

# Aboriginal Legal Service (NSW/ACT) Limited

Suite 404  
56 Station street  
Parramatta NSW 2150  
Telephone:02)88428000  
Fax: 02)88428011

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Senator Marise Payne  
Chairperson  
Senate Standing Committee on Legal and Constitutional Affairs  
The Senate  
Parliament House  
Canberra ACT 2600

Dear Senator Payne

Senate Legal and Constitutional Affairs Committee  
Inquiry into the *Crimes Amendment (Bail and Sentencing) Bill 2006*

Thank you for the opportunity to give evidence to the Standing Committee on Legal and Constitutional Affairs in your Inquiry into the *Crimes Amendment (Bail and Sentencing) Bill 2006* (the *Bill*) and for your invitation to make further submission on the matter of how provisions of the *Bill* might be drafted so as to still allow effective operation of a circle sentencing path for Aboriginal defendants in appropriate cases.

The view of the Aboriginal Legal Service (NSW/ACT) Limited (ALS) is that the measures proposed as s15AB(1)(b) and 16A(2A) of the *Crimes Act 1914* (Cth) (the *Crimes Act*), which would prevent a court from considering “any form of customary law or cultural practice” in determining bail applications by, or sentencing, an Aboriginal defendant should not be implemented. (As noted in our evidence to the Inquiry, the ALS supports the *Bill*’s amendments to the *Crimes Act* under section 15 AB(1)(a) and 15AB(2), to protect victims and witnesses.)

We note that in the *Bill*’s Explanatory Memorandum, reference is made to the Australian Government’s especial concern at the reported high levels of family violence and child abuse in indigenous communities. The memorandum further identifies one of the principal features of the *Bill*’s proposed amendments being “to ensure that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of any criminal behaviour with which ....[the *Crimes Act*]... is concerned.” It is our view that the proposed prohibition on a court’s consideration of customary law or cultural practice in sentencing *any* Commonwealth offence goes beyond a purpose of preventing family violence and child abuse.

Notwithstanding the above, if it is determined that the *Crimes Act* is to be amended in the manner proposed by the Bill, in an effort to constructively assist the Committee's deliberations, the ALS would respectfully submit that the phrase "cultural practice" be removed from the Bill's proposed amendments. This would result in the situation whereby a court, while prevented from taking into account "customary law" in bail applications and sentencing, would not be prevented from considering "cultural practice" in its deliberations. Such proposed amendment would also still allow a circle sentencing model to operate with some degree of effectiveness.

We would further recommend that, so as to remove any doubt on the matter, the *Bill* clearly state that while a court must not take into account "customary law", it is not prevented from a consideration of "cultural practice". (The ALS has already referred to the disproportionate impact on indigenous communities in charges of Centrelink fraud, a Commonwealth offence, but not linked to family violence or child abuse.)

I wish to stress that this view is expressed as the view of the Aboriginal Legal Service of NSW and the ACT. We are not authorised to express the view of the Aboriginal Legal Service of any other state or territory and we acknowledge that there are differing local realities across the various states and territories.

We again thank you for this opportunity to make submission to the Senate Standing Committee and are available to address any further enquiries you may have at your convenience.

Yours sincerely

John McKenzie  
Chief Legal Officer