



Australian Government

Australian Law Reform Commission

Professor David Weisbrot
President

Ms Jackie Morris
Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

29 September 2006

Dear Ms Morris

Crimes Amendment (Bail and Sentencing) Bill 2006

Further to the ALRC's appearance before the Senate Committee today in relation to the Crimes Amendment (Bail and Sentencing) Bill 2006, I provide the following information as promised.

Australian Government submissions to the ALRC Sentencing Inquiry

The Australian Government made the following submissions during the course of the ALRC's Inquiry into the Sentencing of Federal Offenders, which ran from July 2004 to April 2006:

- Attorney-General's Department, SFO 52, 7 July 2005;
- Attorney-General's Department, SFO 83, 15 February 2006;
- Department of Family & Community Services, SFO 30, 15 April 2005; and
- Department of Immigration and Multicultural and Indigenous Affairs, SFO 49, 10 May 2005.

The two submissions by the Attorney-General's Department and the submission by the Department of Family & Community Services refer to issues relating to the sentencing of Aboriginal and Torres Strait Islander offenders; however, none of the submissions suggested that custom or cultural background should be removed from the legislation as a sentencing factor.

In fact, the February 2006 submission from the Attorney-General's Department makes positive reference to initiatives that can be developed to assist the courts to take into consideration the cultural background of Aboriginal and Torres Strait Islanders in the sentencing phase.

All of these submissions are public, and can be made available upon request.

Clarification on country of birth of federal prisoners

In response to a question from Senator Crossin regarding the nationality of federal prisoners, the Committee was referred to Table A1.13 in the ALRC report *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006). It was indicated that 74% of prisoners were Australian-born. This is actually the

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percentage of Australian-born prisoners of all prisoners held in Australian prisons (that is, not limited to *federal* prisoners). The percentage of Australian-born federal prisoners is 43%. As mentioned to the Committee and as indicated in the Table, the percentages of other nationalities represented in the federal prison population are thinly divided across many national groups.

Precedents from the region on customary law recognition

The ALRC indicated to the Committee that a number of other jurisdictions in the region also have grappled with the issue of recognising and applying customary law in the legal system—including in criminal law matters—but balancing this against the need to respect the basic principles of international human rights law.

We have extracted below the relevant provisions from the Papua New Guinea *Customs Recognition Act 1963* and *Underlying Law Act 2000*, and the Solomon Islands *Customs Recognition Act 2000*.

As can be seen, the legislation specifically provides for the courts to take custom into account in sentencing; however, express exceptions are made where such recognition or application of custom would: (a) result in an injustice or be contrary to the public interest; or (b) be contrary to the best interests of a child; or (c) be contrary to the human rights protections contained in the Constitution (which are basically the same as those in the ICCPR).

The ALRC considers that this approach would be far better, in principle and in practice, to the proposed provisions of the Crimes Amendment (Bail and Sentencing) Bill 2006 in terms of addressing the concerns of the Australian Government in combating domestic violence and child abuse.

Customs Recognition Act 1963 (PNG)

3. Recognition of custom.

(1) Subject to this Act, custom shall be recognized and enforced by, and may be pleaded in, all courts except so far as in a particular case or in a particular context—

- (a) its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest; or
- (b) in a case affecting the welfare of a child under the age of 16 years, its recognition or enforcement would not, in the opinion of the court, be in the best interests of the child.

4. Criminal cases.

Subject to this Act and to any other law, custom may be taken into account in a criminal case only for the purpose of—

- (a) ascertaining the existence or otherwise of a state of mind of a person; or
- (b) deciding the reasonableness or otherwise of an act, default or omission by a person; or
- (c) deciding the reasonableness or otherwise of an excuse; or
- (d) deciding, in accordance with any other law whether to proceed to the conviction of a guilty party; or
- (e) determining the penalty (if any) to be imposed on a guilty party,

or where the court thinks that by not taking the custom into account injustice will or may be done to a person.

Underlying Law Act 2000 (PNG)

4. Application of sources of underlying law.

(1) Subject to Subsection (2) or (3):

(a) the customary law; and

(b) the common law,

shall be adopted and applied as part of the underlying law.

(2) The customary law shall apply unless:

(a) it is inconsistent with a written law; or

(b) its application and enforcement would be contrary to the National Goals and Directive Principles and the Basic Social Obligations established by the *Constitution*; or

(c) its application and enforcement would be contrary to the basic rights guaranteed by *Division III.3 (Basic Rights) of the Constitution*.

Customs Recognition Act 2000 (Solomon Islands)

6. Recognition of custom

Subject to the provisions of this Act, custom shall be recognised and enforced by, and may be pleaded in, all Courts except so far as in a particular case or in a particular context-

(a) its recognition or enforcement would result, in the opinion of the Court in an injustice or would not be in the public interest; or

(b) be inconsistent with the provisions of the *Constitution* or an Act of Parliament.

7. Criminal cases

Subject to the provisions of this Act, the law of evidence and to any other law, custom may be taken into account in a criminal case only for the purposes of-

(a) ascertaining the existence or otherwise of a state of mind of a person;

(b) deciding the reasonableness or otherwise of an act, default or omission by a person;

(c) deciding the reasonableness or otherwise of an excuse;

(d) deciding, in accordance with any other law whether to proceed to the conviction of a guilty party;

(e) determining the penalty (if any) to be imposed on a guilty party; or

(f) taking the custom into account in order to avoid any injustice that may be done to a person.

We hope this further information assists the Senate Committee with its review of the Bill.

Warmest regards

Yours sincerely

A handwritten signature in black ink, appearing to read "David Weir". The signature is written in a cursive, flowing style.