Human Rights and Equal Opportunity Commission

Aboriginal Torres Strait Islander Social Justice Commissioner

3 October 2006

Senator Marise Payne
Chair
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT

Dear Senator Payne,

Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006

The Commission provides the following information to the Committee in response to questions taken on notice when I appeared before you on 29 September 2006.

1. Answer to question by Senator Trood

Senator Trood asked whether the Commission was able to suggest another way that the Bill might respond to the COAG agreement of 14 July 2006.

As I indicated to the Committee in my oral evidence, the Bill might do this by containing a more straightforward statement that makes it clear that family violence and abuse is a breach of the human rights of women and children and that it is not something that is tolerated or condoned by the criminal codes of our country. This is far preferable to a general attempt to exclude from all cases consideration of cultural background and practice and customary law.

While care would need to be taken in drafting an appropriate provision, the Commission suggests its effect should be as follows:

> Cultural practice and/or customary law shall not be taken into consideration in sentencing where it is inconsistent with universal human rights and fundamental freedoms. In particular, cultural practice and/or customary law shall not be recognised in a manner that condones family violence or abuse, particularly against women or children.

2. Answer to questions by Senator Payne

(a) Proposed s 15AB(1)(a)(ii)

Senator Payne asked for the Commission's view on the proposed s 15AB(1)(a)(ii) which requires a court to take into account, in considering whether to grant bail, the potential impact

of granting bail on ‘any witness, or potential witness, in proceedings relating to the alleged offence, or offence’.

The Commission does not object to this specific aspect of the Bill. It is appropriate for a court considering whether to grant bail to take into account the protection of victims, witnesses and other members of the community. The nature of the offence with which a person has been charged and the fact they may intend to return, while on bail, to a remote community will be relevant to this decision.

The Commission notes, however, that this part of the Bill may be unnecessary. State and Territory Courts are required by their respective laws to take into account the protection and welfare of the community when granting bail: see s 24 *Bail Act* (NT); s 22 *Bail Act 1992* (ACT); s 32 *Bail Act 1978*(NSW); s 16 *Bail Act 1980* (Qld); s 10 *Bail Act 1985* (SA); s 4 *Bail Act 1977* (Vic); sch 1, part C *Bail Act 1982* (WA); ss 34-5 *Justices Act 1959* (Tas).

(b) The recommendations of the Royal Commission into Aboriginal Deaths in Custody

Senator Payne also sought the Commission’s views in relation to the consistency between the Bill and the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) relating to sentencing and bail.

The Commission notes at the outset that nothing in the reports of the RCIADIC suggested that offences involving family violence or abuse of women and children should be treated less seriously because the perpetrator may be an Indigenous person.

The RCIADIC concluded that the high rates at which Aboriginal people were dying in custody was reflective of their high incarceration rates and called for reform on a number of levels to deal with this.

A fundamental theme of the RCIADIC reports was that empowerment and self-determination were vital to reduce the number of Aboriginal people in custody.

Most relevantly to the present Bill the RCIADIC report recommended that:

- There be consultation between sentencing authorities and Aboriginal communities and organisations in sentencing – both generally and in specific cases subject to preserving the civil and legal rights of offenders and victims (recommendation 104).

- In reviewing options for non-custodial sentences, governments should consult with Aboriginal communities and groups (recommendation 111)

While a detailed consideration of Aboriginal customary law was beyond the scope of the RCIADIC, Commissioner Johnston indicated his view that the Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Law (ALRC 31) was a ‘significant, well-researched study’ (see RCIADIC recommendation 219).

The RCIADIC also recognised the important role that local, functional recognition of Aboriginal law through initiatives such as community patrols and community justice projects can play in empowering Aboriginal communities and individuals and addressing problems in the relationship between Aboriginal people and the criminal justice system (see Chapter 29 of the National Report of the RCIADIC).

These recommendations and findings of the RCIADIC are consistent with the Commission’s view that positive engagement with Indigenous customary law and practice is essential to

improving the way in which Indigenous people relate to the criminal justice system. Such engagement is also essential to greater self-governance by Indigenous people generally.

It is through self-governance that real solutions to the problems that face Indigenous people will come. The blanket rejection of customary law in the manner proposed by this Bill can only be a step backwards and is inconsistent with the finding and recommendations of the RCIADIC.

The failure, in the introduction of this Bill, to consult with Indigenous people who practice customary law is also contrary to the findings and recommendations of the RCIADIC which emphasised the importance of consultation with Indigenous people.

Thank you for allowing the Commission this opportunity to provide this further information for the Committee's consideration.

Yours sincerely,

Tom Calma

Aboriginal and Torres Strait Islander Social Justice Commissioner and
Acting Race Discrimination Commissioner