Australian Government
Australian Law Reform Commission

Professor David Weisbrot
President

Ms Julie Dennett
Acting Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

25 September 2006

Dear Ms Dennett

Crimes Amendment (Bail and Sentencing) Bill 2006

Please find attached a submission from the Australian Law Reform Commission in relation to the Crimes Amendment (Bail and Sentencing) Bill 2006.

Yours sincerely

Attachment

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Australian Government

Australian Law Reform Commission

ALRC submission on the Crimes Amendment (Bail and Sentencing) Bill 2006

25 September 2006

Contents

1. The Australian Law Reform Commission (ALRC) makes the following submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the provisions of the Crimes Amendment (Bail and Sentencing) Bill 2006.

ALRC inquiry into sentencing of federal offenders

2. In April 2006, the ALRC completed its Report on the sentencing of federal offenders entitled *Same Crime, Same Time* (ALRC 103, 2006). The Terms of Reference for the Inquiry required the ALRC to review Part IB of the *Crimes Act 1914* (Cth) and consider whether it is an appropriate, effective and efficient mechanism for the sentencing, imprisonment, administration and release of federal offenders. The Report was tabled in Parliament on 22 June 2006. The ALRC understands that the Department is currently considering the 147 recommendations contained in the Report.

3. The ALRC concluded that the system for sentencing federal offenders should be significantly overhauled to provide greater consistency, fairness and clarity. Following extensive research and consultation, the ALRC found there is compelling evidence of inconsistent treatment of federal offenders—who are typically tried and sentenced by state and territory courts—as well as a range of gaps, uncertainties and problems in the way the federal system meshes with the systems in place in the states and territories.

4. The Inquiry's key recommendations include:

- The Australian Government should seek to ensure broad equality across Australia in the sentencing, administration and release of federal offenders in different states and territories.[1]

1 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 3–1.

- A new federal sentencing Act should be enacted, which includes a statement of the purposes of sentencing, the fundamental principles that must be applied in sentencing, and the factors that courts must consider in sentencing federal offenders.[2]

- A database on federal sentences should be developed for use by judicial officers and others as a practical tool in promoting consistency in federal sentencing (akin to the databases already developed in some state jurisdictions, such as the Judicial Information Research System (JIRS) in New South Wales).[3]

- A new sentence indication scheme should be introduced, which, with appropriate safeguards, is designed to encourage guilty defendants to plead guilty by indicating the likely sentencing outcome prior to the plea.[4]

- An Office for the Management of Federal Offenders should be established within the Attorney-General's Department, with a broad range of responsibilities to monitor, advise and liaise with the states and territories in relation to federal offenders.[5]

- A federal parole authority should be established to make parole-related decisions in relation to federal offenders.[6]

5. As part of the Inquiry, the ALRC considered the operation of s 16A of the *Crimes Act*, and in particular the sentencing of Aboriginal and Torres Strait Islander offenders. The ALRC's recommendations include the following:

- Cultural background should be considered by a court when sentencing a federal offender.[7]

- Legislation should endorse the practice of considering traditional law and customs, where relevant, in sentencing an Aboriginal or Torres Strait Islander offender.[8]

The reasons for making these recommendations are set out below.

6. The ALRC did not consider bail applications as part of its Sentencing Inquiry. Consequently, the operation of the Crimes Amendment (Bail and Sentencing) Bill 2006 in relation to bail and the proposed amendment to s 15 of the *Crimes Act* are not considered as part of this submission.

Sentencing purposes and principles

7. It is a fundamental principle of the criminal law and the sentencing process that like cases should be treated in a like, or consistent, manner. For this reason, many of the recommendations in ALRC 103 are aimed at encouraging and supporting greater consistency in the sentencing of federal offenders and equality among federal offenders across Australia.

8. There is, however, a difference between consistency of sentencing processes and consistency of sentencing outcomes. By improving consistent application of sentencing processes, sentencing outcomes will become more consistent. However, it is neither necessary nor appropriate to achieve identical outcomes in every case. The circumstances of each case must be taken into consideration in order to best meet the aims of the criminal justice system.

2 Ibid, Recs 2–1, 4–1, 5–1, 6–1.
3 Ibid, Recs 21–1, 21–2.
4 Ibid, Rec 15–1.
5 Ibid, Recs 22–3, 22–4, 22–5, 22–6, 22–7, 22–8.
6 Ibid, Rec 23–1.
7 Ibid, Rec 6–1.
8 Ibid, Rec 29–1(a).

9. In order to promote consistency, clarity and transparency in the sentencing process, the ALRC recommends the establishment of new federal sentencing Act, distinct from the federal provisions dealing with criminal procedure and from those dealing with substantive criminal law. An important aspect of a modern sentencing Act is to set out the purposes of sentencing to describe the goals or objectives that a sentence should aim to achieve. The ALRC recommends that federal sentencing legislation should provide that a court can impose a sentence on a federal offender only for one or more of the following purposes:

- to ensure that the offender is **punished** justly for the offence;
- to **deter** the offender and others from committing the same or similar offences;
- to promote the **rehabilitation** of the offender;
- to **protect** the community by limiting the capacity of the offender to re-offend; and
- to promote the **restoration** of relations between the community, the offender and the victim.[9]

10. Restoration aside, these purposes are well established at common law and are regularly applied by courts in all Australian jurisdictions. The ALRC considers that restorative justice should be recognised and promoted as a purpose of sentencing. Where used appropriately, restorative initiatives have demonstrated their potential to complement and enhance the operation of the criminal justice system by recognising victims' interests in the sentencing process and encouraging offenders to accept responsibility for their actions.

11. The purposes of sentencing cannot be considered in isolation and, if pursued in an unbalanced fashion, each purpose could lead to the imposition of unjust sentences, whether unduly lenient or unduly harsh. It is the principles of sentencing—the overarching legal rules that are to be applied when determining a sentence—that provide appropriate legal boundaries for sentencing.

12. There are five fundamental sentencing principles that are firmly established at common law and the ALRC recommends that these be specified in federal sentencing legislation.[10] The principles are:

- **Proportionality**. The principle of proportionality requires courts to impose sentences that bear a reasonable, or proportionate, relationship to the criminal conduct in question, thus imposing an obligation on judicial officers to ensure that sentences imposed on offenders are of a severity that reflects the gravity of the crime considered in light of its objective circumstances.
- **Parsimony**. The principle of parsimony operates to prevent the imposition of a sentence that is more severe than is necessary to achieve the purpose(s) of the sentence, recognising the inherent dignity and worth of offenders by mandating concern for their welfare.
- **Totality**. The principle of totality is relevant to the sentencing of offenders for multiple offences, ensuring an offender receives an appropriate sentence overall and not a 'crushing sentence'. The principle also applies when a court sentences an offender who is already serving a sentence.
- **Consistency**. Consistency is fundamental to maintaining a just and equitable criminal justice system. In the ALRC's view, the principle of consistency requires courts both to adopt a similar approach to the task of sentencing and to impose sentences that fall within an

9 Ibid, Rec 4–1.
10 Ibid, Rec 5–1.

appropriate range in light of the objective seriousness of the offence and the subjective circumstances of the offender.

- **Individualised justice**. The principle of individualised justice requires the court to impose a sentence that is just and appropriate in all the circumstances of the particular case. Courts have consistently recognised the importance of this sentencing principle, which can only operate where the judicial officer possesses a broad sentencing discretion that enables him or her to consider and balance multiple facts and circumstances when sentencing an offender.

Sentencing factors

13. Sentencing factors are matters that must be considered by the court when sentencing an offender for breach of the criminal law. The ALRC recommended that federal sentencing legislation should state that a court, when sentencing a federal offender, must consider any factor that is relevant to a purpose or principle of sentencing, where the factor is known to the court.[11]

14. At present, s 16A(2) of the *Crimes Act* sets out a non-exhaustive list of 13 matters that a court must take into account, to the extent they are relevant and known to the court. The ALRC agreed that such a list is appropriate, but made a recommendation to restructure the existing factors to provide a more principled and usable framework for judicial officers, and to promote clarity of approach. The ALRC recommended grouping the factors into broad categories, and providing examples of sentencing factors under each category. The following categories are suggested:

I factors relating to the offence;

II factors relating to the conduct of the offender in connection with the offence;

III factors relating to the conduct of the offender other than the specific conduct constituting the charged offence;

IV factors relating to the background and circumstances of the offender;

V factors relating to the impact of the offence;

VI factors relating to the impact of conviction or sentence on the offender or the offender's family or dependents;

VII factors relating to the promotion of sentencing purposes in the future; and

VIII factors relating to any detriment sanctioned by law to which the offender has been or will be subject as a result of the commission of the offence.

15. These categories are not mutually exclusive, and a single sentencing factor might be relevant to more than one category. Examples of factors that fall under each of the categories are discussed in detail in ALRC 103.[12]

Background and circumstances of the offender

16. The most relevant category in relation to the Crimes Amendment (Bail and Sentencing) Bill 2006 is category IV factors relating to the background and circumstances of the offender. Consideration of these factors facilitates individualised justice, one of the key sentencing principles.

17. The personal characteristics of an offender are also relevant to the sentencing principle of proportionality and the sentencing purposes of specific deterrence and rehabilitation. A factor such as the offender's youth may affect the assessment of culpability for the offence in question or

11 Ibid, Rec 6–1.
12 Ibid, [6.35]–[6.149].

highlight the need for sentencing orders that promote rehabilitation.[13] A factor such as old age may need to be considered because each year of a custodial sentence for an aged person represents a substantial proportion of his or her remaining life expectancy.[14] Factors such as old age, ill health and vulnerability may be relevant in determining the choice and duration of a sentencing option because they can render imprisonment particularly onerous for the offender or for the corrective services authorities who have to administer the sentence.[15]

18. In ALRC 103, the ALRC recommended that new federal sentencing legislation should include 'cultural background' as an example of one of the category IV factors relating to the background and circumstances of the offender that must be considered when sentencing a federal offender, provided the factor is known to the court.[16]

Cultural background

19. The consideration of cultural background as a factor in determining sentence is undertaken by many courts as part of the sentencing process. As stated by Fox and Freiberg:

> Courts, in dealing with identifiable racial or ethnic groups, particularly with persons of Aboriginal background, have tried to make allowance for 'ethnic, environmental and cultural matters'. These matters do not necessarily relate to the offender's race, but the person's actual circumstances, such as their background, education, cultural outlook and life experiences.[17]

20. In the High Court of Australia case of *Neal v The Queen*, Brennan J emphasised that:

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.[18]

21. Such factors could include social, economic and other disadvantages associated with or related to a particular offender's Aboriginality.[19] As Fox and Freiberg note, those circumstances may be sufficient to justify leniency in sentencing, but '[i]t is not discriminatory to take them into account because the same factors, if present, would be relevant in relation to other racial, national, ethnic or social groups'.[20] Neither are those factors self-executing 'in the sense that [their] mere existence necessarily requires a reduction of the penalty otherwise appropriate to the offence'.[21]

ALRC recommendations relating to cultural background

22. Part IB of the *Crimes Act* was first enacted in 1990 as a major reform of federal sentencing legislation.[22] It implemented selected parts of an earlier ALRC inquiry on the sentencing of federal offenders, which culminated in the Report *Sentencing* (ALRC 44, 1988). However, Part IB diverged from or failed to implement the ALRC's recommendations in a number of respects.

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13 Courts tend to emphasise rehabilitation rather than deterrence in the case of young offenders: R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.701], [3.708].
14 *R v Hunter* (1984) 36 SASR 101, 103.
15 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.711].
16 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 6–1.
17 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.716].
18 *Neal v The Queen* (1982) 149 CLR 305, 326.
19 *Rogers v The Queen* (1989) 44 A Crim R 301, 307.
20 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.716].
21 *E (A Child)* (1993) 66 A Crim R 1, 19.
22 *Crimes Legislation Amendment Act (No 2) 1989* (Cth).

23. Although the ALRC had recommended inclusion of 'cultural background' as a sentencing factor in ALRC 44,[23] the words 'cultural background' were not part of the original enactment of s 16A(2)(m). The additional factor was added by the *Crimes and Other Legislation Amendment Act 1994* (Cth) in response to a further recommendation by the ALRC in its report *Multiculturalism and the Law* (ALRC 57, 1995).

24. The ALRC's Multiculturalism Inquiry arose out of the National Agenda for a Multicultural Australia, and involved examining the principles underlying family law, criminal law and contract law to consider whether they are appropriate for a society made up of people from different cultural backgrounds and from ethnically diverse communities.[24]

25. In its consideration of sentencing laws in ALRC 57, the ALRC found that cultural considerations can be, and sometimes are, taken into account on sentencing.[25] Section 16A(2)(m) at that time did not include 'cultural background'—but as the list of factors in s 16A is non-exhaustive, this did not preclude consideration of cultural background at the time of sentencing a federal offender. The ALRC recommended that it should be specified as a factor in s 16A(2)(m) 'as it would ensure that the offender's cultural background is not overlooked where it is relevant'.[26]

Concerns regarding the inclusion of cultural background as a sentencing factor

26. In making its recommendation in ALRC 57 to amend s 16A(2)(m), the ALRC noted concerns raised during the Inquiry that such an amendment may be used to justify less harsh sentences in cases involving violence against women. The ALRC was told that the offender's cultural values are often raised as a mitigating factor in domestic violence cases.[27] However, many submissions supported the proposal. The ALRC was 'confident … that courts can attribute to this factor the weight that is, in all the circumstances, proper'.[28]

27. These concerns led to the referral of the Crimes and Other Legislation Amendment Bill 2004 (Cth)—which contained the proposed amendment to s 16A(2)(m)—to the Senate Standing Committee for Legal and Constitutional Affairs. The proposal was supported by the majority of submissions received by the Senate Committee, and was not opposed by the Commonwealth Director of Public Prosecutions.[29] The Women's Legal Resources Centre agreed that cultural background was a relevant matter for consideration on sentence, but raised concerns about the effect in trials for crimes of violence. However, the Centre noted that:

> The risk of injustice resulting from an inappropriate penalty is probably best addressed by means of judicial education and the availability of anthropologists or other expert witnesses who can assist the court in determining what is the relevant cultural practice or belief, if any.[30]

28. In its submission to the Senate Committee, the Law Council of Australia noted that the view that violence was an acceptable part of other cultures largely had been shown to be a cultural myth, and that the education of judges and lawyers had reached the stage where the courts would not

23 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [170]. The factor was not discussed in detail in this Report, but accepted as a factor commonly taken into account by judicial officers and identified by the ALRC as one of the list of factors that should be specified in legislation.
24 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 58 (1995), [1.2].
25 Ibid, [8.13].
26 Ibid, [8.14].
27 Ibid, [8.13].
28 Ibid, [8.14].
29 Senate Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Crimes and Other Legislation Amendment Bill 1994* (1994), [1.11].
30 Women's Legal Resources Centre Submission, quoted in Ibid, [1.12].

condone the use of cultural background as a justification for violence.[31] The Senate Committee supported the inclusion of 'cultural background' in s 16A(2)(m).

> The evidence before the Committee was overwhelmingly in support of including 'cultural background' as a relevant matter in the sentencing of federal offenders. It is a matter which many courts already consider, in appropriate circumstances, and a matter governed by developed principles. In the form proposed in the Bill, 'cultural background' will be relevant not to guilt or innocence, but simply in determining an appropriate sentence. The Committee supports the fairness and commonsense that underlies this approach.[32]

Aboriginal and Torres Strait Islander traditional laws and customs

29. The recommendations in ALRC 57 and ALRC 44 were consistent with an earlier recommendation from the ALRC Report *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986). In ALRC 31, the ALRC considered the extent to which Aboriginal customary law should be taken into consideration as part of the sentencing process. It found that, to a considerable degree, the courts already were recognising Aboriginal customary laws when sentencing Aboriginal offenders, with a distinction being made between taking Aboriginal customary laws into account, on the one hand, and incorporating aspects of Aboriginal customary laws in sentencing orders, on the other. The courts were not doing the latter, and the ALRC considered this appropriate. The ALRC recommended that legislative endorsement be given to the practice of taking Aboriginal customary laws into account.[33]

30. The inclusion of 'cultural background' in s 16A(2)(m) covers Aboriginal and Torres Strait Islander (ATSI) culture. Giving consideration to the cultural background of an ATSI person is broader than, but will include, giving consideration to the traditional laws and customs of that person.[34]

31. In ALRC 103 *Same Crime, Same Time*, the ALRC affirmed its commitment to the recommendations made in ALRC 31 and their application to the sentencing of federal ATSI offenders, in particular the recommendations that:

- legislation should endorse the practice of considering traditional laws and customs, where relevant, in sentencing an ATSI offender; and
- legislation should provide that, in ascertaining traditional laws and customs or relevant community opinions, a court may give leave to a member of an ATSI offender's or ATSI victim's community to make oral or written submissions.[35]

32. The ALRC and other Australian law reform commissions gave close consideration to evidential provisions relating to the admissibility of evidence of ATSI traditional laws and customs in the recent review of the uniform Evidence Acts.[36] Although the laws of evidence apply in sentencing

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31 Ibid, [1.13].
32 Ibid, 7.
33 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, ALRC 31 (1986), [516].
34 Note that in recent reports the ALRC uses the term 'traditional laws and customs' in preference to 'customary law', consistent with terminology used in s 223 of the *Native Title Act 1993* (Cth): see discussion in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [29.56]; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC 112, VLRC FR (2005), Ch 19, Rec 19–3.
35 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 29–1.
36 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC 112, VLRC FR (2005), Ch 19.

hearings on a limited basis,[37] the approach taken by the law reform commissions in that inquiry was consistent with the approach taken by the ALRC in ALRC 31 and ALRC 103.[38]

33. The Law Reform Commission of Western Australia (LRCWA) recently concluded a thorough review of Aboriginal traditional laws and customs in that State and considered whether, and if so to what extent, those laws and customs should be recognised and given effect to in Western Australia. A report is expected to be released in late October 2006. In a Discussion Paper containing its proposals for reform, the LRCWA made a number of proposals consistent with those made by the ALRC in its various reports, including that cultural background (generally) should be included in legislation as a sentencing factor,[39] and when sentencing an Aboriginal offender a sentencing court must consider any aspect of Aboriginal customary law that is relevant to the offence.[40] The LRCWA produced a range of publications as part of its inquiry, a number of which provide up-to-date information on the interaction of sentencing and traditional laws and customs.

34. There are two key ways in which traditional laws and customs may be considered as part of the sentencing process. One is taking into consideration a traditional punishment that has been or will be imposed on the offender as a result of the offending behaviour. It could be argued that suffering a traditional punishment may be a mitigating factor in sentencing. It has been held that courts do not condone, encourage or facilitate traditional punishments by taking them into account in sentencing, but rather recognise them as inevitable.[41] As noted by the LRCWA, it is not appropriate to legislate that punishment under traditional law or custom should preclude punishment under Australian law, but it is appropriate that traditional law and custom consequences be considered so that ATSI offenders do not face excessive punishment.[42] This is consistent with the sentencing principles of parsimony and totality.

35. The other way in which traditional laws and customs may have an impact on sentencing is to provide a reason or explanation for the commission of an offence. Consideration of an offender's reasons or motives is part of the consideration of the background and circumstances of the offender. However, the weight to be attached to the factor should always be a matter for the court's discretion. In some cases the facts would not warrant a modification in the sentence or order imposed, while in other cases the reasons may highlight a need to modify the sentence in order to achieve an appropriate sentence in all the circumstances of the case.

Violence against women and children and traditional laws and customs

36. Cases in which Aboriginal offenders have been convicted of violence against women and children have been highlighted as a particular area where the application of the factor of considering cultural background, and in particular traditional laws and customs, as part of the sentencing process has raised concerns.

37. In ALRC 103, it was noted that on occasions courts have concluded that violent offences committed by ATSI men against ATSI women and children are less serious than similar offences

37 See discussion in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [13.75]–13.83].

38 The report includes recommendations to amend the uniform Evidence Acts to provide: (1) an exception to the hearsay rule for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs (Rec 19–1); and (2) an exception to the opinion evidence rule for evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group (Rec 19–2): Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC 112, VLRC FR (2005).

39 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), Proposal 29.

40 Ibid, Proposal 31.

41 See, eg, *R v Minor* (1992) 2 NTLR 183; *Jadurin v The Queen* (1982) 44 ALR 424.

42 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), 214.

committed in non-ATSI communities.[43] However, it also noted that a number of other sentencing judgments have stressed vigorously that the legal system must ensure that ATSI women and children are protected from violent criminal behaviour.[44]

38. The ALRC agrees with the concerns of the Human Rights and Equal Opportunity Commission which submitted to the Sentencing Inquiry that ATSI cultural practices should not be allowed to prevail over the rights of individuals to be free from violence and discrimination.[45] In its recommendation to allow consideration of traditional laws and customs in the sentencing process, the ALRC stressed that this should be done without derogating from international human rights principles.[46]

39. In a Background Paper prepared for the Law Reform Commission of Western Australia, Davis and McGlade discuss the concept of 'bullshit traditional violence' which is said to be a distorted customary law developed by Aboriginal men to justify illegitimate violence.[47] The LRCWA was able to examine in detail the issue of the interaction of sentencing laws and concerns regarding violence against women and children in Aboriginal communities. While acknowledging the existence of concerns, it was noted that more recently courts have been firm in rejecting spurious arguments that family or domestic violence is generally acceptable within Aboriginal communities or permitted under traditional laws and customs.

> The Commission strongly condemns any suggestion that family violence or sexual abuse against Aboriginal women and children is justified under Aboriginal customary laws. However, while the Commission accepts the potential for Aboriginal customary law to be incorrectly argued as an excuse for violent and sexual offending, this should not prevent courts from considering Aboriginal customary law. The common law suggests that such arguments would today be likely to fail. Further, due to the discretionary nature of sentencing, courts are able to balance Aboriginal customary law and international human rights standards that require the protection of women and children.[48]

40. The ALRC agrees with the views of the LRCWA on this issue.

Effect of Crimes Amendment (Bail and Sentencing) Bill 2006

41. The proposed removal of 'cultural background' from s 16A(2)(m) of the *Crimes Act* would remove what the ALRC has always considered to be a relevant sentencing factor from the Act. This would have an impact not only on consideration of the cultural background of ATSI offenders, but also on the cultural background of any offender. In 2004, 53% of federal prisoners with a known country of birth or nationality were foreign and seven per cent of federal prisoners were of Indonesian nationality.[49] Some of the issues faced by offenders from linguistically and culturally diverse backgrounds include:

- experience of isolation in prison due to the fact that the offender cannot speak English;

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43 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [29.59] referring to *R v Lane* (Unreported, Northern Territory Supreme Court, 29 May 1980). See also M Davis and H McGlade, *International Human Rights Law and the Recognition of Aboriginal Customary Law* (2005) Law Reform Commission of Western Australia for a discussion of other cases.

44 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [29.59] citing *R v GJ* [2005] NTCCA 20; *Hales v Jamilmira* (2003) 13 NTLR 14; *R v Daniel* (1997) 94 A Crim R 96.

45 Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

46 See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 29–1.

47 M Davis and H McGlade, *International Human Rights Law and the Recognition of Aboriginal Customary Law* (2005) Law Reform Commission of Western Australia, 404.

48 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), 218–219.

49 See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Appendix 1, Figure A1.13 and accompanying text.

- more limited access to appropriate alternative sentencing options; and
- poor access to appropriate rehabilitation programs within prisons or upon parole.[50]

42. Given that s 16A(2) is a non-exhaustive list of sentencing factors, the removal of 'cultural background' from the list does not preclude it from being considered by judicial officers making sentencing decisions. The Explanatory Memorandum to the Bill notes this point, and the desirability of removing the 'unnecessary emphasis' on cultural background.[51] As noted above, consideration of this factor has developed at common law in the absence of legislation in a number of jurisdictions, including the Commonwealth prior to its legislative enactment in 1994. However, it is likely that the deliberate removal of the factor from s 16A(2) will result in a downplay of the need to consider cultural background in future decisions. The ALRC does not consider this an appropriate development in the law, and remains convinced that cultural background is an important factor that should be included in any legislative list of sentencing factors.

43. Of particular concern to the ALRC is the proposed insertion of s 16A(2A) and (2B). These provisions dealing with a prohibition on consideration of customary laws or cultural practices as a reason for excusing, justifying, authorising, requiring or rendering less serious the criminal behaviour to which the offence relates are diametrically opposed to the recommendations of the ALRC in numerous reports. They are also in conflict with the recommendations of the Royal Commission into Aboriginal Deaths in Custody, which the Government indicates it considered when drafting these provisions.[52]

44. As noted above, the consideration of traditional laws and customs to explain an offender's reasons or motives for committing the offence is merely one factor to be considered in the sentencing process. The weight to be attached to the factor always should be a matter for the court's discretion, consistent with the application of Australia's obligations under international law and our own human rights instruments. It must be considered together with a large range of other factors, and applied so as to impose a sentence that is consistent with the sentencing principles and the purposes of sentencing, and appropriate in all the circumstances of the case. Prohibiting consideration of this particular factor limits the judicial discretion to consider and weigh up all relevant factors of the case.

45. The ALRC acknowledges that there are real concerns about the way in which the 'cultural' factor is sometimes applied. The ways to alleviate these concerns including continuing judicial education and improved methods to inform the court of appropriate traditional laws and customs. These have been addressed in ALRC 103. The ALRC does not consider that a limitation of judicial discretion is the appropriate way to meet the concerns.

46. The ALRC also considers that the insertion of s 16A(2A) and (2B) may result in an unfair and discriminatory application of the law on ATSI or culturally diverse offenders. The actions of any offender, and the reasons and motives for those actions, should be considered as part of the sentencing process. Appropriate weight can then be assigned to those reasons and motives. However, if the reasons and motives of the actions of an offender are related to customary law or cultural practice, those reasons and motives should not be prohibited from consideration.

50 Ibid, [29.77]–[29.79].
51 Explanatory Memorandum, Crimes Amendment (Bail and Sentencing) Bill 2006 (Cth), 3.
52 Ibid, 1.