Law Council
OF AUSTRALIA

NP:1625

Ms Jackie Morris
Acting Secretary
Legal and Constitutional Committee
The Senate
Parliament House
Canberra ACT 2600

Dear Ms Morris

Responses to Questions on Notice

Thank you for your email dated 3 October 2006, setting out questions on notice arising from the Law Council of Australia's witness statements and submissions to the Senate Legal and Constitutional Committee regarding the *Crimes Amendment (Bail and Sentencing) Bill 2006* .

I am pleased to provide the the **attached** responses to those questions on notice.

If you or the Senate Committee members have any further queries regarding these matters, or any of the submissions made by the Law Council concerning the Bill, please do not hesitate to contact me.

Yours sincerely

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Law Council of Australia

RESPONSES TO QUESTIONS ON NOTICE

Q1—Mr Parmeter—*I will add to that by referring to a case that I have outlined in the COAG submission called the Queen v Gondarra, which was an unreported decision in the Northern Territory but is a significant example of what we are talking about. The man concerned was convicted of arson after burning down his own house, and afterwards he was essentially allowed to complete a chamber of law, which was a significant aspect of his rehabilitation. Those are the sorts of sentencing options which will be cut off by this legislation.*

Senator TROOD—*Do we know whether or not he has repeated the offence or anything like it?*

The offender in *the Queen v Gondarra* was sentenced by Southwood J in the Northern Territory Supreme Court, as follows:

> "I sentence you to three years imprisonment. The sentence is to be suspended forthwith on conditions that:
>
> (1) The offender is to be under the supervision of the Director of Correctional Services or his delegate for a period of 12 months.
>
> (2) The offender is to complete the third stage of the chamber of law or Ngarra.
>
> (3) Save for when the offender completes the third stage of the Ngarra and is to reside at Galiwinku, the offender is to reside at Barrkira or otherwise as reasonably directed by the Director of Correctional Services or his delegate for a period of 6 months.
>
> (4) The offender is to obey the reasonable directions of the director of Correctional Services or his delegate as to his employment, whether it be CDEP or for the Galiwinku Community Incorporated or otherwise for a period of 12 months.
>
> Pursuant to s 40(6) of the Sentencing Act, I specify that the offender is not to commit another offence punishable by an order of imprisonment for a period of three years from 14 July 2005."

The Law Council has contacted Northern Territory Correctional Services, which has advised that the offender in that case, James Gondarra, successfully completed his period of direct supervision on 14 July 2006. Presently, there are no matters pending hearing for Mr Gondarra, indicating that he has complied with the conditions of his parole and has not re-offended since his conviction for arson on 15 July 2005.

The North Australian Aboriginal Justice Agency Ltd (NAAJA) has advised that Mr Gondarra completed the third stage of his Chamber of Law in September 2005. The Galwinku community invited 8 members of the NAAJA and a number of other parties to attend a traditional ceremony marking the completion of the Chamber of Law by Mr Gondarra.

Q2 - *Do we have examples of groups in our community other than Indigenous people whom this bill will impact upon? You have given one example of the person with an Italian background; do you have others?*

There are a number of cases in which a non-Indigenous offender's cultural origins, customary laws or cultural practices have been considered relevant in the sentencing process. Most of the cases referred to below are relevant to the impact of the bill, if adopted uniformly by states and territories as ultimately intended. This is the context in which the particular example of the person with the Italian background was given.

It is noted that the Bill under consideration is likely to have the most significant direct impact in relation to those from multicultural backgrounds. There are limited circumstances in which an offenders' cultural background will be relevant to the commission of an offence and, where those matters are considered, the weight given by the court will vary.

The case examples below largely consider the application of cultural background evidence to offences in all jurisdictions. Most commonly, the cultural background of an offender has been raised as relevant to the plea of provocation, as a partial or total defence to a charge of murder, manslaughter or assault. However, in all cases it is clear that the court has only given weight to the cultural background of an offender that was appropriate, having regard to all relevant facts.

Provocation

The example given involving an Italian offender was *Masciantonio v R* (1995)183 CLR 58. That case has been summarized briefly in the Law Council of Australia's submission to the Senate Committee and outlines the common law principles by which a plea of provocation by an offender of different cultural origins is examined.

The test for provocation set out in *Masciantonio* is as follows:

1. the offender's powers of self-control are assessed by reference to objective standards of behaviour for an ordinary person of that person's age and maturity;

2. then the gravity of the conduct said to constitute the provocative behaviour is assessed by reference to the relevant characteristics of the accused, including race, ethnicity and cultural background.

If the judge is satisfied that the conduct is sufficient to enable an ordinary person to form the view that the offence can be downgraded to manslaughter, it will be left to the jury to determine whether the provocative behaviour was sufficient to cause a person, bearing the specific characteristics of the offender, to lose control to the extent claimed by the offender. This approach has been applied in subsequent cases involving offenders of different cultural origins.

R v Tuncay [1998] 2 VR 19

The offender was charged with the murder of his wife. Both were of Turkish background. The victim had told the offender that she intended to leave him and take their children because of his drinking, saying she would look for a man who adhered to the religious beliefs of Islam. The offender begged her not to leave, saying he could not live without her and the children. She responded by saying "gebher", which was interpreted to mean "I would be free of you that way". The accused then killed his wife.

At trial, the court allowed the jury to consider the issue of provocation and a conviction for murder resulted. The Court of Appeal upheld the conviction and found that the issue of provocation should not have been left to the jury, as "no reasonable jury could have concluded that any incident of the behaviour by words or conduct of the deceased could have caused an ordinary person to form an intention to inflict serious bodily harm or death".

R v Abebe (2000) 1 VR 429

The offender, a man of Ethiopian origin, was convicted of murder by stabbing of his ex-wife's lover. The victim was also Ethiopian and the offender's wife was Eritrean.

At trial, the offender pleaded guilty, but argued provocation on the grounds that the behaviour of his ex-wife and the victim was contrary to Ethiopian custom. He alleged that rumours had spread in the Ethiopian community which had caused him deep shame. He also claimed that, moments before he attacked the victim, his wife had told him that she and the victim were lovers and they planned to live together, at which time the victim smiled at him in an arrogant and condescending manner.

Following his conviction, the offender appealed on the basis that the trial judge had failed to properly direct the jury by not explaining that, in consideration of the gravity of the allegedly provocative conduct, the accused was entitled to have brought into consideration his ethnicity and background, and that of his wife and the deceased, as well as evidence of Ethiopian cultural values when considering

the extent of the offender's shame and humiliation. The appeal was allowed, the conviction quashed and a re-trial was ordered.

R v Leonboyer [2001] VSCA 149

The offender, a man of Chilean background, was convicted of the murder of his fiancée, who was of Columbian extraction, after stabbing her 22 times with a knife in their bedroom. The offender pleaded guilty and raised the defence of provocation, claiming that his Chilean cultural values had instilled a strong sense of superstition and jealousy in his relationship with the deceased. The deceased had confessed to him of infidelity, stated that she did not intend to be faithful to him in the future and had apparently offended him with taunts.

The trial court, and subsequently the Court of Appeal, dismissed the offender's claims. It was noted that there was little evidence that the offender was in a position of particular vulnerability to the taunts of the deceased and the cultural evidence relied upon by the offender said very little as to the gravity of the alleged provocation in relation to him.

R v Mazin Yasso [2004] VSCA 127

The offender appealed against a conviction for the murder of his estranged wife on the grounds that the trial judge had erred in not leaving the issue of provocation to the jury to determine. The offender and his wife had been separated for some time and his wife had apparently commenced a new relationship with another member of the Chaldean Iraqi community.

The offence occurred when the offender had arranged to meet his wife and collect his passport and some other belongings. An argument ensued and he stabbed his wife to death, allegedly after discovering that she had commenced another relationship. It was further alleged by the offender that she had spat on him during the course of their dispute.

The offender and the deceased had lived in Iraq for the majority of their lives. Evidence of the strict traditions and customary rules observed by members of that community was presented to the Court of Appeal. It was noted that the customs had existed for hundreds of years, placing great importance on marital fidelity. Witness testimony was made that great shame and humiliation was caused to a man in the position of the offender, who is seen as responsible for the actions of his wife. It was stated that it is not uncommon for a man to beat, or even kill, his wife if she is unfaithful. The act of a wife spitting on her husband was also said to be an "unthinkable insult" of such gravity that there "was an expectation that the wife would be beaten or killed, if not by her husband then by her family".

The court ruled that the jury should have been left to consider provocation, as it could not be determined that, on a view of the facts most favourable to the

offender, a reasonable jury would be satisfied beyond reasonable doubt that the attack had been unprovoked. The sentence was quashed and a retrial ordered.

Other cases involving cultural background

R v Ng Yun Choi (1991) Unreported, NSW Supreme Court, 4 September 1990

This case concerned an offender of Vietnamese background who spoke very little English. The NSW Supreme Court determined that the offender's lack of English was a relevant factor in sentencing, as it would impact on whether the offender would experience isolation in prison.

R v MSK, R v MMK, R v MAK [2006] NSWCA 237

This case concerned 3 brothers of Pakistani origin who committed 2 gang rapes, culminating in a range of offences, including aggravated sexual assault, common assault and indecent assault. The offences took place in Sydney between 2001 and 2002. At the time of the offences the perpetrators were aged between 15 and 23 and their victims were aged between 13 and 14.

MSK, who was aged 23 at the time of the offences, raised in mitigation that he had been brought up in "the most fiercely Muslim part of Pakistan", in a town near the border with Afghanistan, "where a combination of strictly Islamic mores and patriarchal tribal values leads to the domination of 'a stern puritanical Muslim tribal culture'." It was argued that, as a result of his cultural background, MSK viewed promiscuity by a woman to be completely unacceptable, such that the woman should be punished by way of disfigurement, or even killed, by her father or brothers to restore family honour.

It was noted that male dominance over women in Pakistani society is re-enforced by the legal system, which makes it extremely difficult for women to be protected against domestic violence, rape or false accusations made against them.

This claim was made in conjunction with a plea that MSK was suffering from a mental disorder which, combined with his cultural beliefs, led him to believe that what he was doing was not wrong.

The NSW Court of Appeal stated, in relation to cultural background evidence:

> "The argument that a cultural background such as that disclosed by the evidence in the present case might bear upon the sentence for sexual assault is unpalatable, but is worthy of measured consideration and cannot be peremptorily dismissed."

The court ultimately found that the offenders "had sufficient exposure to the Australian way of life to be aware that the place occupied by women in the traditional culture of his area of origin is far removed from our social norms".

Hidden J concluded that "[The offender] can have no doubt that to treat those two young women in the manner he did was utterly unacceptable".

R v Vu Quang Hy [2005] NSWCCA 362

The offender was convicted, along with 3 accomplices, of trafficking and importing 52 kilograms of MDMA, heroin in a bottle of Bailey's Irish Cream and various amphetamines through the post. The offender's role in the enterprise was described as that of a courier. The offender was sentenced to 12 years with a non-parole period of 8 years.

All offenders appealed against their sentences, largely due to the disparity in sentences handed down to each and due to the failure by the trial judge to properly consider the mitigating circumstances raised by the offenders under s.16A(2) of the *Crimes Act 1914* (Cth).

A range of mitigating factors were alleged, including that the offender pleaded guilty, was suffering from a mental disorder at the time of the offence and that his cultural background was a key factor in his decision to become involved in the enterprise. It was argued by offender that he felt obliged to play some role in the enterprise as he had been asked to do so by his father-in-law. He gave evidence that he found it difficult to refuse his father-in-law's request because in the past his father-in-law had assisted him in getting married and commencing a laundry business. He noted that in his own family, discipline had been very strict and, when his father-in-law went to Vietnam to see his parents, they had told him that "the power of the family, all the disciplines in the family was given to him".

The court accepted this was a relevant consideration in the sentencing process, along with a range of other factors raised in the case, which effectively mitigated the offender's role in the enterprise compared with his accomplices. Ultimately, the offender was sentenced to 8 years imprisonment, with a non-parole period of 5 years and 3 months.

Observations

- It is noted that, in each of the cases referred to above the offender did not and could not claim that their customary laws or cultural practices excused, justified, authorized or required them to engage in the conduct with which they were charged. Indeed, the majority pleaded guilty and sought to mitigate the seriousness of their offending by reference to a range of mandatory considerations set out under the criminal statute in the relevant jurisdiction. In each case, cultural background was just one factor considered and, even where the court gave cultural background little or no weight, it was still regarded as a relevant consideration in the sentencing process.

- In each of the above cases, it is apparent that prohibiting consideration of the "cultural practices or customary laws" of the offender would not prevent consideration of the cultural factors relied upon in mitigation of the offences. None of the offenders in any of the cases alleged that they were following customary law or observing a cultural practice (unless speaking a foreign language is regarded as a cultural practice). Rather, it was claimed by offenders that their cultural background had engendered in them a certain attitude toward women or exacerbated their sense of shame and humiliation, precipitating their loss of control or decision to breach the law.

- It is noted that in evidence provided by the Attorney-General's Department at public hearings on 29 September 2006, it was suggested the amendments would apply equally to Anglo-Australians, who may argue that their cultural values of 'mateship' led them to commit an offence. The Law Council has been unable to locate any case relating to an offence by an Anglo-Australian in which such a claim has been made and, indeed, the likelihood of mitigation in those circumstances appears remote in the extreme.

- Accordingly, it is unclear what impact, if any, the proposed amendments will have on any perpetrator of a serious violent crime or drug offence. Even if adopted by other jurisdictions, the Law Council believes that the impact of the amendments will be largely restricted to Indigenous offenders, whose customs and beliefs are more accurately described as 'customary laws and cultural practices'.