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More than Money

Justice Catherine Branson*

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Justice Catherine Branson

Abstract

In this Paper, I refer to probably the most disadvantaged sector of the Australian community, its indigenous peoples. I have chosen this group, because Aboriginal and Torres Strait Islander peoples have become a significant body of litigants in my Court since the Federal Court of Australia was given jurisdiction to make determinations of native land title. I will start by providing some limited information concerning indigenous Australians. This information, by necessity, glosses over the diverse experiences and lifestyles of the Aboriginal and Torres Strait Islander peoples, and indeed, the diversity of non-indigenous Australian experiences and lifestyles. Nonetheless, it reflects the reality of a seriously disadvantaged sector of the Australian community. I will then outline briefly the historical background of two current areas of legal disputation of great importance to Aboriginal and Torres Strait Islander Australians. The first is the issue of native title to land. The second is the issue of the forced separation between 1910 and 1970 of indigenous Australian children from their families. Next, I will identify the (not ungenerous) efforts undertaken to ensure that legal advice and representation is available to indigenous Australians in these critical areas of legal disputation. Finally, I will close with an examination of some of the structural and other difficulties which nonetheless face indigenous Australians in their pursuit of justice through the legal system. In doing this I will refer particularly to claims to native title to illustrate issues of broader significance.

MORE THAN MONEY

Justice Catherine Branson

INTRODUCTION

I wish to open by challenging the notion that access to justice, even for the poor, is exclusively, or in some cases, even principally, a matter of money. Of course, not being poor is likely to correlate positively with the capacity to obtain a desired result from any legal system—the relationship between money and justice is not always a simple one. Those with limited financial resources will be assisted by money in retaining legal representatives, paying court costs, and meeting other expenses which arise out of litigation—money alone will not guarantee them a "fair go" in the courts. Money can enhance access to litigation, but it does not guarantee access to justice.

Access to justice is a more complex issue than mere access to litigation. It raises issues touching on the very nature of justice itself. Access to justice requires that legal representatives and judges alike understand that an individual's values will have a cultural setting. All individuals have a tendency to see the world in the light of their own experience. In Australia,[1] and I suspect in most of the countries that are represented at this forum, lawyers and judges are primarily literate in the culture of the middle classes, from which they are likely to come. They will relate intuitively to parties with a similar background, and they will tend to view facts in the light of their own background and experiences regardless of the cultural environment in which such facts are embedded. It is for this reason that ethnic minorities and indigenous groups often find themselves in a disadvantaged position before the courts—particularly when their opponents are from the middle classes or institutions of the state. In this sense, disadvantage in terms of access to justice is in addition to other forms of disadvantage. It is not merely the consequence

1. Australia is a common law country with a population of 18,500,000. It is a federation (The Commonwealth of Australia) of six states and certain territories. It has a written constitution, influenced by the Constitution of the United States of America, but which provides for a Parliamentary democracy based on the British Westminster model. It contains no formal Bill of Rights.

of the material, social, and educational disadvantage known to be common among ethnic minority and indigenous groups.

The interests of justice demand that issues of cultural disadvantage in our courts be addressed. Also, the interest of public confidence in the courts requires that issues of cultural disadvantage be addressed. The perception among people from ethnic and racial minorities that they tend to be losers in our courts undermines their confidence in the fairness of the legal system. Some may see the system as racially biased.

In my experience, racial bias within the justice system is rare. I know the extent of the commitment of my judicial colleagues to "do right to all manner of people according to law without fear or favour, affection or ill will."[2] Before we can be confident this commitment reflects reality, however, we need to enhance our cultural awareness generally and our sensitivity to the extent to which our judgments may be affected by our own values, views, and experiences.

None of this is intended to deny that having sufficient money to ensure access to legal advice and representation is an important aspect of access to justice. In many cases it is a necessary condition of access to justice. It is not, however, a sufficient condition.

In this Paper, I seek to illustrate the above points by referring to probably the most disadvantaged sector of the Australian community, its indigenous peoples. I have chosen this group, because Aboriginal and Torres Strait Islander peoples have become a significant body of litigants in my Court since the Federal Court of Australia was given jurisdiction to make determinations of native land title. I will start by providing some limited information concerning indigenous Australians. This information, by necessity, glosses over the diverse experiences and lifestyles of Aboriginal and Torres Strait Islander peoples, and indeed, the diversity of non-indigenous Australian experiences and lifestyles. Nonetheless, it reflects the reality of a seriously disadvantaged sector of the Australian community.

I will then outline briefly the historical background of two current areas of legal disputation of great importance to Aboriginal and Torres Strait Islander Australians. The first is the issue of native title to land. The second is the issue of the forced sepa-

2. Federal Court of Australia Act, 1976, § 11, sched. (Austl.).

ration between 1910 and 1970 of indigenous Australian children from their families.

Next, I will identify the (not ungenerous) efforts undertaken to ensure that legal advice and representation is available to indigenous Australians in these critical areas of legal disputation. Finally, I will close with an examination of some of the structural and other difficulties which nonetheless face indigenous Australians in their pursuit of justice through the legal system. In doing this I will refer particularly to claims to native title to illustrate issues of broader significance.

I. *INDIGENOUS AUSTRALIANS*

In *Mabo and Others v. The State of Queensland*,[3] to which I will shortly refer in more detail, Justices William Patrick Deane and Mary Genevieve Gaudron observed with respect to the Aboriginal inhabitants of the Australian continent in 1788:

> The following broad generalizations must . . . now be accepted as beyond real doubt or intelligent dispute at least as regards significant areas of the territory which became New South Wales. . . . [I]t is clear that the numbers of Aboriginal inhabitants far exceeded the expectations of the settlers. The range of current estimates for the whole continent is between three hundred thousand and a million or even more. Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined.[4]

A. *Some Relevant Statistics*

In the years following the colonization of Australia, the indigenous population declined dramatically due to the impact of new diseases, repressive and often brutal treatment, dispossession, and social and cultural disruption. It seems likely that by the 1920s the Aboriginal and Torres Strait Islander population

3. [No. 2] (1992) 175 C.L.R. 1.
4. *Id.* at 99.

had declined to around 60,000 people.[5] Today, the Aboriginal and Torres Strait Islander people are a small, although important, proportion of the Australian population. As of June 1996 (the latest figures available), they constituted approximately 2.1% of the nearly 18,500,000 Australians—but with an annual growth rate of nearly twice the rate of the total population. Aboriginal and Torres Strait Islander peoples comprise 28.5% of the population of the sparsely populated Northern Territory. In no other state or territory do they exceed 3.2% of the total population.[6]

Children under fifteen years old account for a much larger proportion of the indigenous population than the total population. Conversely, there is a very low proportion of people sixty-five years old and over in the indigenous population.[7] At the time of the 1996 census, 52.7% of Australia's indigenous population fifteen years old and over were in the labor force, compared to 61.9% of the total population in the same age group. Of the indigenous labor force participants, 22.7% were unemployed, more than double the unemployment rate for the total population. At the same time, the median personal income of indigenous Australians was 65% of the median income of all Australians.[8]

In 1996, 13.3% of indigenous Australians reported speaking an indigenous language at home. A 1986 study revealed that in rural areas 42% of Aboriginal and Torres Strait Islander people five years old or over spoke an Aboriginal language at home. In urban areas, the figure was only 6%.[9]

The Australian Institute of Criminology[10] has published figures which indicate that Aboriginals and Torres Strait Island-

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5. AUSTRALIAN BUREAU OF STAT., *Aboriginal and Torres Strait Islander Australians: A Statistical Profile from the 1996 Census in* YEAR BOOK AUSTRALIA (1999) [hereinafter 1996 Census].

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. The Australian Institute of Criminology "is the national focus for the study of crime and criminal justice in Australia and for the dissemination of criminal justice information. The Institute draws on information supplied to it by a wide variety of sources and its policy advice is objective and independent." *Australian Institute of Criminology* (visited June 26, 2000) <http://www.aic.gov.au> (on file with the *Fordham International Law Journal*).

ers are nineteen times more likely to be taken into custody and fifteen times more likely to be imprisoned than other Australians. The Royal Commission of Inquiry into Aboriginal Deaths in Custody[11] found that in August 1988, 20% of those detained in police custody were Aboriginal and Torres Strait Islander people.[12] The rate of incarceration for indigenous youth is almost twenty-two times that of non-indigenous youth.[13]

A study conducted by the National Injury Surveillance Unit[14] suggested that indigenous Australians are seventeen times more likely to be hospitalized due to family violence than non-indigenous Australians. The life expectancy of indigenous Australians is 15-20 years lower than that of non-indigenous Australians.[15]

B. *Mabo and Others v. The State of Queensland [No. 2]*

In *Mabo and Others v. The State of Queensland [No. 2]* ("Mabo"),[16] the High Court of Australia ("High Court") (Australia's ultimate appellate court) acknowledged for the first time that the indigenous peoples of Australia, at the time of white settlement, held rights and interests in the respective areas of land then occupied by them. The High Court further held that, where native title had not been extinguished by valid legislative or executive acts which were inconsistent with the continuing existence of native title, indigenous peoples who have maintained their traditional connection with their land continue to enjoy native title.

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11. The Royal Commission into Aboriginal Deaths in Custody was established to find out why Aboriginal people where dying in prison. *See ATSIC—Issues RCIADIC* (visited June 26, 2000) <http://www.atsic.gov.au/issues/rciadic/Default.asp> (on file with the *Fordham International Law Journal*).

12. ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY, NATIONAL REPORT (1991).

13. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES 493 (1997) [hereinafter BRINGING THEM HOME].

14. The mission of the National Injury Surveillance Unit is "to inform community discussion and public policy-making on injury prevention and control, and related issues by providing information to support injury control activities, and improving injury information systems and methods." *National Injury Surveillance Unit* (visited July 13, 2000) <http://www.nisu.flinders.edu.au/welcome.html> (on file with the *Fordham International Law Journal*).

15. *See* 1996 Census, *supra* note 5.

16. Mabo and Others v. The State of Queensland [No. 2] (1992) 175 C.L.R. 1.

Mr. Eddie Mabo and his co-plaintiffs were Meriam people from the Murray Islands in the Torres Strait. The Murray Islands were occupied long before first European contact and the present inhabitants of the islands retain a strong sense of affiliation with their ancestors and with the society and culture of earlier times. Gardening has always been of profound importance to the Meriam people and individual ownership of parcels of land used for gardening purposes is a traditional feature of their community life.[17]

Six members of the High Court, with one judge dissenting, were in agreement in the Mabo case that the common law of Australia recognizes a form of native title. In cases where it has not been extinguished, this native title reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands. The High Court issued declarations that, with the exception of certain particular areas of island land, the Meriam people are entitled against the whole world to possession, occupation, use, and enjoyment of the Murray Islands—but subject to the legislative and executive power of the State of Queensland to extinguish that title by valid exercise of that State's powers.

Subsequently, the Commonwealth Parliament enacted the Native Title Act 1993[18] which, amongst other things, provides a process by which determinations of native title can be made.

C. *The Stolen Generation*

On August 2, 1995, the then Attorney-General of Australia requested the Australian Human Rights and Equal Opportunity Commission[19] ("HREOC") to inquire into and report on, amongst other things, "the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effect of those laws, practices and poli-

17. *Id.* at 17 (Brennan, J.) (citing the findings of fact in the case).

18. Native Title Act, 1993 (Austl.).

19. The Human Rights and Equal Opportunity Commission "administers federal legislation in the area of human rights, anti-discrimination, social justice and privacy. This includes complaint-handling, public inquiries, policy developments and education and training." *About the Commission* (visited June 26, 2000) <http://www.hreoc.gov.au/about/index.html> (on file with the *Fordham International Law Journal*).

cies."[20] In April 1997, HREOC reported that:

> Nationally we can conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figures was undoubtedly much greater than one in ten. . . . Most families have been affected, in one or more generations, by the forcible removal of one or more children.[21]

The HREOC report, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* ("Bringing Them Home"),[22] explains that the early philosophy behind the forcible removal of indigenous children from their families and communities appears to have been to assist the "merger" of the indigenous population of mixed descent with the non-indigenous population. The full descent, or "pure black," it was assumed, would in time become "extinct." The legal mechanisms used were initially based on protectionism legislation, which gave public officials appointed as "Chief Protectors" removal and guardianship powers.

After 1940, the forcible removal of indigenous children was justified under child welfare legislation which required proof that a child was 'neglected,' 'destitute,' or 'uncontrollable.' Little practical difference seems to have attended this legal change until indigenous groups received funding to challenge the high rates of removal of indigenous children. When, from the early 1970s, Aboriginal legal services began to represent indigenous children and families in removal applications, there was an immediate decline in the number of indigenous children being removed from their families.

HREOC, in its report Bringing Them Home, recommended that reparation be made in recognition of the history of gross violations of human rights involved in the removal of indigenous children from their families.

No steps have been taken to establish a special regime pursuant to which those who suffered because of forcible removal

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20. BRINGING THEM HOME, *supra* note 13 (establishing the full terms of reference).
21. *Id.*
22. *Id.*

policies can claim compensation. Potential claimants, therefore, must look to the courts for awards of damages. They must be able to identify a relevant cause of action which is not statute barred; call evidence of the particular instance of forcible removal upon which they rely and establish that the removal was not legally justified; and endure the stress, trauma, and loss of privacy associated with legal proceedings.

It has been suggested that the courts may not provide the most appropriate forum in which to address the grievances of the "stolen generation."[23] It is too early to say whether any significant number of the claims made by, or on behalf of, indigenous Australians removed from their families will succeed in the ordinary civil courts, and if they do, what the personal and financial costs will be on both sides of the litigation.

D. *Legal Assistance to Indigenous Australians*

Australia has a national legal aid scheme utilizing federal and state government money. As in many countries, funding for the scheme is tight. It is not an entitlement scheme, but rather, legal aid is provided by prioritizing areas of expenditure. A high proportion of the available funding is utilized in the area of criminal law, although the Commonwealth of Australia has also made family law a priority area. I will not take time now to outline the principal features of the Australian legal aid scheme, other than to note that it is increasingly facing funding pressures, with most civil litigation, other than some family law matters, falling outside its scope.

Indigenous Australians have, of course, the same rights as others to access mainstream legal aid, but there are specialist Aboriginal and Torres Strait Islander Legal Services ("ATSILS"). These are the preferred service providers for most indigenous Australians. ATSILS are indigenously owned and controlled community-based centers. These services (24 in all) are located in areas of need and tend to be more physically accessible and more culturally acceptable to indigenous Australians than mainstream legal aid centers. Their funding is provided by Commonwealth tax payers through the peak indigenous body, the Aboriginal and Torres Strait Islander Commission ("ATSIC").[24] AT-

23. *Id.* at 17.

24. The Aboriginal and Torres Strait Islander Commission is Australia's "national

SILS primarily provide criminal defense services (86% of clients) although attempts are being made, as funds permit, to expand their services into family law and other areas of civil law.

Importantly for present purposes, in addition to funding ATSILS, ATSIC allocates AUD$1,000,000 per annum for test cases of particular significance to indigenous Australians. During 1998 (the latest figures available), funding was provided for litigation relating to, amongst other things, consumer credit, intellectual property rights in traditional art and design, and a test case in which compensation is being sought from the Commonwealth for the past forcible removal of indigenous children from their families.[25]

This case, which is currently before my own court, is concerned with claims for compensation made on behalf of the mothers of removed children, children themselves removed from their families, and the children of children removed. The case provides a good example of the willingness of members of the private legal profession in Australia to subsidize the provision of legal aid either by undertaking *pro bono* work, by accepting reduced fees or by acting on a "no win, no fee basis."

The applicants are represented in the proceeding by a private firm of solicitors which successfully tendered to undertake the work. The available ATSIC funds, however, cover the firms disbursements only—transcripts, accommodation costs, and counsel fees (at a reduced rate). The services of the solicitors themselves are being provided on a "no win, no fee basis." Nonetheless, the total funding allocated to this case between 1996 and 1997 and 1999 and 2000 exceeds AUD$2,700,000.

In addition, the Public Interest Advocacy Centre[26] ("PIAC")

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policymaking and service delivery agency for indigenous people." *ATSIC—About ATSIC*, (visited July 13) <http://www.atsic.gov.au/about_atsic/Default.asp> (on file with the *Fordham International Law Journal*).

25. ABORIGINAL AND TORRES STRAIT ISLAND COMMISSION, Briefing Paper: Law and Justice (1998) (on file with the author).

26. NATIONAL WOMEN'S JUSTICE COALITION, *Public Interest Advocacy Centre E-bulletin* (last visited July 10, 2000) <http://www.nwjc.org.au/piacemailbulletin.htm> (on file with the *Fordham International Law Journal*). The Public Interest Advocacy Centre ("PIAC") is an independent, non-profit legal and policy center, which was established in Sydney, New South Wales in 1982. Through strategic test case litigation, policy intervention, and community education, it strives to empower disadvantages citizens, consumers, and communities. The PIAC focuses on health and community services, utilities reform, access to justice, and the governmental system. The PIAC provides legal

has undertaken test case litigation in the New South Wales Supreme Court and the New South Wales Victims Compensation Tribunal, seeking redress for the removal and subsequent treatment of members of the "stolen generation." The test case in the Supreme Court, which sought to establish a breach of the fiduciary duty of the State to children in its care and custody, was withdrawn during the course of the hearing. The applicant withdrew the case, at least in part, because of her concern for the emotional distress that the litigation was causing, and would cause, her and her family. The applicant feared that this distress would outweigh any benefits she may gain from the litigation. The Victims Compensation Tribunal rejected the claim that came before it.

II. *LEGAL ASSISTANCE REGARDING NATIVE TITLE*

The Native Title Act[27] provides for the recognition of representative Aboriginal and Torres Strait Islander bodies in respect to particular areas. The functions of the representative bodies include facilitating the researching, preparation, or making of applications for determinations of native title and the provision of assistance by the Native Title Act. The taxpayers fund the operations of representative bodies through ATSIC.[28] Generally, those seeking a determination of native title in their favor obtain legal advice and representation through these representative bodies.

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advice and representation in public interest litigation, policy development and campaigning, and community legal education.

27. Native Title Act, 1993 (Austl.).

28. Aboriginal and Torres Strait Islander Commission Act, 1989 (Austl.) [hereinafter ATSIC Act] (last visited July 10, 2000) <http://www.austlii.edu.au.au.special/rsjproject/rsjlibrary/atsic/ar1991-92/9.html> (on file with the *Fordham International Law Journal*). The Aboriginal and Torres Strait Islander Commission ("ATSIC") is the main Commonwealth body operating in the field of Aboriginal and Torres Strait Islander affairs. It amalgamates the previous Department of Aboriginal Affairs (established in 1972) and Aboriginal Development Commission (established in 1980). The Aboriginal and Torres Strait Islander Act combines representative, policy-making, and administrative elements. The representative arm consists of 60 elected Regional Councils across Australia. These have between 10 and 20 members depending on the population of each region. Though established under the ATSIC Act, Regional Councils are independent bodies. A separate annual report is available for each Regional Council. Regional Councilors in turn elect 17 Commissioners, one for each ATSIC Zone. The Minister for Aboriginal and Torres Strait Islander Affairs appoints three Commissioners, including the Chairperson. The 20 Commissioners make up the ATSIC Board, which is now the main policy-making body in indigenous affairs.

Under the Native Title Act, all persons other than claimants[29] who become involved in inquiries, mediations, or proceedings under the Native Title Act may seek financial assistance from the Attorney General of the Commonwealth. The principal criterion for assistance is a reasonableness criterion. In 1998, the total expenditure authorized by the Attorney General in respect of native title matters was approximately AUD$7,400,000. The funds earmarked for these purposes in 1999 are approximately AUD$7,100,000.

Like Australians generally, indigenous Australians have unmet needs for legal aid funding. In the two areas of litigation that I have identified, however, indigenous Australians probably are not suffering any exceptional disadvantage relating to litigation funding. The more fundamental question regarding indigenous Australians is whether access to the courts results in access to justice.

A. *Access to Justice*

Efforts have been made in Australia to improve judicial understanding of Aboriginal and Torres Strait Islander culture. The Australian Institute of Judicial Administration[30] ("AIJA") has taken steps to implement a recommendation made by the Royal Commission into Aboriginal Deaths in Custody[31] that awareness about Aboriginal culture amongst the Australian judi-

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29. Claimants obtain funding through ATSIC.

30. AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION [hereinafter AIJA], *About AIJA: Purposes and Objectives* (last visited Jul. 10, 2000) <http://www.aija.org.au/> (on file with the *Fordham International Law Journal*). The Australian Institute of Judicial Administration ("AIJA") is a research and educational institute, affiliated with the University of Melbourne. The AIJA has over 1000 members. The principal objectives of the AIJA include research into judicial administration and providing educational programs on court administration and judicial systems for judicial officers, court administrators, and members of the legal profession. The AIJA has published in matters of judicial administration and areas such as case management, cultural awareness, judicial ethics, technology and the courts, complex criminal trials, and cross-vesting legislation.

31. ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY, *Recommendations of the Royal Commission into Aboriginal Deaths in Custody: Background* (last visited July 10, 2000) <http://www.act.gov.au/government/reports/adc/backgrd.html> (on file with the *Fordham International Law Journal*). The Royal Commission into Aboriginal Deaths in Custody ("RCIADIC") was established in 1987 to investigate the high number of Indigenous peoples who have died in custody and the reasons why. The RCIADIC investigated the deaths of 99 Aboriginal and Torres Strait Islander peoples across the country, between January 1, 1980 and May, 31 1989. The Commission considered the social, cultural, and legal factors that contributed to these deaths and, subsequently, listed 339

ciary should be enhanced.[32] In implementing this recommendation, the AIJA facilitated the establishment of local committees comprised of judicial officers and indigenous people involved with the justice system in most of the Australian States and Territories. These local committees have devised programs, appropriate to local conditions and subject to the oversight of the AIJA, to assist judicial officers in understanding the differences between their own culture and that of the indigenous people who may appear before them. The programs have included judicial visits to indigenous communities, both urban and rural, seminars, and formal cross-cultural training by experts in this area. As the court principally involved in the hearing of native title claims, the Federal Court of Australia also conducts seminars and workshops at which its judges have the opportunity to hear and speak with anthropologists, indigenous leaders, and other judges and experts who are experienced in working with, and gathering evidence from, indigenous Australians.

The PIAC, additionally, continues to assist the understanding of legal practitioners of Aboriginal and Torres Strait Islander culture. The PIAC endeavors to assist legal practitioners to handle, with competence and sensitivity, individuals and groups affected by the removal of indigenous children from their families. Notwithstanding the above efforts, doubts remain whether Aboriginal and Torres Strait Islander peoples have, or perceive that they have, the same access to justice as mainstream Australians.

B. *Cultural Barriers*

Courts are places where the articulate, educated, and socially sophisticated tend to feel more comfortable than those who do not share these advantages. Particular difficulties face those whose primary language is not that of the court. Moreover, problems and misunderstanding can arise inside and outside the court where cultural differences distort verbal and

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recommendations to Commonwealth, State, and Territory governments that address these issues.

32. ATSIC, Native Title Social Justice Advisory Committee, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures*, Recommendation 96 (Feb. 9, 1995). The relevant section of Recommendation 96 states that "[t]he Commonwealth Government should . . . encourage the development of codes and policies relating to the presentation of Aboriginal and Torres Strait Islander issues as recommended by the Royal Commission into Aboriginal Deaths in Custody . . . ." *Id.*

non-verbal communications, sometimes with significant adverse consequences for one party.

As the statistics to which I have referred show, Aboriginal and Torres Strait Islander peoples may face all of these difficulties when they become involved in litigation. In addition, they can face problems peculiarly their own. Considerable anecdotal evidence indicates that a significant proportion of Aboriginal and Torres Strait Islanders identify courts generally with the criminal law enforcement policies and practices of the past and not as places where their rights may be protected and enforced. Consequently, Aboriginal and Torres Strait Islanders are sometimes unwilling to attend court or, if they do attend, unwilling or unable to give evidence. Both of these factors can have a serious impact on the outcome of any legal proceedings which involve Aboriginal and Torres Strait Islanders.

An example of the practical significance of the fear indigenous people have for the courts occurs when Aboriginal mothers explain their failure to attend Family Court hearings concerning the custody of their children in terms of their concern about being sent to jail. One of my colleagues on the Federal Court of Australia found that many unusually reticent Aboriginal witnesses in an employment case had come from a remote community, and, not only had they never been in a town or city center before, they had never been in a large European style building. Moreover, the culture of these witnesses was one of quiet, measured discourse. The experience of being questioned loudly and insistently by counsel only added to their extreme discomfort in the unfamiliar surroundings. His arrangements for the court to sit in a nearby park and to alter the style of questioning transformed the quality of the evidence. According to anecdotal evidence, some indigenous peoples are concerned, or even frightened, about entering old court houses in which harsh penalties, including sentences of death, were imposed their male ancestors.[33]

Other cultural problems which impinge on access to justice, but not necessarily on access to litigation, are also of concern. Native title litigation illustrates this point well.

33. All Australian jurisdictions have abolished the death penalty starting with Queensland in 1922 and ending with Western Australia in 1984. The last person to suffer the death penalty in Australia (a white man) was hanged in 1967.

The Native Title Act requires Aboriginal and Torres Strait Islander peoples seeking a determination of their native title to justify not only their entitlement to a determination in the courts against their alleged dispossessors,[34] but also to make the justification in ways which the legal system of those same dispossessors will accept. It should not be a surprise to anyone to discover that Aboriginal and Torres Strait Islanders apprehend that they are outsiders in the court system.

Our legal system demands the disclosure of information by way of evidence. In Aboriginal society there can be cultural prohibitions on the disclosure to outsiders of information regarding the relationship between a community and its country. Some information, such as rituals and traditional stories concerning land, may only be spoken of in the presence of a limited section of the community itself—perhaps only in the presence of women or initiated men.[35] There is a measure of cultural violence in making the price of a determination of native title that evidence be given publicly. Australian Courts, including the Federal Court of Australia, are seeking means to address these issues without undermining the overall fairness of the hearing.

It cannot be known how much information relevant to the indigenous communities relationship of indigenous communities with land does not come to the attention of courts and tribunals at all for cultural reasons. Considering the legal process before the formal hearing, it is unknown how often the legal representatives of Indigenous peoples, who are nearly exclusively non-indigenous Australians, fail to identify the existence of such culturally sensitive material. A growing body of evidence suggests that where the material is possessed by indigenous women, the chance of its being ignored or undervalued is regrettably high.[36] In this and other areas, the western cultural understanding of the role of women in society continues to impact on the power structures of indigenous communities.[37]

Commonly, Aboriginal peoples are reluctant to speak about

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34. The dispossessors are, of course, not required to justify their acts of dispossession.

35. *See* Dr. Deborah Rose Bird, *Land Rights and Deep Colonizing: The Erasure of Women*, 3 ABORIGINAL LAW BULLETIN 85, at 6 (1996).

36. *See generally* WE ARE BOSSES OURSELVES: THE STATUS AND ROLE OF ABORIGINAL WOMEN TODAY (Fay Gale ed., 1983).

37. *See* Bird, *supra* note 35, at 6.

their connection with an area of land when not on that land. Further, cultural impediments prevent individuals from speaking for a community without the presence of others related to that community. Unless courts are willing to sit in places where they do not usually sit and to modify the traditional way in which they take evidence, access to litigation may not amount to access to justice for indigenous litigants.

Currently, the Federal Court of Australia regularly sits on the land which is the subject of a claim for a native title determination. This may involve travel to remote locations and the necessity to camp out. Sometimes, a group of indigenous witnesses is sworn in at one time and, in effect, group evidence taken. There have been instances in which the Court has made orders excluding individuals of an opposite sex, other than the judge, from the hearing to allow for the admission of culturally sensitive evidence. When building a new courthouse in a city with a significant indigenous population, a courtroom is designed in consultation with indigenous peoples to take into account cultural preferences and to avoid the negative associations attached to traditional courtroom designs. The Federal Court of Australia is making real attempts to address issues of cultural sensitivity. It is, however, still in the early days. A meaningful assessment of the success of these attempts will require the passage of further time.

C. *Other Evidentiary Difficulties*

The extent to which indigenous communities seeking determinations of native title in their favor must call into evidence the traditional laws and customs of their ancestors at the time of first contact with Europeans is still a moot question. To obtain a determination of native title indigenous communities must establish that they possess rights and interests in the land under the acknowledged, traditional laws and customs observed by them.[38] In calling upon evidence which touches on their traditional laws and customs, Aboriginal and Torres Strait Islander communities may be disadvantaged in at least two important ways.

First, in comparison with the Australian population as a whole, a relatively small percentage of indigenous Australians is older than 65 years of age. Of itself, this can impact adversely on

38. Native Title Act, 1993 § 223(1) (Austl.).

the availability of evidence of tradition. There is the previously mentioned issue of indigenous health problems generally. Once an application for a determination of native title is made, it is crucial to make court orders to preserve the evidence of elderly or frail witnesses. There is considerable, probably inevitable, delay in bringing native title cases to hearing. For a case to fail because of the death of elderly or frail witnesses during this period of delay is not consistent with access to justice. Yet commonly, parties and their legal representatives overlook the desirability of seeking orders for the preservation of evidence.

Secondly, written records assume particular importance once circumstances earlier than living memory become an issue. Aboriginal and Torres Strait Islanders did not have a written language at the time of first European contact. European observers prepared all written records touching on the laws and customs of the indigenous peoples from that time. Because these observers were looking at something totally foreign to their understanding, they were severely limited in their capacity to appreciate the structure and operation of the indigenous communities with which they came in contact, and the relationship of the communities with the land and other indigenous communities. Yet when these records are the only contemporaneous records available to a court, a court will almost inevitably give them weight—possibly a weight that they do not deserve. Again, these are matters that can impact on the fairness of justice in litigation.

CONCLUSION

The general issues in this Paper are not unique to indigenous Australians, or to the indigenous inhabitants of any country. All those who approach the courts who are affected by disadvantages, whether of language, social skills, education, or otherwise, risk achieving access to litigation but failing to achieve access to justice.

Indigenous Australians have a particularly significant form of disadvantage that is notoriously difficult to deal with, which is that they fall outside the mainstream, as the law, courts, and judges view the world. The majority of judges, and those who administer the justice system, more readily empathize with those whose experiences and values they intuitively understand, rather

than with those whose experiences and values they may neither know nor understand. Because the culture, life experiences, and values of indigenous peoples can be so startlingly different from the mainstream of society, their legal experiences can vividly illustrate general problems relating to access to justice.

The increasing diversity amongst those who constitute the legislatures, the bureaucracies, and the judiciaries in many countries will lead to improvement in access to justice. Forums of this kind can also help—as will all experiences which help those involved in administrating justice to develop an understanding of the extent to which we see the world through our own culture and experiences.

I close by congratulating The Association of the Bar of the City of New York and its co-sponsors on the holding of this international forum. The issues to be addressed during this forum are truly international in their significance. Access to justice is a fundamental aspect of the rule of law in any country—and an essential prerequisite for the protection and enforcement of the civil rights of all citizens. As lawyers, we must continue to urge governments to make available appropriate amounts of money to ensure that no one is denied access to justice simply because he or she is poor. Equally, we must remember that access to justice is not merely a matter of money.