



**Australian Government**  
**Attorney-General's Department**

**Indigenous Justice and  
Legal Assistance Division**

06/17247

28 September 2006

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

Dear Ms Morris

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

I refer to your letter of 27 September 2006, received by e-mail yesterday afternoon, in which you advised that Senator Ludwig has requested that the Department provide an interim submission or outline of answers to the various issues that have been highlighted in submissions made to the Committee relating to this Bill, prior to the Committee's hearing in Sydney tomorrow.

The Attorney-General's Department had not intended to provide a submission to the inquiry. However, in response to Senator Ludwig's request, I attach an outline of the Department's responses to some of the key issues that we have identified in others' submissions. Necessarily, given the extremely short timeframe and the fact that most of these submissions were not available to us until today, this outline is short. Nonetheless, I trust that it will assist the Committee.

I confirm that Mr John Boersig, Assistant Secretary, Indigenous Law and Justice Branch and Ms Kimberley Williams, Acting Principal Legal Officer, Criminal Law Branch, will be available in Sydney tomorrow to further assist the Committee in its consideration of this legislation.

Yours sincerely

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## **KEY ISSUES RAISED IN THE SUBMISSIONS TO THE COMMITTEE**

### ***1. Cultural background should be a mandatory consideration***

- The Australian Government believes that the law should apply equally to all Australians regardless of their cultural background.
- The Australian Government wants to send a clear message that customary law and cultural practice do not lessen the seriousness of criminal behaviour and to ensure that victims and witnesses of crime are protected by the law.
- The purpose of the proposed insertion of subsection 16A(2A) in the Crimes Act is to give effect to the Council of Australian Governments' decision of 14 July 2006, that 'no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse.'
- However, even after the proposed amendments are enacted, subsection 16A(1) will still require a court to consider 'all the circumstances' of the offence, which might include an offender's cultural background.

### ***2. The amendments will lead to increased incarceration***

- Changes to sentencing considerations could potentially, but would not necessarily, lead to an increase in the numbers of Indigenous people in prison.
- The Australian Government is particularly concerned about the high levels of family violence and child abuse in some Indigenous communities and that appropriate sentences are imposed that reflect the seriousness of the crime. This concern was highlighted and agreed at the intergovernmental Summit on Violence and Child Abuse in Indigenous Communities and at the COAG meeting on 14 July 2006.

### ***3. The Bill will further limit judicial discretion***

- Under the proposed changes, courts will not have to consider cultural background when sentencing an offender since the Bill will remove 'cultural background' from the list of matters that 'must' be considered. However, as noted above, the amended subsection 16A(1) of the Crimes Act will still require a court to consider 'all the circumstances' of the offence, which might include an offender's cultural background.
- The amendments, however, will prevent a sentencing court from considering claims that criminal behaviour was excused, justified, authorised, required or less serious because of some form of customary law or cultural practice.

### ***4. The legislation is discriminatory against Indigenous and other cultural groups***

- The legislation does not discriminate as it applies to all Australians.
- As the legislation prevents reliance on any form of customary law or cultural practice it is not inconsistent with the *Racial Discrimination Act 1975*.

**5. *The Bill undermines important initiatives involving customary law, such as circle sentencing***

- The Australian Government supports alternative dispute resolution processes such as circle sentencing.
- Alternative sentencing practices are not excluded by the proposed amendments. However, claims that cultural practice or customary law excuse, justify, authorise, require or lessen the seriousness of criminal behaviour should not be considered as part of any alternative sentencing process.
- Under the proposed amendments, alternative sentencing processes will continue to take into account the impact of an offence on the offender, the victim and the community.