Submission on the Crimes Amendment (Bail and Sentencing) Bill, 2006.

By the Aboriginal Legal Service (NSW/ACT).

We are concerned at not only the content of the Bill, but also the context in which it is being proposed.

Aboriginal people have long acknowledged the problem of child sexual assault within their communities and have asked various State and Federal governments to assist them in dealing with this issue. Until the recent media frenzy over Alice Springs, however, the requests have fallen largely upon deaf ears.

At a time when governments are finally beginning to listen to the concerns of Aboriginal people in relation to child sexual assault, the debate has once again returned to the familiar theme of demonisation of Aboriginal people and their culture. The board of the Aboriginal Legal Service (NSW/ACT) Limited (ALS) is convinced, however, that such violence in Aboriginal communities either in NSW or in the Northern Territory is not a part of present day Aboriginal culture as supported and practised by the overwhelming majority of Aboriginal people.

For the majority Aboriginal board of the ALS, there is no question that both child sexual assault and broader family violence are nothing short of abhorrent and must be addressed in Aboriginal communities around Australia.(1) But this must not be at the expense of hard-won principles developed in the NSW case of *R v Stanley Edward Fernando (R v Fernando)* (2) which allow for courts to take account of Aboriginal disadvantage in sentencing.

The provisions in the Bill to direct consideration during bail deliberations to the circumstances of the alleged victim and potential witnesses, especially those in remote communities, are appropriate and are supported by the ALS.

However, the measures in the Bill which seek to prohibit the consideration of customary law and cultural practice in bail deliberations and sentencing procedures are unjust and contrary to basic principles of equality before the law. Further, the provision to remove the mandatory consideration of the cultural background of an offender in sentencing is greatly alarming to us in New South Wales.

<u>Sentencing Procedures</u>

In NSW, where European colonisation began, it is arguable that customary law only survives in limited form.(3) As a result, it is rarely taken into consideration by courts in sentencing. However, disadvantage suffered by an Aboriginal defendant as a direct result of their Aboriginality may be taken into consideration following the sentencing decision of Wood J (as he then was) in *R v Fernando*. Although the Bill would not prohibit a court from addressing the principles laid down in this case, it would allow a magistrate or judge to by-pass those principles in sentencing an Aboriginal offender for a Commonwealth offence. Sentencing directives are in place in relevant legislation

so as to lay down road maps to all members of the judiciary, even those who do not themselves accept the need or relevance of the measures. Every magistrate and judge decides for themselves what weight, if any, they attach to such considerations, but at least they must address their minds to the principles. Any removal of a mandatory provision such as this will send a message that the cultural background of the offender is unimportant.

After excessive consumption of alcohol, Fernando knocked his de facto partner to their bed and stabbed her a number of times around the neck and leg to the point where she had to be admitted to the local hospital where her wounds were sutured.

In his remarks on sentence, Wood J noted that Fernando had spent much time on a reserve at Walgett and had a fairly lengthy criminal history, mostly for offences related to the excessive consumption of alcohol. Wood J described Fernando as "a semi-educated Aborigine from a large family with a deprived background".

After referring to case law and a number of articles concerning the sentencing of Aboriginal people presented to him by counsel for Fernando, his Honour distilled the following propositions:

(a) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group, but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.

(b) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment, but rather to explain or throw light on the particular offence and the circumstances of the offender.

(c) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones, and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(d) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(e) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and the environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors

have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(f) That in sentencing persons of Aboriginal descent, the court must avoid any hint of racism, paternalism or collective guilt, yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(g) That in sentencing an Aboriginal who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience in European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.

(h) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence amid what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.

Having distilled these propositions, Wood J went on to find special circumstances which then allowed his Honour to extend leniency by reducing the non-parole period to be served by *R v Fernando*.

Wood J's propositions highlight that although NSW courts are generally unable to take Aboriginal customary law into consideration in the sentencing of Aboriginal defendants, they are able to take account of Aboriginal disadvantage. Presently, this is permitted by s.21A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) which lists the aggravating and mitigating factors which a court is required to take into account in determining an appropriate sentence for an offence. Though Aboriginal disadvantage is not listed as a specific mitigating factor, it may be considered pursuant to s.21A(1)(c) which allows a court to take into consideration: "any other objective or subjective factor that affects the relative seriousness of the offence".

Subsection (5) provides that the fact that an aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

The current s.44 of the *Crimes (Sentencing Procedure) Act* requires that a court first set the non-parole period for the offence, followed by the balance of the sentence, which must not exceed one third of the non-parole period. However, s.44(2) provides that where a court finds special circumstances (and documents these), the balance of the sentence may be extended. In the case of *R v Fernando*, Wood J found special circumstances which resulted in his Honour imposing a relatively short non-parole period, leaving a lengthy balance during which time Fernando would be under the supervision of the Probation and Parole Service by which he would be given opportunities to further his rehabilitation. (4)

The ALS fears that the Bill will lead to a situation in which the disadvantage associated with an offender's cultural background will not to be taken into account in sentencing. Such a move would spell disaster for Aboriginal defendants whose offending is largely symptomatic of broader problems such as dislocation from land, poverty and lack of opportunity for education and employment. It may result in Aboriginal people spending more time in gaol, further adding to the already overwhelmingly disproportionate number of Aboriginal people in custody.(5)

It is significant to note the context in which the decision in *R v Fernando* arose. Edney observes that the principles distilled by Wood J in that case effectively consolidated a number of existing sentencing principles concerning Aboriginal defendants.(6) The decision had also emerged in the context of the publication of the findings of the 1991 Royal Commission into Aboriginal Deaths in Custody.

Since the decision in *R v Fernando* was handed down, a number of further decisions have made reference to the principles distilled by Wood J, in particular *R v Ceissman* (7), *R v Pitt* (8), *R v Newman, R v Simpson* (9) and *R v Kelly* (10). In some instances (11), the facts of a subsequent case have been distinguished from those of *R v Fernando*, a situation which may create the impression that courts are generally reluctant to apply the Fernando principles. Proving quite the contrary, however, in his dissenting judgment in *R v Newman, R v Simpson*, Shaw J traced the history of the citation of the Fernando principles in a number of Australian jurisdictions. His Honour highlighted that even where the Fernando principles have been cited but not applied, the discussion surrounding their citation reflects the relevant court's full approval of Wood J's statements of principle in *R v Fernando*.(12)

Where courts have not applied the Fernando principles, they have been careful to state that this is because R v Fernando does not present Aboriginality as a mitigating factor in and of itself. Rather, as Fernandez observes, a defendant submitting that the Fernando principles apply in a particular case must establish the disadvantage that they have suffered as a result if their Aboriginality. (13)

In relation to this, Wood CJ at CL (as his Honour became), in the later decision of *R v Ceissman*, said: "The principles stated [in *R v Fernando*] should not be elevated so as to create a special class of persons for whom leniency is inevitably to be extended, irrespective of the objective and special circumstances of the case. To do so would itself be discriminatory of others." (14)

In the subsequent decision of *R v Pitt*, his Honour explained further that: "What Fernando sought to do was to give recognition to the fact that disadvantages which arise out of membership of a particular group, which is economically, socially or otherwise deprived to a significant and systemic extent, may help to explain or throw light upon the particular offence and upon the individual circumstances of the offender. In that way an understanding of them may assist in the framing of an appropriate sentencing order that serves each of the punitive, rehabilitative and deterrent objects of sentencing." (15)

Though, as Shaw J has suggested, courts may generally approve of the appropriate application of the Fernando principles, they have tended to suggest that their application may be limited to Aboriginal people from rural and remote areas of NSW

who have little experience of European ways.(16) However, Nicholson DCJ has argued that this is not necessarily what was intended by the words of Wood J.(17) Indeed, Nicholson DCJ argues that Fernando was himself not such a person, as he had spent time in Queensland, touring around Australia with a boxing troupe and working in cotton fields with labourers from a variety of backgrounds. (18) In addition, Nicholson DCJ notes that some of the source material from which Wood J derived the Fernando principles was taken from Commissioner Wootten's report to the Royal Commission into Aboriginal Deaths in Custody which involved Aboriginal people who had not lived in isolated communities. Finally, Nicholson DCJ aptly notes the use of the word "or" in Wood J's enumeration of principle (g) which suggests that the application of the Fernando principles may be triggered when an Aboriginal defendant who has lived in an Aboriginal community bears any one of the traits of coming from a deprived background, being otherwise disadvantaged by reason of social or economic factors, or having little experience of European ways.(19)

Prohibition of Customary Law and Cultural Practice Considerations

As previously stated, there is very little, if any, application of Customary Law in NSW courts. There are no legislative provisions that direct the application of Customary Law in the criminal justice system. However, the exclusion of "Cultural Practice", as proposed in the Bill, is far broader in its ramifications in NSW.

The most common type of Commonwealth offence for which Aboriginal people are charged in NSW is that of Centrelink fraud. It is a common 'cultural practice' in many Aboriginal communities that a person may be obligated to share whatever resources they temporarily hold with members of their extended family. To prohibit the consideration of such a practice in the sentencing and bail determination of an Aboriginal person charged with Centrelink fraud will result in a miscarriage of justice.

This proposal is contrary to fundamental principals of equality before the law as enunciated by the High Court and by the principles underpinning the *Racial Discrimination Act 1975*. We refer you in particular to the following dicta of Justice Brennan, as he then was, in the case of Neal v R (20) :

> "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 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.
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> 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."

We endorse and approve the submission of the Law Council of Australia in its submission to the Law Reform Commission of Western Australia 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."

An important development in the improvement of the position of Aboriginal people in the criminal justice system throughout Australia has been the development of special interest Aboriginal Courts. These courts operate under a variety of names between the various States and territories including, Nunga Courts, Koori Courts, Murri Courts, Community Courts and Circle Sentencing Courts which we have in NSW.

We argue that the recognition of cultural difference and the ability to take into account cultural practices are fundamental matters in the successful operation of such courts. To deprive a sentencing court of the power to consider cultural matters including customary law and cultural practice would be to deny these Aboriginal Sentencing Courts an important component 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.

Conclusion

The ALS (NSW/ACT) supports the provisions in the Bill relating to victims and witnesses, especially those in remote communities.

The ALS (NSW/ACT) opposes the provisions relating to the prohibition of customary law and cultural practice from bail and sentencing considerations. We also oppose the removal of the cultural background of the offender as one of the mandatory considerations for sentencing courts.

Endnotes (over)

Endnotes

1. S Omeri, "Considering Aboriginality" *Law Society Journal,* August 2006 p.76.
2. (1992)76 A Crim R 58.
3. Omeri, op cit. p.76 endnote 3, cf " 'Urbanisation' of New South Wales' Aboriginal population" in NSW Law Reform Commission report 96 (2000) *Sentencing: Aboriginal Offenders*, [3.4] –[3.9].
4. (1992) 76 A Crim R 58, see also Omeri, op cit. p78, endnote 4.
5. Though comprising 1.9 per cent of the total NSW population, Aboriginal people make up 16.1 per cent of those in custody in NSW prisons. See statistics from 2001 Census at *www.abs.gov.au/ausstats/abs@census.nsf/Census_IP_ASGC_ViewTemplate?ReadForm&Expand=1*. See also . Lind and S. Eyland, "The Impact of abolishing short prison sentences" (2002) 73 *Contemporary Issues in Crime and Justice* 1, p.2.
6. R. Edney, "The Retreat from Fernando and the Erasure of Indigenous Identity in Sentencing" 6 (17) *Indigenous Law Bulletin* 8, p.9.
7. (2001) 119 A Crim R 535.
8. [2001] NSWCCA 156.
9. (2004) 145 A Crim R 361.
10. A Crim R 499.
11. *R v Ceissman* and *R v Pitt*.
12. at [104].
13. L. Fernandez, "Sentencing Aboriginal Offenders" (2004) unpublished manuscript, p.3, quoted in Omeri, op cit., p.78, endnote13.
14. at [32].
15. at [21].
16. see also *R v Kelly* at [55].
17. J. Nicholson SC, "Stanley Fernando and other matters" (2005) Annual COALS Conference, 1 September 2005, p.6.
18. Ibid.
19. Id., p.7.
20. (1982) 149 CLR at 326.