or a court might form the view that the responses of a defendant with (an unknown) hearing loss indicate that the defendant does not understand the purpose of bail or is unlikely to comply with bail conditions. Bail may then be refused.

### **Questioning and Confessions**

The attendant problems of hearing loss present strong reasons for police, counsel and the judiciary to carefully scrutinise confessional material obtained in the course of an investigation.<sup>19</sup> The dangers of relying on the admissions of Aboriginal suspects with a limited grasp of English is well recognised by the courts. Particular rules (the *Anunga Rules*) were developed in the Northern Territory in response to the potential unfairness of evidence being received from Aboriginal defendants agreeing with incriminating propositions

put to them by police while not necessarily accepting the truth of those propositions.<sup>20</sup> Hearing related communication problems of defendants raise similar considerations in relation to the admission of confessions. The problem may not be apparent to investigators. The chances of misinterpretation and mistakes in relation to the content and significance of questions are more likely. It is possible that unidentified hearing loss contributed to problems that the *Anunga Rules* sought to redress.

It is likely that an Aboriginal defendant with communication problems related to hearing loss will not be in a position to offer an exculpatory or mitigating explanation to police or prosecutors who are determining whether or not to prosecute.

### **Fitness to Plead**

In each jurisdiction there are provisions that provide for the situation where "it appears to be uncertain, for any reason, whether (the defendant) is capable of understanding the proceedings"<sup>21</sup> This provision is most usually applied in the situation where the defendant is suffering from a mental disability. However, there is authority to support the application of the provision if a communication impasse is caused by language<sup>22</sup> or cultural factors<sup>23</sup> and an Aboriginal defendants' counsel is unable to receive adequate instructions on essential facts. The factor of unidentified hearing loss may further complicate the ability of an accused to participate fully in the proceedings. The consequences of a finding of unfitness to plead range from being detained at Governor's pleasure through to discharge.

### **Communication with Counsel**

Hearing loss puts at risk rapport and quality communication between a client and his/her counsel. One Aboriginal man with hearing loss related that, years earlier, feeling confused and embarrassed about his hearing-related communication difficulties, he pleaded guilty to a charge of which he believed he was innocent. He thought it would be easier to plead guilty than to try to explain his innocence in court. He subsequently spent six months in prison.<sup>24</sup>

The content of the legal duty owed by a lawyer to his or her client was described by Muirhead J in *Putti v Simpson*<sup>25</sup>:

"... it is absolutely vital that counsel remember their function and obligations, not least of which is to ensure they are adequately instructed before appearing for clients ... and that the clients are properly advised. ... The practice of appearing armed only with hurriedly gained instructions, especially where the language or cultural differences jeopardise understanding,

may result in substantial injustice to individuals ... I am not unaware of the difficulties faced by all involved in the administration of justice in remote areas, of poor communications, of problems encountered in obtaining instructions, in arranging legal representation ... Yet neither these matters, nor crowded lists to be coped with on hurried court itineraries, should be allowed to jeopardize an individual's right to the most careful presentation and consideration of his case."

Legal representation is assumed to ensure defendants are treated fairly in the criminal justice process. This assumption is open to challenge in the case of many Aboriginal defendants for a range of reasons. One of these reasons is communication problems related to undetected hearing loss.

In New South Wales, counsel are subject to a specific rule that places the responsibility of ensuring that an accused person's disabilities in communication do not prejudice their client.<sup>26</sup> Counsel who appear for Aboriginal people need to be alert to the possibility of communication difficulties with clients resulting from hearing loss.

The discharge of counsel's duty is often made difficult by the physical environment in which interviews between defendants and counsel take place. The interview room may compound communication problems. The interview facilities for defendants in custody in the Magistrates Court complex in Darwin are an example of a 'poor' environment for interviewing defendants with hearing loss. Conversation with defendants takes place through a perspex wall punctuated by small drill holes. Sounds are muted and muffled. An ineffective partition between interview rooms creates the added difficulty of high levels of background noise created by fellow counsel or defendants shouting in an attempt to be understood.

### **Communication in Court**

There are major differences between Western and Aboriginal socio-linguistic etiquette; for example, in expectations about eye contact and the obligation to answer questions.<sup>27</sup> However, Aborigines in the court-room may be disadvantaged if they do not participate in a process that is a highly verbal, often archaic example of Western social etiquette. They often fail to fulfil, or actively resist, these expectations.

An anthropologist made the following comment after observing Aboriginal defendants in court proceedings in Western Australia:

"(The) most frequent response is to withdraw from the situation, mentally, emotionally and visually. One magistrate

in a country town complained to me that 'Aborigines in the dock are always gazing out of the window, or looking down and either ignoring questions or mumbling inaudible answers'.<sup>28</sup> Language and cultural differences are frequently presumed to be the reason why an Aboriginal witness misinterprets a question, gives an inexplicable answer, remains silent in response to a question or asks for a question to be repeated. The contribution of hearing loss to communication break-down is generally not considered. Research suggests that hearing loss and socio-linguistic differences interact to compound communication problems.<sup>29</sup> It is probable that the distinctive demeanour of many Aborigines in court is related to hearing loss.

Many experienced judicial officers and counsel are aware of differing socio-linguistic etiquette that contribute to Aboriginal court-room demeanour. However, Aboriginal liaison officers also describe instances of Aboriginal defendants being berated by magistrates, or their own lawyers, for failure to participate as expected in court processes. Further, they report that there is the very real danger of Aboriginal court-room demeanour (not answering questions, avoidance of eye contact, turning away from those attempting to communicate) being interpreted as indicating guilt, defiance or contempt. The Australian Law Reform Commission has noted the unreliability of demeanour as an indicator of truthfulness.<sup>30</sup> Nevertheless demeanour continues to be used as an indicator of credibility of witnesses.

### Sentencing

The hearing impairment of a defendant may also be relevant to sentencing in three ways. First, it may be possible to demonstrate a causal connection between the defendant's unlawful behaviour and the disability. This fact is relevant to the sentencing disposition:

"Difficult personal circumstances such as emotional and medical problems are accepted as mitigating."<sup>31</sup>

"It is erroneous to neglect consideration of emotional stress which explains criminal conduct; that factor is material to the assessment of proper retribution and it may be material to deterrence - at all events if those to be deterred are likely to be subjected to similar emotional stress".<sup>32</sup>

Secondly, where the effect of a defendant's medical condition would be to make custody particularly onerous for the defendant then the sentence should be adjusted to reflect the unique hardship that the defendant would endure. In considering the principles to be applied to sentencing a man who suffered from

claustrophobia, the South Australian Court of Criminal Appeal has commented:

"An offender's psychological or medical condition which would render imprisonment a greater hardship to him than to another person, is a relevant consideration ... Nevertheless an offender cannot be allowed to escape punishment for serious crime because he possesses a claustrophobic temperament ... The courts can make some adjustment to sentences to take account of the additional hardship caused to an offender by his condition, but they are necessarily limited in the extent of such adjustment by the necessity of maintaining proper standards of punishment."<sup>33</sup>

Hearing loss imposes a degree of social isolation, which detention is likely to exacerbate. Accordingly a custodial sentence imposed on a person with hearing loss may "render imprisonment a greater hardship to him than to another person". Indeed, detention may magnify the social and psychological problems of some individuals with hearing loss beyond their ability to cope.

Thirdly, upon conviction, court demeanour is a relevant consideration in sentencing, particularly if demeanour indicates responsiveness to reform.<sup>34</sup> Any misinterpretation of demeanour by a court puts hearing impaired Aborigines in peril of receiving heavier sentences because they appear to be unresponsive to non-custodial measures.

### Conclusion

This article highlights the urgent need for further research into the connection between criminal behaviour and partial hearing loss, especially in a cross-cultural setting. It follows that police, counsel and judicial officers ought to be aware of the difficulties of persons such as the defendant in *The Queen v A.T.*

It behoves health and justice officials to consider a comprehensive response. In sentencing the defendant in the *The Queen v A.T.*, the comment was made:

"(his) medical problems are now not just his problem. They are in fact, a problem for the 'whole community in which he lives...".<sup>35</sup>

Clearly resources are needed at all relevant stages: prevention, early detection, and treatment. All those in the criminal justice system (police, lawyers and judicial officers) need to be aware of the distinct possibility that the accused has a history of chronic hearing loss. This hearing loss could explain communication difficulties, inappropriate demeanour and even the criminal conduct itself.

### Endnotes:

1. Thomas, J., *The Queen v A.T.*, Unreported, NT

Supreme Court, SCC No. 62 of 1992, 26/10/92.

2. *Ibid* at p48.

3. Although, see Gillman, K., "Going to Court in Deafness Awareness Week", *Legal Service Bulletin*, 16 October 1991, p247.

4. The authors are grateful for the information provided by a range of sources: Aboriginal liaison officers working for the North Australian Aboriginal Legal Aid Service, Aboriginal people with known hearing loss, and family and health professionals in contact with Aboriginal people with hearing loss.

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6. Quinn, S., "Aboriginal hearing loss and ear disease in the Australian Northern Territory", *The Australian Journal of Audiology*, Vol. 5, No. 2, 1983, pp41-47.

7. Lewis, N., "Otitis Media and Linguistic Incompetence", *Archives of Otolaryngology*, 102, 1976, pp387-390.

8. McPherson, B., Preston, G., Canuto, C., and Kimber, L., "Teacher Identification of Hearing Loss in Aboriginal Children", *Australian Journal of Audiology*, 14, 1992, pp41-48.

9. Howard, D., "Mild hearing loss and Aboriginal Children's Learning", *The Aboriginal Child at School*, Vol. 19, No.1, February/March, 1991.

10. *Royal Commission into Aboriginal Deaths in Custody, National Report, Volume 2*, AGPS, Canberra, 1991, p351.

11. *Ibid*.

12. Personal communication with a nursing sister working in a Western Australian Aboriginal community.

13. Personal communication with Aboriginal Legal Aid Liaison Officers.

14. Personal communication.

15. See for example NT Police Commissioners General Orders A1222.

16. The *Collins Concise Dictionary* defines 'amenable' as "likely to listen, cooperate".

17. Eg., s8 *Bail Act 1982* (NT).

18. Eg., s24 *Bail Act 1982* (NT).

19. In the NT police may hold a person in custody for a reasonable period for the purpose of questioning: *Police Administration Act 1978* (NT), ss137 & 138.

20. *R v Anunga* (1976) 11 ALR 412; *Coulthard v Steer* (1981) 12 NTR 13.

21. Northern Territory: s357 *Criminal Code* (NT). See also: Western Australia: s631 *Criminal Code* (WA); Queensland: s13 *Criminal Code* (Qld); Victoria: s393 *Crimes Act 1958* (Vic); New South Wales: Part XIA *Crimes Act 1900* (NSW); South Australia: s293 *Criminal Law Consolidation Act 1935* (SA).

22. *Ngalayi v R* (1980) 30 ALR 27 at 31-32.

23. *Smith v Crieve* (1974) WAR 193; *R v Grant* (1975) WAR 193; *Ngalayi v R* (1980) 30 ALR 27.

24. Personal communication.

25. (1975) 6 ALR 47 at 50-51.

26. R 56 NSW Bar Rules.

27. Harris, S., *Culture and Learning: Tradition and Education in North East Arnhemland*, Department of Education, Darwin, 1980.

28. Parker, D., "The Administration of Justice and its Penal Consequences" in Hazlehurst, K., (ed), *Ivory Scales - Black Australia and the Law*, NSW University Press, 1987, at p144.

29. Howard, D., "Mild hearing loss and Aboriginal Children's Learning", *The Aboriginal Child at School*, Vol. 19, No.1, Feb/Mar, 1991.

30. ALRC Discussion Paper 48, *Multiculturalism: Criminal Law*, May 1991.

31. *Neal v R* (1982) 42 ALR 609 at 617 (Murphy J.).

32. *Ibid* at 625 (Brennan J.).

33. *Hans De Vroome* (1989) 38 A Crim R 146. See also *R v Smith* (1987) 44 SASR 587; *R v Todd* (1976) Qd R 21; *Martin* (1990) A Crim R 168.

34. Fox, R., and Freiberg, A., *Sentencing State and Federal Law in Victoria*, 1985, p483; *C v Bourne*, NT Supreme Court, Unreported, Angel J., 4\10\92.

35. Thomas, J., *The Queen v A.T.*, *op cit.*, at p50.

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