



North Australian Aboriginal Justice Agency (NAAJA)
submission to the
Senate Community Affairs References Committee
Inquiry into Hearing Health in Australia

Thank you for the opportunity to make submissions to this Inquiry into Hearing Health in Australia.

NAAJA

The North Australian Aboriginal Justice Agency's (NAAJA) charter is to provide high quality and culturally appropriate legal aid services for Aboriginal and Torres Strait Islander people within the North Zone of the Northern Territory. The operations of NAAJA are to:

- ensure that legal assistance is provided in the most effective, efficient and economic manner;
- provide quality, culturally appropriate and accessible legal aid related services to
 - Aboriginal people through legal advice and representation in Criminal Law, Civil Law and Family Law;
 - provide legal representation in the following courts: Supreme Court of the Northern Territory, Magistrates Court both in Darwin and Katherine and on circuit in remote communities, Family Court and Federal Magistrates Court;
 - coordinate law reform and policy activities and deliver community legal education and information;
 - endeavour to secure the services of language interpreters to assist Aboriginal persons with matters in respect of which they are provided with legal assistance;
 - and train and employ Aboriginal people.

NAAJA has a civil and a criminal legal section providing advice and case work, as well as a dedicated advocacy and community legal education program.

Introduction

This submission has two parts. In the first, we will consider the intersection between hearing impairments and higher involvement with the criminal justice system. And in the second, we will look at the problems faced by those with hearing impairments involved in the justice system.

1. Hearing Impairments and Increased Criminal Activity

1.1 Prevalence of Hearing Impairment Amongst Aboriginal Children and Adults

The significant hearing problems present in Aboriginal populations are well-documented. Aboriginal children living in remote communities have the highest internationally published prevalence rates for the middle ear infection, otitis media¹. A recent study of Aboriginal children, aged between 6 and 30 months, in remote areas of Northern Australia, found that 25% of children had acute otitis media without perforation and another 6% had acute otitis media with perforation².

This disease is largely preventable, and factors considered to contribute to the greater prevalence in Aboriginal populations include bacterial colonisation in infants, overcrowded living conditions, poor hygiene, insanitary living conditions, family members with the disease, malnutrition and passive smoking³. Otitis media can cause hearing loss later in life.

In relation to the prevalence of hearing loss in the Northern Territory, a study of four remote communities reported that the prevalence of hearing loss in populations ranged from 35 to 74 per cent⁴.

Despite evidence for high prevalence rates for hearing impairments in Aboriginal children, the hospitalisation rate for middle ear and mastoid disease for Aboriginal children 0-3 year olds (8.9 per 1000) was below that for non-Aboriginal 0-3 year olds (9.7 per 1000)⁵.

1.2 Hearing Impairment, Education, and Criminal Involvement

Hearing impairments, especially when unrecognised, often lead to lower educational attainment. It is noted that hearing loss severely affects school performance and

¹ Morris, P.S. et al. (2006), 'An overview of acute otitis media in Australian Aboriginal children living in remote communities', *Vaccine*, 25, 2389-2393.

² Ibid., at 2390.

³ Steering Committee for the Review of Government Service Provision (2009) *Overcoming Indigenous Disadvantage – Key Indicators 2009*, Productivity Commission, Canberra, at 5.40 – 5.41.

⁴ Poltl, S.M. (1993), *Hearing loss and ear disease in Aboriginal school children in remote communities*. Paper presented at the meeting for Otitis Media in Childhood: Issues, Consequences and Management Conference, Perth, Australia.

⁵ Steering Committee for the Review of Government Service Provision (2009) *Overcoming Indigenous Disadvantage – Key Indicators 2009*, Productivity Commission, Canberra, at 5.39.

relationships with teachers⁶. A 2008 study found that the prevalence of ear disease was almost twice as high amongst Aboriginal people who had completed Year 9 and below, compared to Aboriginal people aged 18-34 who had completed Year 12.⁷

There is also evidence to suggest this decreased educational attainment correlates with an increased likelihood of involvement in criminal activity. Aboriginal people who have completed Year 9 or below are more than 3 times more likely to be imprisoned than Aboriginal people who complete Year 12. And, Aboriginal people who have only completed Year 9 or below are also more than twice as likely to have been charged with an offence than Aboriginal people who have completed Year 12⁸.

1.3 Hearing Impairment, Self Concept and Social Functioning

Hearing impairments can have a significant impact on self-concept and identity. This in turn may increase the likelihood of involvement in criminal activity. It is considered that a hearing loss of more than 20 dB may have significant negative social consequences, and that a loss of 35 dB almost certainly will⁹.

Limaye found that deafness often leads to poor communication skills, which leaves adolescents feeling frustrated¹⁰. This feeling can lead to 'emotional and behavioural problems such as social withdrawal, short temper tantrums, anger towards themselves and their parents'¹¹. It is noteworthy that MacPherson found that the best identifier of hearing loss among urban Aboriginal students was social problems with their peers¹².

The link between social and psychological problems caused by hearing disabilities and criminal activity was made in the Royal Commission into Aboriginal Deaths in Custody. It was there noted in relation to the case of Graham Walley that hearing impairment:

“would have added to his problems because it has a compounding effect ... of reducing self-esteem and seeing himself negatively ... certainly it would have been a factor in poor behaviour”¹³.

It is also significant that in one large remote Aboriginal community where hearing tests were conducted, it was noted that many petrol sniffers in the community were youths who had previously been identified as having chronic hearing loss¹⁴.

⁶ Australian Indigenous Health Info Net (2006) *Review of ear health and hearing*, par 2. at <http://www.healthinfonet.ecu.edu.au/other-health-conditions/ear/reviews/our-review> (viewed 8 February, 2010)

⁷ Australian Bureau of Statistics and Australian Institute of Health and Welfare (2008) *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008*, ABS Release 4704.0, p 25.

⁸ NSW Bureau of Crime Statistics and Research (2006) 'The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey', *Contemporary Issues in Crime and Justice*, 104.

⁹ Above, note 3.

¹⁰ Limaye, S. (2004) 'Exploring the Impact of Hearing Impairment on Self-Concept', *International Journal for the Advancement of Counselling*, 26 (4).

¹¹ Ibid.

¹² McPherson, B., Preston, G., Canuto, C, and Kimber, L. (1992) 'Teacher Identification of Hearing Loss in Aboriginal Children', *Australian Journal of Audiology*, 14.

¹³ Royal Commission into Aboriginal Deaths in Custody, National Report, Volume 2, AGPS, Canberra, 1991, 16.5.11

1.4 Hearing Impairments Aboriginal Prison Populations

A study of prisoners Darwin Correctional Centre found that 90 per cent of Aboriginal prisoners had some level of hearing impairment¹⁵. Disproportionately high levels of hearing impairment have also noted in Indigenous prison populations in Victoria¹⁶. The *Royal Commission into Aboriginal Deaths in Custody* argued that there was an association between hearing loss and issues of education and self-esteem.

“The effects of hearing impairment on educational achievement is commented on in several of the cases including Graham Walley, Clarence Nean, Craig Karpany and the young man who died at Elliott.”¹⁷

The Royal Commission considered that this lack of education “increases the likelihood of contact with the judicial and custodial systems”¹⁸.

Issues such as hygiene, health care, diet and overcrowded living conditions are linked to hearing loss, as described above. It is also NAAJA’s experience that these conditions are frequently linked to the commission of criminal offences. Hearing loss may not *cause* criminal activity, but when considering the stigmatising effects of hearing impairment on self-concept, educational attainment and social skills, there is a causal link to criminal activity.

¹⁴ Howard, D., Quinn, S., Blokland, J. and Flynn, M. (1993) ‘Aboriginal hearing loss and the criminal justice system’, *Aboriginal Law Bulletin* 58

¹⁵ Yonovitz, A. (2004), *Hearing loss and communication disability within the criminal justice system* (Poster presented at the Australasian Audiology Conference, Brisbane, 2004), cited in D Howard, *Communication, listening and criminal justice*, (Presentation to NT Magistrates, Darwin and Alice Springs, March, 2006)

¹⁶ Quinn, S. & Rance, G. (2009), ‘The extent of hearing impairment amongst Australian Indigenous prisoners in Victoria, and its implications for the correctional system’, *International Journal of Audiology* Vol 48(3) pp 123-134.

¹⁷ Royal Commission into Aboriginal Deaths in Custody, National Report, Volume 2, AGPS, Canberra, 1991, 16.5.8

¹⁸ Royal Commission into Aboriginal Deaths in Custody, National Report, Volume 2, AGPS, Canberra, 1991, 16.1.9

2. Prejudices within the Justice System against People with Hearing Impairments

2.1 Detecting Hearing Impairments in the Criminal Justice System

NAAJA has a large proportion of clients who suffer from hearing impairment. It is our experience that there is a general lack of detection of hearing impairment affecting Aboriginal people within the criminal justice system. And that even where hearing impairment issues are detected, that they are responded to in a haphazard and sometimes stigmatising way.

The failure to detect hearing loss occurs for a number of reasons. Firstly, most hearing loss is caused from the middle ear infection, otitis media, which develops in early childhood. This means that clients have often learnt to socialise in a way that does not reveal their hearing disabilities. Rather, they will resort to short replies and gratuitous concurrence.

Secondly, hearing difficulties often lead to difficulties similar to those that arise from cultural and linguistic barriers. This means that issues of understanding and miscommunication are attributed to linguistic difficulties, while the hearing impairments, which may really cause this, are often unrecognised.

This issue was noted by Howard, Quinn, Blokland Martin Flynn:

“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. It is probable that the distinctive demeanour of many Aborigines in court is related to hearing loss.”¹⁹

2.2 Police and Detection of Hearing Impairments

The non-detection of hearing impairment is particularly problematic and potentially devastating at the police level. If a person cannot “put their side of the story” when being questioned by police, it can mean that they will be charged when they would not otherwise be charged, or prosecuted when they might otherwise have been offered a warning, caution or diversion. Howard, Quinn, Blokland Martin Flynn note:

“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.”²⁰

¹⁹ Howard, D., Quinn, S., Blokland, J. and Flynn, M. (1993) ‘Aboriginal hearing loss and the criminal justice system’, *Aboriginal Law Bulletin* 58

²⁰ Ibid.

2.3 Facilities for the Hearing Impaired in Jails

NAAJA is also extremely concerned as to the inadequate facilities for the hearing impaired in jails. It is unquestionably the case that the experience of jail is significantly more severe on people with hearing impairments. Prisons operate with a heavy reliance on prisoners hearing commands, and responding as required. This includes the use of bells and sirens and following oral instructions. It is also for communication and participation, such as being able to engage in discourse with other prisoners and being able to access facilities and programs run by the prison.

The use of amplifiers, the installation of hearing loops and the use of interpreters for programs run by prisons are essential human rights provisions for the hearing impaired. The failure to provide these facilities increases trauma of hearing impaired prisoners, and increases alienation for the hearing impaired in prison.

2.4 Defence Counsel and Detecting Hearing Impairments

Defence counsel play a crucial role in the criminal justice system as the defendant's "mouthpiece." It is the case, however, that defendants can only rely on counsel as their mouthpiece to the extent that they are able to clearly and effectively communicate with them.

It is trite to observe that there are degrees of hearing loss amongst Aboriginal defendants, as there are amongst the population generally. We are concerned in particular that partial hearing impairment in Aboriginal defendants is sometimes undetected by defence counsel. As noted above, this may be because clients present with cultural and language barriers that also impact on communications and lawyers are simply unaware that a hearing impairment is also present. Or it may be because Aboriginal defendants having suffered hearing loss for so long, have adapted to their hearing impairment by lip reading or relying on the few words that they can partially hear.

Coupled with this are issues of Aboriginal defendants feeling overwhelmed by the prospect of court proceedings. Many defendants actually state their desire to "get their charges over and done with," irrespective of their guilt. Some may provide instructions that they are guilty because they do not want to go through the lengthy court processes associated with having a contested hearing. This situation of clients may again lead to difficulties for lawyers in detecting hearing impairments.

More generally, the danger of gratuitous concurrence is real and present. Lawyers may think that a client suffering partial hearing impairment understands communications simply because they respond with a 'yes' answer or by nodding their head. Such responses may in fact mask hearing impairment.

Other pressures faced by defence counsel at court also inhibit their ability to detect hearing impairments. This may include the pressures of having multiple clients to see in a very short space of time, the needs of courts to see clients quickly or clients who are upset or agitated, 'shamed' by their hearing impairment or whose communication deficit is also influenced by cultural and/or language factors.

And finally, the location and circumstances in which client interviews take place often contribute to difficulties identifying hearing loss. Lawyers may have to speak to clients through glass barriers which carry sound very poorly or through speakers that muffle some of the words spoken. In Darwin, for example the police watch-house interview room and the Magistrates Court cells are environments that inhibit the ability of counsel and their clients to communicate freely, and that impair the ability of counsel to properly identify hearing issues.

Taken together, it is easy to see how the situation as described by Howard et al of an Aboriginal man with a hearing impairment who stated that he pleaded guilty and spent 6 months in prison because he felt intimidated by court proceedings and that it would be easier to plead guilty than try to explain his innocence in court²¹ can arise.

2.4 Response to Hearing Impairment by the Criminal Justice System

Where hearing impairments are detected in the criminal justice system context, it is our experience that amplifiers are only infrequently used. This is likely due to the pressures of having matters dealt with as quickly as possible outweighing the full and proper assessment and detection of hearing impairment. We suspect that if the latter were to occur, the use of amplifiers would increase exponentially.

Where used, it is NAAJA's experience that amplifiers have an immediate positive impact on both the ability of Aboriginal defendants to communicate and the demeanour of clients.

Another issue regards the absence of hearing loops in police stations and court rooms. Hearing loops are found in a wide variety of places throughout Australia and are able to assist hearing impaired people, with or without hearing aids²². Considering how widespread they have become in Australia, even being found in buses, trams, trains and taxis, we think there ought be a positive obligation on Government to make them compulsory in police stations and court rooms. These are human rights issues that need to be addressed to ensure all people have the right to a fair procedure and trial.

It is also our experience that sign interpreters are only rarely used in court for Aboriginal defendants. We have encountered significant barriers to use of sign interpreters in the court context. Aboriginal people who develop hearing impairments during their life often have two language barriers to overcome. Many of our clients speak English as their third or fourth language, and may have only a rudimentary understanding of English, if at all. When an Aboriginal person loses their hearing, because sign language is taught in English, the learnt sign language will be adapted to their needs for communicating, and will be different to that used the hearing impaired who understand English.

In this situation, we have encountered many clients for whom sign interpreters simply cannot be used, because they do not have an adequate understanding of English to use

²¹ Howard, D. et al. (1993) 'Aboriginal hearing loss and the criminal justice system', *Aboriginal Law Bulletin* 58

²² Deafness Forum of Australia, 'Assisting Listening Systems – hearing loops' <http://www.deafnessforum.org.au/pdf/1036%20DF%20Hearing%20Loop.pdf>

them. NAAJA would strongly urge the training of sign interpreters in the various spoken Aboriginal languages in the Northern Territory to address this issue. This service could be aligned to the Aboriginal Interpreter Service and could be called at short notice and on an as needs basis.

2.5 Conclusion: A Case Study

The consequences of not properly addressing hearing impairment issues facing Aboriginal defendants in the criminal justice system can be devastating. The case study below demonstrates the spiralling consequences that can occur:

Case Study - N

N is charged with several serious driving offences, including driving under suspension. He is deaf, and does not know sign language. N has significant difficulties explaining himself and will often nod during conversations, which leads to people to believe he is replying 'yes', when, in fact, he does not understand. He has a very limited and idiosyncratic form of sign language. Every now and then he does something that resembles signing.

N is not able to communicate with his lawyer. An AUSLAN interpreter has been utilised, but because N cannot sign, he is not able to convey instructions to his lawyer of any complexity. N's lawyer sought to arrange a Warlpiri finger talker through the Aboriginal Interpreter Service, but the interpreter concerned was not willing or able to come to court. It was also not known if N would even be able to communicate using Warlpiri finger talking.

The witness statements disclosed to defence included a statement from a police officer describing how she came upon a group of men drinking in a park drinking. She ran a check on N, to discover he had warrants for his arrest, at which time she arrested him. Her statement reads: "It is my belief that he understood as he looked at me and became quite distressed. I asked (N) verbally if he understood and he nodded and turned his head away from me while raising his arms in the air."

N is currently on bail, but has spent significant periods on remand at Darwin Correctional Centre. His charges are yet to be finally determined, and an application for a stay of proceedings is pending. N is effectively trapped in the criminal justice system. He cannot plead guilty or not guilty because he is not able to communicate with his lawyer and provide instructions.

He had previously been granted bail, but after failing to attend court as required, his bail was revoked. Significantly, his inability to convey information (or to understand what his lawyer was trying to tell him) in relation to his charges has also been highly problematic in relation to bail.

For example, when he was explaining to his lawyer with the assistance of the AUSLAN interpreter when he was to reside, both the interpreter and lawyer understood N to be referring to a particular community. It was only when the

interpreter was driving N home, with N giving directions on how to get there, that it was discovered that he was actually referring to a different community altogether.

It has arguably been the case that N was not able to comply with his bail because he did not understand what his bail conditions were. N has subsequently spent a lengthy period of time remanded in custody as a result.

Whilst in custody, N is not provided appropriate services or assistance. He relies heavily relatives who are also in custody. He is unable to hear bells, officers' directions and other essential sounds in the prison context. At one point, it was alleged that N was suicidal and he was moved to a psychiatric facility as a result. N denied the allegation but was unable to properly explain himself to resist his transfer.

As described in this case study, there is a failure to properly address hearing impairment issues for Aboriginal defendants in the criminal justice system. The system deals with clients such as N on an ad hoc basis, without policies, guidelines or with any kind of systematic approach. And yet N is not the only client in this situation. At the present time, NAAJA has another client in an almost identical predicament.

And there is a major issue in the way police respond to people with hearing impairment. The conclusion that N demonstrated understanding because he looked distressed is of grave concern. This is a repeated scenario faced by people with hearing impairment. They are unable to seek or provide information to police. They naturally become upset and distressed because they cannot tell what they are doing 'wrong'. Instead of thinking that there is a problem with their communication, police leap to conclusions such as with N that the person knows they are in trouble and their distress is tantamount to an admission of guilt. Or more commonly, when faced with aggression resulting from this distress, police may respond with force.

It is our submission that action is urgently needed to properly addressing hearing impairment issues facing Aboriginal defendants in the criminal justice system. NAAJA's recommendations that follow are geared towards the better detection of hearing impairment issues facing Aboriginal defendants and would also lead to improved facilities being provided on a uniform basis so that all hearing impaired defendants can be treated in a humane way in their dealings with police, the court system, their counsel, and in the prison system.

Until systemic change is effected, N and others like him will still be enmeshed in a criminal justice system that they do not understand and cannot properly participate in. And tragically, the consequence will be that N and others like him will spend time in custody, in atrocious conditions, when the non-hearing impaired would not.

NAAJA Recommendations

NAAJA recommends:

- (1) Mandatory health and hearing checks to be performed on anyone who comes in contact with the justice system and has communication difficulties. This should occur even if individual police or lawyers consider that the communication difficulties are arising from cross-cultural communication and/or other issues.
- (2) Development of a simple screening tool to assist police and legal professionals to detect hearing impairments in Aboriginal people.
- (3) Establishment of a Disability Diversion Court in the Northern Territory, where legislation, policies and guidelines can be developed to systematically and appropriately manage the needs of the hearing impaired in their interactions with the criminal justice system.
- (4) Hearing loops to be installed in all police station and court rooms. Loop receiver devices should be made available in these locations for people without hearing aids.
- (5) Greater availability and use of amplifiers at police stations, legal aid and Aboriginal legal aid offices and court rooms. Amplifiers should always be available for use during police questioning.
- (6) Greater use of amplifiers, the installation of hearing loops and the use of interpreters for programs run in the prison context.
- (7) Greater education amongst police, lawyers and magistrates about the issues of hearing impairments in Aboriginal communities.
- (8) Greater resources devoted to training Aboriginal people to communicate in sign language, and to interpret across this 'double language barrier'.