Reply To: Adelaide

Your Reference: Our Reference:

26th September 2006

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

Dear Ms Morris

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

The Aboriginal Legal Rights Movement makes a submission to the Committee in its Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006.

This year 2006 marks the twentieth anniversary of the release of the Australian Law Reform Commission's Report No 31 on the Recognition of Aboriginal Customary Laws.

For twenty years that report has been universally praised but very little has been achieved in terms of implementing its very sensible measured and reasonable recommendations.

It is sadly ironic that in the twentieth anniversary of the Report, the Commonwealth Government has sought to limit the recognition of Aboriginal Customary Law through the Crimes Amendment (Bail and Sentencing) Bill 2006. What follows is a critique and commentary on the Bill as it was presented.

Clause 3 of the Bill

Clause 3 would enact Section 15AB which covers matters to be considered in relation to bail applications. Sub-sections 1 paragraph (a) and sub-paragraph (i) and (ii) and subsection (2) are innocuous provisions. No submission is made in relation to them other than that they put into statutory form existing common law principles in relation to bail ; they cover matters that are regularly taken into account by Judges and Magistrates on a daily basis in relation to bail applications.

Sub-paragraph (b) is similar to the provisions found in clause 4 Section 16A(2A) in relation to sentencing. Sub-paragraph (b) prevents a court from taking into account customary law or cultural practice *as a reason for excusing justifying etc* alleged criminal behaviour, in relation to a bail application for the offence charged.

Sub-paragraph (b) is an unusual provision. Matters of mitigation are not normally taken into account in relation to bail applications, since the bail discretion, may be applied whether the person would be pleading guilty or not guilty and is made in the context of the presumption of innocence. In that circumstance, a provision which prevents a court from taking into account customary law or cultural practice *as a reason for excusing*

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justifying etc alleged criminal behaviour, in relation to a bail application for the offence charged may not be relevant to the consideration of bail in any event.

The circumstances in which customary law matters arise in bail applications were discussed in some detail by the Australian Law Reform Commission in its report number 31 on the Recognition of Aboriginal Customary Law, at paragraph 495 pages 356 and 357of the Report. The whole of the report of the Law Reform Commission in relation to this case is commended to the Committee as worthy of its detailed consideration

The Report discusses the case of *R v Joseph Murphy Jungarai (1981)9NTR30*, the decision of the former Chief Justice of the Northern Territory, Justice Forster on an application for bail. The Law Reform Commission summarises the case as follows.

> "Jungarai was charged with murder after he stabbed another Aboriginal man in Tennant Creek. He was drunk at the time, so much so that he could not afterwards recall what happened; medical evidence suggested that he was suffering from alcohol induced amnesia. The attack on the victim apparently arose from resentment over attention Jungarai believed the victim had paid to one of his wives. Jungarai was committed to trial, bail being refused by the Magistrate on a further application to the Northern Territory Supreme Court, Chief Justice Forster ordered his release on bail."

We reproduce the Law Reform Commission's quotation of Chief Justice Forster's reasons for judgment in granting bail as follows;

> Whatever may be the defences available to the accused under the law of the land and whether the appropriate verdict after the trial may be guilty of murder, guilty of manslaughter or not guilty, it is plain that according to Aboriginal law and custom the accused is held responsible for [the victim's] death and must accordingly be punished. The precise tribal punishment appropriate for the accused is not absolutely certain, but the strong probability is that it will consist of a single ceremonial spearing in the leg followed by banishment into the bush for a period to be fixed in order to remove from the community a possible focus for trouble ... The extended families of the deceased and the accused are in a state of mutual hostility which will only cease when the whole matter is 'finished up' by the accused suffering the appropriate tribal punishment. The accused is willing, indeed anxious, to undergo this punishment and feels deeply his inability to do so in order that peace between the families may be restored ... As a result of the court proceedings the accused will either be convicted of murder or manslaughter or will be acquitted. If he is convicted, it is likely that he will be in prison for a period which will satisfy the banishment requirement, even though this is a result of the court's action rather than the communities. If he is acquitted, or, having been convicted, is dealt with in such a way that he is not in prison. the accused will return to the community and may then be banished if it is thought necessary to do so to avoid trouble. Whatever may happen as to this aspect, it is almost certain that until the spearing has taken place the matter of retribution or pay back in Aboriginal terms will be unresolved and the community will be ill at ea se and serious trouble may flare up at any time. It is equally certain that once the spearing has occurred, the unease and the probability of serious trouble arising out of the killing will be at an end. In these circumstances and notwithstanding the fact that persons charged with murder are normally not allowed to be released on bail I considered it right to make the order which I did make. This should not be regarded as a precedent in the sense that the mere assertion of similar facts from the bar table will be sufficient ... to justify a similar order in every case. There must be credible evidence to support such a course being taken ... Aboriginal customs vary greatly from place to place and, of course, the circumstances of killings must differ ... I should also say that for the purpose of dealing with the application for bail I express neither approval nor disapproval of the course proposed to be taken by the family of the deceased, endorsed as it is by the community — including the family of the accused. Whether or not the proposed action constitutes an offence under the law of the land seems to me, for present purposes, to be irrelevant. The order for release on bail should not be interpreted as necessarily involving approval of what will happen nor, of course, should my failure to approve it be interpreted as disapproval. What will almost certainly happen is simply, for present purposes, an important fact to be considered

His Honour was at pains to point out further that his decision in the matter of Jungarai was not to be regarded as a precedent for future cases but was an unusual and special case, which justified the granting of bail.

ALRM commends to the Committee the analysis of Jungarai in paragraph 506 of the ALRC Report page 366vol 1.

We make the following points in relation to the proposed Clause 15AB: and the interaction of subparagraphs (1)(a) and (b).

(1) A requirement that a court take into account the potential impact of granting on bail on alleged victims or witnesses or potential witnesses will, in customary law cases involve situations where the victims or the alleged victims and their families will actively wish for the accused to be released upon bail so that he may undergo in the future consensual customary law traditional punishment from them, the victims.
(2) As such, the effect of granting bail in a customary law case may potentially have a beneficial impact upon victims for that reason and have the effect of restoring peace to families which were in dispute as a result of the offence which gives rise to the bail application.
(3) These considerations in favour of granting bail could however potentially contradict the effect of subparagraph (b) and the interaction of subparagraphs15AB (1) (a) and (b) is thus difficult to understand.
(4) Sub-paragraph (b) on its face prevents the court from taking into account customary law or cultural practice *as a reason for excusing justifying etc* alleged criminal behaviour, in relation to a bail application for the offence charged. If as we assert taking into account customary law for that purpose is not entirely relevant to the Bail application then, we must conclude that either the sub paragraph is too narrowly drawn to achieve what was intended, or else that it is not clear what actually was intended by the provision.
(5) If it were enacted in its present form, a court considering the operation of paragraph 15AB might conclude that bail should be granted in such a case because of the favourable effect of granting bail upon the victim and that sub-paragraph (b) had no, or little effect effect, because the customary law or practice as relevant to mitigation of penalty was not relevant to a bail application in relation to future payback in any event. Does the Parliament intend that the court be prevented from taking into account customary law or cultural practice, simpliciter? ALRM submits that should not be done.
(6) The real issue in bail applications which involve traditional punishment is the implied condonation of future punishment for the sake of peacekeeping, and the question whether courts should condone such punishments of an accused person, even if consensual whilst he or she is on bail. It may be observed that Chief Justice Forster was somewhat coy on the topic in *Jungarai*, and it was probably for that reason that His Honour did not want his decision to be regarded as a precedent of general application.

It is submitted that the Committee should recommend to the Parliament that Section15AB be withdrawn and that more detailed consideration to be considered to the policy objectives, which the Parliament wishes to achieve. It is further submitted that the cautious approach of Forster CJ in *Jungarai* and the ALRC in paras 503 & 506 of the Report is appropriate to be followed.

ALRM also commends to the Committee section 20 of the Draft Customary Law Recognition Bill, as drafted by the ALRC. The point we draw from the ALRC Bill is a simple one, if a court is obliged to consider customary law in the circumstances of a bail application, that does not mean that allowing for customary law is a compelling consideration in consideration of bail, or that the court has to conclude that the evidence brought forward is compelling as to the existence or appropriateness of the customary law invoked.

ALRC Report para 503. Consent to Traditional Punishments. If this view is accepted by the Australian courts, then virtually no case of consensual traditional punishment involving wounding or beating (except corporal punishment imposed by a parent or a person *in loco parentis*) will be lawful at common law It is not clear whether the Australian common law goes as far in the direction of discounting consent as the English Court of Appeal has done. But (with the exception of surgical procedures) consent will not justify the deliberate infliction of grievous bodily harm, or of any permanent or serious injury. This was the view taken by Justice Nader in what is apparently in the only Australian case involving traditional punishment where consent has been expressly raised as a defence It is difficult to avoid the conclusion that the common law has shown a measure of ethnocentricity in accepting the validity of consent to quite extreme forms of deliberate physical violence in some sports, while (probably) rejecting consent to the infliction of force in the course of indigenous traditional punishments But the problem is not to be resolved by the application or reform of the law relating to consensual assaults. In some cases, the extent of traditional punishment is likely to go beyond anything that could be justified on the basis of the victim's consent. On the other hand consent is clearly relevant, in relation to bail in sentencing, and in prosecution policy. The Commission has been informed of the policy of the South Australian police in relation to 'spearing' as a form of tribal punishment:

> Providing the spearing relates to strict tribal custom and no complaint is made to police by the victim, a prosecution is not pursued.

In fact there have been few, if any, prosecutions of a traditionally oriented Aborigine for inflicting a punishment such as spearing which did not lead to the death of or serious injury to the victim, and this is true not only of South Australia but elsewhere. The inference is that the process leading to such punishment is substantially a voluntary one, and that complaints to the police in such cases are not made or pursued. As was pointed out by the Commonwealth Department of Aboriginal Affairs:

> Traditional sanctions — spearing and other assaults — are still widely accepted in, for example, communities in Central Australia, and the use of these sanctions often does not result in charges being laid. In effect, the communities and the police give some de facto recognition to certain aspects of customary law. Those inflicting 'traditional punishments' generally know that they risk charges under Australian law but they and their communities have a reasonable expectation that only serious woundings are likely to result in court proceedings

Para 506. Refusing Bail to Prevent Customary Punishments. Somewhat similar principles apply in the context of discretions with respect to bail. A court should not prevent a defendant from returning to his or her own community (with the possibility or even likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for release on bail are met. In fact it is not unusual for bail to be granted by police or magistrates to enable a defendant to return to his or her community to resolve through traditional processes the dispute the offence has caused. A rare reported decision to this effect is that of Chief Justice Forster in *Joe Murphy Jungarai* Of course, the other conditions for the grant of bail must be met: the defendant should not be a risk to the community and there must be sufficient assurance that he or she will not abscond to avoid trial But, subject to these requirements, the courts will not necessarily decline bail in these kinds Of cases. To do so would be a form of paternalism and might, as Chief Justice Forster pointed out, exacerbate the situation in the defendant's community

ALRC Draft Customary Law Recognition Bill

Bail

20. Where a person or body has, under a law of the Commonwealth or a law of a State or Territory, power to grant bail to a person (in this section referred to as the accused) in respect of an offence, the matters that the person or body shall take into account in determining whether to grant bail to the accused and the conditions on which bail is to be granted include, if the accused or a victim of the offence is a member of an Aboriginal community, the customary laws of that community so far as they are relevant.

Clause 4 of the Bill

Clause 4 of the Bill, the proposal to amend subsection 16A(2) (m) *Crimes Act* would remove 'cultural background' of an offender from compulsory consideration by a sentencing court, yet it would not of itself prevent a court from considering cultural background of its own motion. There are very compelling reasons why, in the ordinary course, a sentencing court would consider cultural background in cases where it was relevant to the assessment of the offender and their personal circumstances, as a factor necessarily relevant to sentencing.

There are also arguments that section 20 the *Crimes Act* is not a Code of sentencing considerations, which a court is compelled to follow religiously, so even if 'cultural background' were removed from compulsory consideration by a court, it could and indeed should be acted upon in appropriate cases.

To that extent, clause 4 of the Bill is otiose, nevertheless we cannot agree with the Explanatory Memorandum that clause 4 removes an "unnecessary emphasis on the 'cultural background"' of convicted offenders.

A starting point is the submission of the Law Council of Australia to the Law Reform Commission of Western Australia Reference on Aboriginal customary law. The Law Council said at paragraph 83 of its submission the following, which we endorse.

> "The Law Council submits that removal of the power of courts to consider all factors relevant to the state of mind of an accused in criminal matters would be inimical to the principles upon which the law in Australia is based. The disposition and circumstances of the accused will always be relevant to the commission of a crime, whether it is murder, assault or trespass. Removing the capacity of a court to consider customary law will not only offend that principle, but will further confuse the Indigenous communities that continue to live by and observe age-old customs and laws."

In relation to the precise relationship between "cultural background" and Aboriginal customary law, we note that the former is a very general category, which the Bill removes from compulsory consideration and the latter is a specific consideration that the Bill removes completely. The courts of Australia have acknowledged that the latter is a necessary corollary of the former. C.f. the Northern Territory case of Minor (1992) 59 ACrimR 227.

We also refer the Committee to the dicta of Justice Brennan, as he then was, in the case of Neal v R reported in (1982) 149CLR at page 326.

> "The same sentencing principals 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.

> That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal."

In accordance with the principles of Neal quoted above, it is our submission that equality before the law implies and requires recognition by courts of cultural difference in relation to sentencing matters. There are three matters in issue here.

Firstly, consideration of cultural background as relevant to sentencing acknowledges the fact that Australia is not a mono cultural society. The fact that cultural diversity exists in Australia implies that a sentencing court, in carrying out its obligation to consider all factors relevant to the person to be sentenced, must consider the subjective disposition and circumstances of that person in any particular criminal matter – which must include in appropriate cases the cultural factors relevant to that very understanding. That is the principle of equality and equal treatment to which Brennan J had referred. To the extent that they would remove that consideration, Clauses 4 &5 of the Bill are, in our submission, contrary to the principles underpinning the *Racial Discrimination Act 1975*.

Secondly it is clear from the dicta of Justice Brennan that these cultural factors are not necessarily factors of mitigation, indeed in certain circumstances, as understood within the person's cultural setting, they may be matters of aggravation.

Further, it is also made clear by Justice Brennan that the weight to be given to such factors, whether it be great or small, is itself a matter to be considered by the sentencing court.

Thirdly the impact of the legislation upon Nunga Courts needs to be considered.

An important development in the improvement of the position of Aboriginal people in the criminal justice system throughout Australia has been the development in the States and Territories of special interest Aboriginal Courts. These courts operate under a variety of names in the States and territories including, Nunga Courts, Koori Courts, Murri Courts, Community Courts and Circle Sentencing Courts. The first such court was started in South Australia in 1999 as the Port Adelaide Nunga Court.

Such State and Territory Courts regularly exercise Federal jurisdiction and sentence offenders under or pursuant to the *Crimes Act* for Commonwealth offences and thus would be affected by the proposed legislation.

The recognition of cultural difference in sentencing is fundamental to the successful operation of such courts. To deprive a sentencing court of the power to consider customary law and to make cultural context a non-compulsory consideration would be to deny these Aboriginal Sentencing Courts the pith and substance of what makes them work so well in the interest of justice and in the interest of Aboriginal Communities.

They are effective in reducing the crime in Aboriginal Communities because they allow for the settlement of disputes within Aboriginal Communities. They allow community members to be heard and to deal with issues that arise in the context of their culture and society. They allow Aboriginal communities to censure and correct wrong doers in their cultural context.

Any attempt to remove or limit sentencing discretions in relation to Commonwealth offences would be detrimental to the operation of this highly successful new justice initiative.

In summary it is our submission that consideration of cultural background is a very broad consideration, which was established by the High Court of Australia in *Neal* and it is ordinarily and properly taken into account by all criminal courts in Australia, whether the cases involve Aboriginal people or persons of other cultural backgrounds. Any proposed amendment to the *Crimes Act 1914* by deleting cultural background from section 16A(2) would be inappropriate and would adversely effect the ability of courts to sentence all ethnic and cultural minority groups as well as Aboriginal people.

Clause 5 of the Bill would add subsection 16A(2)(2A) and (2B).

The effect of subsection (2A) would be to exclude from the sentencing discretion in Commonwealth matters "any form of customary law or cultural practice *as a reason for excusing , justifying, authorising requiring or rendering less serious* (hereafter referred to as the mitigating provision), the criminal behaviour to which the offence relates". Subsection (2B) defines criminal behaviour as (a) any conduct, omission to act, circumstance or result that is or forms part of a physical element of the offence in question and (b) refers to any fault element relating to such a physical element. If enacted, this comprehensive provision would be effective in severely limiting the ability of sentencing courts to take into account customary law or cultural practices in Commonwealth matters.

The enactment of this provision would be a retrograde step and would unfairly disadvantage Aboriginal people. ALRM opposes and recommends against it.

What we have called the 'mitigating provision' needs to be put into its legal and moral context.

1. The common law of Australia has never since the early days of colonisation in NSW recognised Aboriginal customary law as a defence to a criminal charge. In *Walker v NSW* [1994] 126 ALR 321 at 323-4, Mason CJ said:

   > 'Even if it be assumed that that the customary criminal law of Aboriginal People survived British settlement, it was extinguished by the passage of criminal statutes of general application. --- There is nothing in Mabo No2 to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.'

2. Customary law matters have arisen in Australian criminal courts, generally in the context of criminal charges against persons who have purported to act against another Aboriginal person in accordance with the requirements or obligations or rights or duties of their commonly accepted customary law. What might have been allowed, or required or approved of under customary law of that Aboriginal population, is not recognised, in itself as a defence to a charge under an Australian criminal law of general application. However that the person genuinely acted under customary law been properly taken into account as mitigation by the criminal courts of Australia in many recorded cases for the last half century at least.
3. Such claims for the recognition of customary law have always and only been taken into account in pleas in mitigation after a guilty plea or finding of guilt. A plea, which raises customary law issues, is the only level of recognition of

customary law, which the Australian Courts have recognised in criminal cases. As such it is a compromise between ignoring customary law and accepting it as a defence to a charge and inviting a form of legal pluralism in Australia.

4. That compromise was as aspect of functional recognition of customary law, which had been specifically recommended for by the Australian Law Reform Commission in the1986 Report Number 31 on the Recognition of Aboriginal Customary Law.

ALRM puts forward the following propositions as illustrative of the concept of functional recognition as recommended by the ALRC and by Bell and Ditton in their 1980 book "Law the old and the New Aboriginal Women of Central Australia Speak Out"

- Customary law can be complementary to the general law, recognized by the general law but certainly not exempt from the general law. Aboriginal people have recognized that it is inevitable that the need will arise to have access to the Australian law to deal with issues outside their own law.
- It is necessary that scope is allowed for customs to be interpreted, the law must remain flexible in this area to allow for changing circumstances and it is certainly undesirable that these issues are legislated exhaustively.
- Recognition can be given to customary law by adjustments to the law, without necessarily incorporating aspects of customary laws but by accommodating them in practice. Issues can potentially be addressed by administrative changes and guidelines. A wide discretion is needed for this to operate. Protective mechanisms are thus adopted in the legal system.
- The Commission suggested that the approach should be flexible rather than categorical, and must pay particular regard to the practicalities of the situation. Recognition is approached in a functional way, issue by issue, thus allowing Aboriginals to maintain control over their customary laws.
- It must be allowed that there be scope for customary law to evolve and the law to accommodate this. It is desirable that the Australian legal system not recognise Aboriginal Customary Law as a whole, but rather it act as a safeguard in protecting the different values and beliefs that fall within the Aboriginal order. This requires an examination of the context of customary law in Aboriginal society. It is vital that the laws be examined in their social context, especially considering that the main source of the customary law is "the dreamtime" a concept entirely foreign to the Australian general law. It must also be borne in mind that customary laws cannot be divorced from social context.
- The Australian general law must not aid discriminatory and oppressive custom in Aboriginal communities, particularly the undermining of women. The flexibility of the law must allow for interpretation of what the roles of men and women in the Aboriginal community are, free from a bias.
- The balance between men and women in Aboriginal society has been fundamentally disturbed by the operation of the new law, and steps should be taken to administer sensitivity in this area and restore the balance where possible.
- The function of facilitating customary law must always have an underlying moral tone, committed to maintaining order and harmonious relationships within society.
- The effect the Australian legal system has had on Aboriginal society must also be acknowledged, particularly the way in which the operation of Australian law can undermine Aboriginal values.

5. An important aspect of functional recognition is that within the confines of the incongruity between Australian law and customary law, it minimises the effect of double jeopardy. A person may be found guilty of an offence before an Australian Court and be punished, but also be liable for or have already received additional punishment, from relatives of the victim of the offence or their own Aboriginal community. That traditional punishment takes many forms amongst the tribal groups of Australia, it includes corporal punishment by way of spearing and it includes sanctions like banishment. Australian courts have regularly accepted that liability for punishment according to the traditional customary law practices ought to be regarded as a matter of mitigation. A person ought not be punished twice for the same offence. It is upon that basis the courts have on occasions shown leniency towards offenders who are liable to be punished according to traditional law and custom. In so far as the Bill would prevent that practice from continuing, it singles out Aboriginal offenders.

6. Another important aspect of recognising the importance of traditional punishment in sentencing is that it allows for peace making within Aboriginal communities. Peace making within communities is a high priority because it is consistent with the maintenance of Law and Order.

7. The weight to be given to customary law matters is in itself a matter in discretion of the Judge deciding the case; it is one of many factors to be taken into account in the balancing of interests involved in sentencing. It does not create a necessary or mathematical reduction of sentence, indeed if the Court is not satisfied of its importance, or thinks it has been raised in a spurious or opportunist way it does not have to give it any mitigating effect at all. (C.f. the quotation from Justice Brennan above)

8. We note that recent practice has been for courts to require proper evidence from anthropologists and other experts in relation to customary law issues before they are acted upon by the courts. This is a proper development. It ensures that prosecution authorities are able to scrutinise customary law issues before they are accepted by the courts in mitigation of penalty, and they allow also for the courts to be satisfied to an appropriate degree of the veracity of customary claims that are put before them. This is implicit in the judgement of the Full Court of Supreme Court of Northern Territory in the case of Minor reported in (1992) 59 ACrimR 227.

9. Such scrutiny should also remove claims made in court for what has been called "bullshit law" that is opportunist claims for customary law which are made in criminal cases in social contexts of personal, physical and sexual abuse and exploitation. Also contexts and practices that rationalise and maintain substance abuse in communities. Also contexts and practices that maintain inappropriate gendered inequality and exploitation. (see paragraph 7 above)Such scrutiny should not be too conceptually difficult if it is remembered that courts are now regularly making determinations upon parallel claims of customary law in native title claims.

10. Whilst there is no doubt that the Clause 5of the Bill, if enacted would remove the prospect of spurious claims of customary law being approved or acted upon by the courts, it is too draconian and too heavy handed. It would remove from the courts' consideration genuine cases as well.

11. It is submitted therefore that if the Committee wants to achieve a proper policy objective of maintaining of law and order in remote communities it ought to reconsider the ALRC Report number 31 and recognise the value of functional recognition of customary law. At the same time the Committee should recognise that the courts have already understood the need, in appropriate cases to limit or refuse that recognition.

12. The Committee might conclude that a suitable legislative response to the Government's quite appropriate concern over the "high levels of family violence and child abuse in Indigenous communities", would be to legislate to the effect that, in relation to Commonwealth offences, a court should not take into account "any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or rendering less serious the criminal behaviour to which offences of child abuse and family violence relate".

13. Further that the Government might properly negotiate and consult with affected communities as to the breadth of operation of such a law and as to the definitions of offences to which it should be legislated that customary law might not be raised in mitigation of penalty.

14. However to remove the ability of a court to take into account such customary law, including traditional punishment completely, would in our submission be to undermine the principle of equality before the law and to undermine the principle that factors arising by virtue of an offenders membership of an Aboriginal traditional society ought properly to be taken into account in sentencing. To put it another way the proper functional recognition of customary law is an extension of and an aspect of the recognition of cultural background referred to in our submission above in relation to clause 4 of the Bill.

ALRM commends to the Committee the overall approach of the ALRC Report no 31, summarised by the Commission as follows:

Relevance of Aboriginal Customary Laws in Sentencing

• Although the defendant's (or the victim's) consent to traditional Aboriginal dispute-resolving processes (eg spearing) is relevant in relation to bail, in sentencing and in prosecution policy, the recognition of this aspect of Aboriginal customary laws is not to be achieved through the existing law relating to consensual assault or through changes to that law (para 503).

• The courts do already recognise Aboriginal customary laws in the sentencing of Aboriginal offenders, to a considerable degree. In considering reform, it is helpful to build on the existing experience in this field, where necessary reinforcing or elaborating on it (para 491-7, 504).

• The courts have recognised a distinction, which in the Commission's view is fundamental, between taking Aboriginal customary laws into account in sentencing, on the one hand, and incorporating aspects of Aboriginal customary laws in sentencing orders, on the other (para 504). In applying that distinction, the following propositions have been recognised:

• A defendant should not be sentenced to a longer term of imprisonment than would otherwise apply, merely to 'protect' the defendant from the application of customary laws including 'traditional punishment' (even if that punishment would or may be unlawful under the general law) (para 505).

• Similar principles apply to discretions with respect to bail. A court should not prevent a defendant from returning to the defendant's community (with the possibility or even likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for release are met (para 506).

• Aboriginal customary laws are a relevant factor in mitigation of sentence, both in cases where customary law processes have already occurred and where they are likely to occur in the future (para 507-8).

• Aboriginal customary laws may also be relevant in aggravation of penalty, in some cases, but only within the generally applicable sentencing limits (the 'tariff') applicable to the offence (para 509).

• Within certain limits the views of the local Aboriginal community about the seriousness of the offence, and the offender, are also relevant in sentencing (para 510).

• But the courts cannot disregard the values and views of the wider Australian community, which may have to be reflected in custodial or other sentences notwithstanding the mitigating force of Aboriginal customary laws or local community opinions (para 511).

• Nor can the courts incorporate in sentencing orders Aboriginal customary law penalties or sanctions which are contrary to the general law (para 512-13).

• In some circumstances, where the form of traditional settlement involved would not be illegal (eg community discussion and conciliation, supervision by parents or persons in loco parentis, exclusion from land) a court may incorporate such a proposal into its sentencing order (eg as a condition for conditional release or attached to a bond), provided that this is possible under the principles of the general law governing sentencing. Care is needed to ensure appropriate local consultation in making such orders, and flexibility in their formulation. In particular it is important that anyone into whose care the offender is to be entrusted, is an appropriate person, having regard to any applicable customary laws (eg is in a position of authority over him, and not subject to avoidance relationships), has been consulted and is prepared to undertake the responsibility (para 512).

• An offender's opportunity to attend a ceremony which is important both to him and his community may be a relevant factor to be taken into account on sentencing, especially where there is evidence that the ceremony and its associated incorporation within the life of the community may have a rehabilitative effect. However initiation or other ceremonial matters cannot and should not be incorporated in sentencing orders under the general law (para 515).

• The Commission endorses these principles which strike the right balance between the requirement that the courts cannot incorporate or require traditional punishments or other customary law processes to occur as a condition to the release of offenders or for the mitigation of punishment, and the need to take account of traditional Aboriginal dispute-settlement procedures and customary laws (para 516).

• A general legislative endorsement of the practice of taking Aboriginal customary laws into account is appropriate. It should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time (para 517).

• In addition it should be provided that, in determining whether to grant bail and in setting the conditions for bail, account shall be taken of the customary laws of any Aboriginal community to which the accused, or a victim of the offence, belonged (para 517).

• A sentencing discretion to take Aboriginal customary laws into account should exist even where a mandatory sentence would otherwise have to be imposed (in particular, in murder cases) (para 522).

Related Evidentiary and Procedural Questions

• Existing powers and procedures to call evidence or adduce material relevant to sentencing in Aboriginal customary law cases should be more fully used. These include in particular:

• the prosecution's power to call evidence and make submissions on sentence (para 526)

• the use of pre-sentence reports (para 529).

• Defence counsel should not be expected to represent the views of the local Aboriginal community or to make submissions on the relevance of Aboriginal customary laws contrary to the interests of or otherwise than as instructed by the accused (para 527).

• Separate community representation is, in most cases, not appropriate (para 528).

• To reinforce the need for proper information as a basis for sentencing, in cases where Aboriginal customary laws or community opinions are relevant, legislation should specifically provide that, where a member of an Aboriginal community has been convicted of an offence, the court may, on application made by some other member of the community or a member of the victim's community, give leave to the applicant or applicants to make a submission orally or in writing concerning the sentence to be imposed for the offence. The court should be able to give leave on terms (eg as to matters to be dealt with, or not dealt with in the statement) (para 531).

Chapters 9 & 10 of the ALRC Report No 31 dealt in detail with the human rights principles underlying the recognition of customary law. The Report's conclusions are worthy of note. The Law Reform Commissions said

> "Special Measures, (within the meaning of the CERD Convention and the *Racial Discrimination Act 1975*), for the recognition of Aboriginal Customary Laws will not be racially discriminatory and will not involve a denial of equality before the law or equal protection as those concepts are understood in comparable jurisdictions , if these measures :
>
> - are reasonable responses to the special needs of those Aboriginal People affected by the proposals:
> - are generally accepted by them ; and
> - do not deprive individual Aborigines of basic human rights, or of access to the general legal system and its institutions.
>
> In particular, such measures should not confer rights on Aborigines as such, as distinct from those Aborigines who, in the particular context, suffer the disadvantages or problems which justify recognition. ALRC Report No31 Vol 1 para 165 page122

It is submitted that these conclusions written 20 years ago are as worthy of note now, as they were in 1986 and that the Committee should reconsider the original report.

Yours faithfully

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