Law Council
OF AUSTRALIA

Ms Julie Dennett
Acting Secretary
Legal and Constitutional Committee
The Senate
Parliament House
Canberra ACT 2600

Dear Ms Dennett

Crimes Amendment (Bail and Sentencing) Bill 2006

Thank you for allowing the Law Council an opportunity to comment on the *Crimes Amendment (Bail and Sentencing) Bill 2006* (Cth) ("the Bill").

The Law Council submits that the Bill should not be passed in its present form.

The Law Council of Australia has expressed significant concerns about the Federal Government's proposals to implement the amendments contained in the Bill, as the amendments will result in discrimination against Indigenous Australians and Australians of multicultural descent. Those concerns are set out in the **attached** submission entitled "Recognition of Cultural Factors in Sentencing" (the Law Council's submission), which was sent to all Australian governments prior to the Council of Australian Governments (COAG) meeting on 14 July 2006.

As the Senate Committee is aware, COAG considered this issue at its meeting on 14 July 2006 and agreed that "no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment".

The Law Council's submissions with respect to the Bill presently under consideration build upon those made in respect of the matters under consideration at the July 14 COAG meeting.

The attached submission examines the background against which Federal Parliament gave bipartisan support in 1994 to insert the requirement that

courts consider the cultural background of an offender in sentencing. The submission also proves, by analysis of case law and sentencing statistics, that the amendments under consideration are based on misconception, including that:

1. there has been no reported case in which cultural background or customary law has been used by an Australian court to determine the guilt or innocence of an offender;

2. in general, courts in Australia have been consistent in sentencing decisions across jurisdictions;

3. where mistakes have been made in sentencing at trial, those mistakes have been invariably rectified on appeal; and

4. cultural background has been considered by a court in only a limited number of cases, and only where it is relevant to the circumstances in which the offence was committed.

The Law Council notes that, despite significant misinformation reported about individual cases where trial sentences have appeared lenient, very few have involved submissions regarding customary law or cultural practices. Indigenous community leaders have consistently abhorred any suggestion that violence against women and children is justified or condoned in any way by customary law. In his report on *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities*, the Aboriginal and Torres Strait Islander Social Justice Commissioner stated:

> *"Aboriginal customary law does not condone family violence and abuse and cannot be relied upon to excuse such behaviour. Perpetrators of violence and abuse do not respect customary law and are not behaving in accordance with it.."*[1]

As demonstrated in the attached submission, courts recognise that Aboriginal customary law and cultural practices will only be relevant in limited circumstances and will not justify or condone abuse of women and children.

Effect of the amendments

The Second Reading speech for the Bill states that:

> *"All Australians should be treated equally under the law. Every Australian may expect to be protected by the law, and equally every Australian is subject to the law's authority…*
>
> *"The high levels of family violence and child abuse in Indigenous communties is appalling. The law covering such crimes must reflect the fact that such criminal behaviour is unacceptable."*

The Law Council supports these sentiments and believes that the law must be able to protect those who are vulnerable, particularly women and children

[1] HREOC, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities – key* issues, June 2006, page 10.

and those who live in remote areas. However, it is not clear that the amendments are well-directed at achieving those important objectives.

It must be noted that the amendments will have immediate impact only in relation to Commonwealth offences. The majority of offences, particularly those offences at which the amendments are directed, are committed and charged under the relevant criminal law statutes of the States and Territories. In 2003/04, there were 9,368 charges made for alleged offences under Commonwealth legislation, of which 891 were for indictable offences[2]. It is not known how many of those charged were Indigenous, how many Indigenous people each year are convicted, or to which offences the charges related. However, the Northern Australian Aboriginal Legal Aid Service has advised the ALRC that only a very small proportion of Indigenous offenders are charged with federal offences and the majority of those relate to offences under the *Social Security Act 1991* (Cth).[3]

It should also be noted that currently there are around 302 federal offenders incarcerated in Australian prisons, of whom Australian citizens comprise only 43 per cent (compared to 74 per cent in all jurisdictions). This indicates that the Bill, if enacted, will have a greater impact upon non-Australians and gives rise to the concern that the Bill will have effect on people and circumstances that have not been properly considered in the rush to implement this Bill.

However, despite the limited reach of the amendments contained in the Bill the Law Council believes that if the Bill is implemented, the Federal Government may seek to compel state and territory governments to implement similar amendments as a condition of federal funding for housing, services in Indigenous communities or other aspects of bilateral agreements between the Commonwealth and State/Territory Governments.

Accordingly, this submission addresses the potentially far-reaching impact of the amendments, if adopted uniformly by the states and territories as ultimately intended.

Discriminatory effect of the amendments

The Law Council believes that the Bill under consideration may breach the provisions of the *Racial Discrimination Act 1975* (Cth). It is noted that:

- The Bill, if enacted, will require courts to treat Indigenous offenders or offenders of particular ethnic origin as if they did not belong to a particular Indigenous or ethnic group.

- The *Racial Discrimination Act* embodies a concept of discrimination which seeks to ensure substantive rather than merely formal equality before the law.

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[2] Data taken from the Australian Law Reform Commission Report 103: *Same Time, Same Crime: Sentencing of Federal Offenders*, (2006) Commonwealth of Australia, Appendix A, which sources its data from the Commonwealth Director of Public Prosecutions' Annual report 2003/04.

[3] Ibid, ALRC 103, paragraph 29.42.

- The Australian Law Reform Commission's (ALRC's) 1986 report on *Recognition of Aboriginal Customary Law* similarly concluded that the prohibition of discrimination: "does not preclude reasonable measures distinguishing particular groups and responding in a proportionate way to their special characteristics, provided that basic rights and freedoms are assured to members of such groups."[4]

- The United Nations Committee on the Elimination of Racial Discrimination, in its General Recommendation concerning Indigenous Peoples (General Recommendation XXIII(51)), called upon States parties to the Convention on the elimination of all forms of racial discrimination, *inter alia*, "to ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and practice their languages."

- The Law Council submits that s.16(2)(m) of the Act is necessary to ensure adequate protection of the distinct identities of Indigenous offenders and offenders of particular ethnic origin, and to achieve substantive racial equality.

The Bill goes further than simply repealing the s.16(2)(m) of the Act – which would remove the "cultural background" of an offender as a mandatory consideration in sentencing. Proposed ss.15AB(1)(b) and 16A(2A) will require any court considering bail or sentencing for a federal offender to disregard that person's cultural background as a relevant matter. This would prevent courts from drawing any distinction between an Anglo-Australian person raised and educated in Canberra, and a person with limited English or formal education, who has lived their entire life in a remote Aboriginal community according to their traditional laws and customs.

As noted by the ALRC in its report on sentencing of federal offenders[5], discrimination on the basis of race is prohibited in the sentencing process. The Law Council believes that preventing consideration of the cultural background of an offender in the ways proposed by the Bill will result in discrimination against persons whose customs and beliefs differ from those observed by the majority of current Australians. If courts are prevented from considering the specific cultural practices or customary laws observed by an offender, the result will be that those whose cultural experience has differed from 'mainstream' Australians may be disadvantaged under our legal system.

Judicial discretion must be preserved

The Law Council believes the protection of victims, witnesses and the broader community must be a paramount consideration. However, it is submitted that the proposed amendments will unnecessarily restrict the discretion of the court, resulting in potential injustice for Indigenous Australians and Australians of multicultural descent.

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[4] ALRC, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) paras 150, 158.
[5] Ibid, ALRC 103, paragraph 29.43.

Courts are required to balance a broad range of considerations, many of which will vary according to the specific circumstances of a case. In *Neal v The Queen*[6], Brennan J stated 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 that exist only by reason of the offender's membership of an ethnic or other group."*

For example, an Aboriginal person accused of trespass may have a legitimate explanation for their actions arising from customary law or cultural practices observed in his or her community. There are also clear distinctions to be made, for example, between a violent offender charged with malicious wounding during a violent altercation while under the influence of alcohol, and a person carrying out traditional punishment with the sanction of their community and according to that community's customary laws.

Similarly, if a person's cultural background or disposition causes them to perceive certain behaviours to be more offensive or provocative, eliciting a more severe reaction than would, ordinarily be the case, that will be a relevant consideration.

It should also be considered that an Aboriginal person living in a remote community may have little or no knowledge of 'black-letter law' that applies in the Territory, State or Federal jurisdiction. It is estimated that over 30 per cent of people living in Aboriginal communities in the Northern Territory do not speak English well, or at all, and literacy rates lag well behind that of the broader community.

As outlined in the attached submission, courts have generally been 'getting it right' with respect to the balancing of different concerns in bail and sentencing. The court's discretion allows it to consider positive aspects of an offender's conduct, as well as the elements of the offence. A good example of this was in *R v Gondarra*[7] (summarised in the attached submission). In that case, the court permitted Gondarra, who had been convicted of arson, to complete a 'Chamber of Law', which was a significant aspect of his rehabilitation in the eyes of the community.

The Law Council believes that s.15AB(1)(b) is of very serious concern, as it will affect those that have not yet been found guilty of an offence. The presumption of innocence is an essential feature of a just and fair legal system. Preventing the consideration of customary law or cultural practices when determining whether an accused may be released on bail will significantly restrict the capacity of a court to make orders that are appropriate in the circumstances. Moreover, considering the customary law or cultural background of an offender in bail proceedings would not be done for the purpose of 'mitigating' the offence, as suggested in the explanatory memoranda. Consideration of such matters in relation to bail proceedings

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[6] *Neal v The Queen* (1982) 149 CLR 305 at 326

[7] [2005] Unreported, Supreme Court of the Northern Territory, SCC20407332.

would more commonly relate to matters such as whether the offender is required to attend ceremonial proceedings, or undergo traditional punishment.

Similarly, s.16A(2A) places an unreasonable fetter on the ability of a court to reach appropriate sentencing decisions based on all of the material before the court. This point, and its potential ramifications, is discussed at length in the attached submission.

The amendments may undermine governance structures

It is also noted, with significant concern, that the proposed restriction on consideration of cultural practices or customary law in sentencing, if adopted nationally, has the potential to neutralise recent constructs, including Aboriginal courts that have been established and tested with outstanding success in a number of jurisdictions. Aboriginal court pilots in Australia have all reported remarkable reductions in recidivism rates, compared with other courts, and success in addressing the behaviour of pertetrators[8].

The amendments may also threaten the role of community justice groups and the contributions made by communities to the sentencing process. For example, in Queensland, ss.9 of the Penalty and Sentences Act provides:

> "(2) In sentencing an offender, the court must have regard to –
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> (o) If the offender is an Aboriginal or Torres Strait Islander person – any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example –
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> (i) the offender's relationship to the offender's community;
>
> (ii) any cultural considerations; or
>
> (iii) and considerations relating to programs and services established for offenders in which the community justice group participates."

The Law Council is advised that these initiatives have strengthened community governance in Indigenous communities by vesting greater authority in community elders[9]. The authority of community elders is of great importance to the social cohesion of many Aboriginal communities, particularly in remote areas where basic services, including police forces, are insufficient or non-existent.

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[8] For example, see I.Potas, J.Smat & G.Brignell, *Circle Sentencing in NSW: Review and Evaluation*, Judicial Commission of NSW.

[9] Discussion in *Trends & Issues in Crime and Criminal Justice – Indigenous courts and justice practices in Australia,* "No. 277: Indigenous Courts and Justice Practices in Australia", May 2004, Australian Institute of Criminology. Available at http://www.aic.gov.au/publications/tandi2/tandi277t.html

It is submitted that if community governance structures are undermined or allowed to deteriorate, the problems of violence and abuse in Aboriginal communities may increase.

ALRC Recommendations

In its report 'Same Crime, Same Time: Sentencing of Federal Offenders', the ALRC considered the sentencing of Indigenous offenders, particularly in view of the role of cultural background evidence in court proceedings. The ALRC made the following recommendations:

> **"Recommendation 29–1** The ALRC affirms its commitment to the recommendations made in ALRC 31, *The Recognition of Aboriginal Customary Laws* (1986) in so far as they relate to the sentencing of federal Aboriginal or Torres Strait Islander (ATSI) offenders. In particular, without derogating from international human rights principles applicable to sentencing decisions, the ALRC affirms its commitment to the recommendations that:
>
> (a) legislation should endorse the practice of considering traditional laws and customs, where relevant, in sentencing an ATSI offender; and
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> (b) 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.
>
> **Recommendation 29–2** The ALRC supports the recommendations made by the *Royal Commission into Aboriginal Deaths in Custody* (1991) in so far as they relate to the sentencing of federal ATSI offenders. In particular, the ALRC supports the following recommendations:
>
> (a) sentencing and correctional authorities should accept that community service can be performed in many ways, and approval should be given, where appropriate, for ATSI offenders to perform community service work by pursuing personal development courses (Rec 94);
>
> (b) judicial officers and other participants in the criminal justice system whose duties bring them into contact with ATSI people should be encouraged to participate in appropriate cross-cultural training programs developed after consultation with appropriate ATSI organisations (Recs 96, 97);
>
> (c) governments should take more positive steps to recruit and train ATSI people as court staff and interpreters in locations where a significant number of ATSI people appear before the courts (Rec 100);
>
> (d) an appropriate range of properly funded sentencing options should be available, and ATSI communities should participate in the development, planning and implementation of these programs (Recs 109, 111, 112, 113);
>
> (e) departments and agencies responsible for non-custodial sentencing programs for ATSI offenders should employ and train ATSI people to take particular responsibility for implementing such programs and educating the community about them (Rec 114); and
>
> (f) corrective services authorities should ensure that ATSI offenders are not denied opportunities for probation and parole because of the lack of infrastructure or staff to monitor such orders (Rec 119)."

The Law Council notes that the amendments being proposed in the Bill run directly contrary to these recommendations, which are based on a substantial body of research and consideration of the unique circumstances of Indigenous people in the criminal justice system.

It is worth noting at this point that there has not been significant progress since the *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC), which found that:

> "*Aboriginality played a significant and in most cases a dominant role in their being in custody and in dying in custody."*[10]

This trend continues today. Aboriginal people are 27 times more likely than non-Indigenous Australians to come into contact with police, a factor which makes the changes to provisions affecting bail highly significant. Indigenous Australians are also 11 times more likely than non-Indigenous people to be incarcerated[11]. Between 2000 and 2004, the rate of detention increased by 11 per cent for Aboriginal males and by 25 per cent for Aboriginal females[12].

It is also clear, as outlined in the attached submission, that average prison terms for indigenous people have increased since the findings of the RCIADIC were released, a fact which runs contrary to assertions by proponents of the Bill that Indigenous people are treated more leniently than non-Indigenous people.

The Law Council believes that the amendments, if adopted nationally, will increase both the rate of incarceration of Indigenous people in prisons and on remand – particularly young people – and this, in turn, could very well lead to a corresponding increase in Aboriginal deaths in custody.

The Government, in its second reading speech to the House of Representatives, stated that:

> *"The recommendations of the Royal Commission into Aboriginal Deaths in Custody were considered during the formulation of the amendments in this bill. The Australian Government remains concerned about Aboriginal deaths in custody and high incarceration rates, but we are particularly concerned about the high levels of family violence and abuse in Indigenous communities. The Government wants to ensure that proper sentences are given to offenders and that the law covering such crimes reflects their seriousness."*

The Law Council submits that, given the lack of progress made since the RCIADIC and a complete lack of evidence that Indigenous people are treated more leniently than non-Indigenous people by Australian courts, the proposed amendments should not proceed.

The Law Council notes that the Government proposes to implement the Bill as part of a broader approach to addressing violence and child abuse in

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[10] *Royal Commission into Aboriginal Deaths in Custody*, Final Report, page 1.
[11] Productivity Commission, *Overcoming Indigneous Disadvantage: Key Indictors 2005*, Commonwealth of Australia, page
[12] Ibid.

Indigenous communities, which will include community legal education and judicial cultural awareness training. While those initiatives are supported by the Law Council, the benefits of a judicial cultural awareness training would be largely defeated by the Bill, which will limit the extent to which judicial officers may utilise that knowledge in sentencing or bail proceedings.

Protection of the community

The Law Council submits that protection of the community can be achieved without restricting the rights of Indigenous people and Australians of particular ethnic origin under the Australian legal system. Rather than preventing courts from considering relevant aspects of an offender's conduct, the Law Council respectfully suggests that the Senate Committee explore ways in which competing concerns can be balanced.

The Law Council considers that ss15AB(1)(a) and 15AB(2) are sufficient to ensure that the court is gives adequate weight to the interests of the victim, potential witnesses and the community when determining bail applications.

It is noted that sentencing errors are a reasonably rare occurrence and are not limited to cases involving Indigenous offenders or offenders of other ethnic origins. However in all circumstances and jurisdictions, DPP policy provides that the DPP will appeal against sentences considered to be manifestly inadequate. The Law Council submits that the structure of the appeal system is sufficient to assuage concerns about appropriate sentencing.

Summary

The Law Council's submissions are summarised as follows:

- the Bill should not be passed, as it will place an unnecessary fetter on the discretion of the judiciary and result in discrimination against Aboriginal people and people of multicultural descent;

- If the Bill is to be passed, proposed ss.15AB(1)(b) and 16A(2A) should be excised;

- the Senate Committee should consider the available evidence, which contradicts claims by many commentators that Indigenous people receive 'special treatment' under the Australian criminal justice system;

- if implemented, the Bill will have significant negative impacts on Indigenous people and other cultural minorities; and

- the amendments will not be effective in preventing or reducing violence in Aboriginal communities, but will increase rates of indigenous incarceration and limit sentencing options for courts attempting to address recidivism and Indigenous disadvantage under the Australian legal system.

Further information and analysis, which debunks claims that Indigenous people are treated leniently, or that limiting judicial discretion is justified, is set out in the attached submission.

If you have any queries regarding this submission, please contact Nick Parmeter on (02) 6246 3715 or nick.parmeter@lawcouncil.asn.au.

Yours sincerely

Peter Webb
Secretary-General

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