ATTACHMENT E

Recognition of Cultural Factors in Sentencing

Council of Australian Governments

10 July 2006

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Table of Contents

Executive Summary

This submission is made to the Commonwealth, State and Territory Ministers attending the Council of Australian Governments (COAG) meeting on 14 July 2006.

The submission concerns the proposed discussions about the appropriateness of courts considering 'cultural background' as a relevant factor in sentencing of Indigenous offenders or people of different ethnicity.

The Law Council of Australia welcomes the commitment of the Commonwealth, State and Territory Governments to addressing violence and sexual abuse within Indigenous communities. However, the Law Council strongly believes that proposals to prohibit courts from considering the 'cultural background' of an offender as a relevant factor in sentencing are misconceived and will unnecessarily restrict the discretion of the court to consider matters which may be relevant, either to mitigate or aggravate, the seriousness of an offence.

It is noted that the Federal Government intends to:

(a) remove 'cultural background' from the list of mandatory considerations under s 16A of the *Crimes Act 1914* (Cth);

(b) exclude from sentencing discretion for all Commonwealth offences claims that 'criminal behaviour was justified, authorised, or required by customary law or cultural practice';

(c) review bail conditions to ensure primary consideration is given to the safety of the victim and the interests of the community; and

(d) recommend that the States and Territories adopt similar provisions in each jurisdiction.

The Law Council is opposed to measures that will limit the factors courts may consider in sentencing and believes that, rather than resulting in 'one law for all', the proposed changes will result in the law applying one way for white, Anglo-Saxon Australians and in another way for Indigenous Australians and Australians of multicultural descent.

Contrary to much of the misinformation and uninformed commentary that has occurred recently, the Law Council has conclusively established the following through detailed analysis and inquiry:

1. there has been no reported case in which cultural background or customary law has been used by an Australian court to determine guilt or innocence of an offender;

2. in general, courts in Australia have been consistent in sentencing decisions across jurisdictions;

3. where mistakes have been made in sentencing at trial, those mistakes have invariably been rectified on appeal; and

4. cultural background has been considered by a court in only a limited number of cases, and only where it is relevant to the circumstances in which the offence was committed.

The Law Council submits that fettering the discretion of the court in the manner proposed will lead to fundamental flaws in the administration of justice, will unfairly discriminate against those whose culture or beliefs do not accord with those of 'mainstream' (usually white, Anglo-Saxon) Australians and will not achieve the desired aims of all Australian Governments, which is to stamp out violence and sexual abuse in Aboriginal communities.

All Australian governments must appreciate that the Australian citizenry includes some Indigenous Australians who live a traditional tribal life and whose appreciation of our system of laws can be very minimal. Where appropriate – and that is a matter best left for the judiciary – our justice system must be able to make due allowance for this.

The Law Council supports the Commonwealth Government's proposal to incorporate provisions requiring the court to give paramount consideration to the interests of the victim and the community in determining whether bail should be granted. However, the Law Council submits that courts should not be prevented from taking account of other relevant considerations in making determinations about bail.

The Law Council understands that the proposed changes, if implemented, will affect people of all cultures and ethnicities. However, given Indigenous violence has been the catalyst for the Commonwealth Government's proposals, this submission focuses primarily on the effect the proposed changes will have on Indigenous people.

Background

1. The term 'cultural background' was inserted into s.16A the C*rimes Act 1914* (Cth) in 1994, along with a range of amendments introduced with the *Crimes and Other Legislation Amendment Bill 1994* (the COLA Bill) by the then Parliamentary Secretary to the Attorney General, the Hon Peter Duncan MP. In his Second Reading speech[1], Mr Duncan stated that the amendment was being made to implement the recommendations of the Australian Law Reform Commission's report entitled 'Multiculturalism and the Law'[2] (the ALRC report), regarding sentencing of federal offenders.

2. The ALRC report recommended that the offender's cultural background should be specified as a factor to be taken into account in sentencing under s.16A(2)(m) of the *Crimes Act*. At paragraph 8.14, the ALRC report states:

> "such a change would be useful to ensure that the offender's cultural background is not overlooked where it is relevant. The Commission recognises that amending the law in this way may lead to more arguments being raised in the sentencing hearing to reduce the severity of sentences in some cases. The Commission is confident, however, that courts can attribute this factor the weight that is, in the circumstances, proper."

3. The ALRC paper also recommended that:

   - s.19B of the *Crimes Act* be amended to specify 'cultural background' as a factor that could be considered by courts when deciding whether to record a conviction; and

   - the Prosecution Policy of the Commonwealth Director of Public Prosecutions include 'cultural background' as a relevant consideration when determining whether prosecuting an offender will be in the public interest.

4. While the suggested amendments were adopted by the Federal Government in 1994, it is unclear whether the Commonwealth DPP amended its prosecution policy. Presently, the policy explicitly excludes "race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved" as matters influencing the DPP's decision to prosecute[3].

5. It is interesting to note that the ALRC made a similar recommendation in earlier reports, including its landmark report on 'Recognition of Aboriginal Customary Law' in 1986[4] and its report on 'Sentencing' in 1988[5]. The common law has also recognised cultural factors and customary law issues for some time, a matter which this submission describes in detail below. The following outlines the

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[1] Hon Paul Duncan MP, Second Reading Speech, *Crimes and Other Legislation Bill 1994*, House of Representatives Official Hansard, 17 November 1994, Commonwealth of Australia.

[2] Australian Law Reform Commission, *'Multiculturalism and the Law'*, Report No.57. Available at http://www.austlii.edu.au/au/other/alrc/publications/reports/57/57.pdf

[3] 'Prosecution Policy of the Commonwealth', Commowealth Director of Public Prosecutions. Available at http://www.cdpp.gov.au/Prosecutions/Policy/Part2.aspx

[4] *Recognition of Aboriginal Customary Law*, ALRC 31.

[5] *Sentencing*, ALRC 44, para 170

debate which preceded the enactment of the reforms, which the Australian Government now proposes to repeal.

Historical debate on 'cultural background'

6. The insertion of 'cultural background' of an accused as a mandatory consideration in the court's sentencing discretion and in decisions to convict under the *Crimes Act 1914* were both carried out with bipartisan support. The then shadow Attorney-General, the Hon Darryl Williams MP, stated in his speech at the Second Reading of the COLA Bill[6]:

> "… the bill is not proposing to make an accused's cultural background a defence to a federal criminal offence … the ALRC unequivocally rejected introducing a defence of cultural background to absolve, partially or completely, an accused from criminal liability. Equality before the law is such a fundamental basis of our system of justice that it would be quite inappropriate for such a defence to be introduced.
>
> It is, however, a relevant consideration to be weighed by the court at the stage in which an accused has already been found guilty. At the same time, offenders should be under no misapprehension that their sentence should be reduced simply because of their cultural background.
>
> …the provisions relating to cultural background are aspects of the bill that were referred to the Senate Standing Committee on Legal and Constitutional Affairs on 25 August…The evidence before the committee was overwhelmingly in support of including cultural background as a relevant matter in the sentencing of federal offenders. This aspect of the bill is supported."

7. The comments of Mr Williams, who served as Attorney-General with the current Federal Government between 1996 and 2003, were supported by Peter Slipper MP a member of the Coalition who stated, in his speech during the Second Reading of the COLA Bill:

> "…the opposition is certainly not opposed to the inclusion of cultural background as a relevant matter to be taken into account by the court when sentencing federal offenders. It is highly likely that, even prior to this amendment, courts in Australia would have taken into account cultural background. Those courts would include courts exercising federal jurisdiction…
>
> It is important to realise we are one people in Australia. We are one nation and the laws binding all of us should be the same. However, given the diversity of the ethnic make-up of some parts of Australia now, it is obviously appropriate that cultural background should be included as one of those matters which courts take into account when sentencing a person after a person is found to have breached the law."[7]

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[6] Hon Darryl Williams MP, Second Reading Speech, *Crimes and Other Legislation Bill 1994*, House of Representatives Official Hansard, 17 November 1994, Commonwealth of Australia

[7] Mr Peter Slipper MP, Second Reading Speech, *Crimes and Other Legislation Bill 1994*, House of Representatives Official Hansard, 17 November 1994, Commonwealth of Australia

8. Prior to implementation, the COLA Bill was referred to the Senate Legal and Constitutional Committee, which was asked to considered whether the proposed insertion of 'cultural background' into ss.16A and 19B were liable to be abused by offenders. The Senate Committee concluded that the proposed amendments would not lead to any such abuse. Significantly, several parties consulted made submissions to the Senate Committee in support of the amendments, including the Law Council of Australia, the New South Wales Bar Association, the Federation of Ethnic Communities Councils of Australia, the National Children's and Youth Law Centre, Mr Martin Sides QC of the New South Wales bar and the Commonwealth Director of Public Prosecutions.

9. Accordingly, it is clear that 'cultural background' was inserted into the *Crimes Act* in 1994 with widespread support within the Australian community.

Present debate about customary law

10. The recent public debate about the place of cultural considerations and 'customary law' within the Australian legal system has arisen as a result of persistent reports of violence and abuse within Indigenous communities and claims that Australian courts have contributed to this by imposing lighter sentences on Indigenous offenders on the basis of cultural considerations.

11. The central argument put forward by proponents of removing 'cultural background' from the range of factors to be considered by the court is that there should be "one law for all Australians"[8]. The Federal Minister for Indigenous Affairs has argued that nobody should be entitled to be treated differently due to their culture and that "cultural law is being manipulated in the courts" to reduce sentences for serious offences[9]. The Federal Attorney-General has raised female genital mutilation as a cultural practice which could presumably be justified by cultural considerations[10].

12. The Law Council notes that none of these arguments are new. The possibility that offenders of different cultural backgrounds may argue for leniency on the basis of their customs or traditions was considered in 1992 by the ALRC, which concluded that the courts would only give weight to cultural factors that were appropriate in the circumstances. This view was widely endorsed by all federal parliamentarians speaking on the record at the time the COLA Bill was introduced. Even the issue of female genital mutilation was considered by Peter Slipper MP, who endorsed the COLA Bill with the comment:

> "If the law in Australia is changed, I certainly will be pleased that, just because a person comes from a different ethnic background where [female genital mutilation] has indeed been the norm, that would not be sufficient reason to allow that person off the hook." [11]

13. Given the apparent enthusiasm for the COLA Bill demonstrated by political representatives on all sides of the political divide at the time of assent, it is concerning that just 12 years later, the Australian Government is proposing to

[8] "One Law For All", The Australian, 29 May 2006.

[9] For example, 'Cultural law "manipulated by offenders"', Sydney Morning Herald, 27 June 2006.

[10] Interview with John Cleary, broadcast on ABC Local Radio, 2 July 2006.

[11] Mr Peter Slipper MP, Second Reading Speech, Ibid (7).

repeal 'cultural background' from the *Crimes Act 1914* and is demanding similar changes to the laws of the States and Territories, as a condition of Commonwealth funding to address Indigenous disadvantage.

14. The Law Council submits that this debate is presently being fuelled by misinformation and a poor understanding of how cultural factors are considered by the courts. Much of the present debate is centred around isolated cases, which some have claimed have resulted in unduly lenient sentences. The Law Council notes that Public Prosecutors have been diligent in appealing cases in which inadequate weight was given to the objective seriousness of the offence. Where an offender has been given a sentence viewed as manifestly inadequate, an appeal court has invariably substituted a more appropriate sentence.

15. Absent from the present debate has been any reasoned and logical analysis of whether the claims of leniency are well founded. Any claim that customary law and cultural factors raised by Indigenous offenders as justification or explanation for violent, abusive or anti-social behaviour have been inappropriately accepted by the court is not justified. Such suggestions are ill-considered and cloud the debate with the false implication that customary law in some way condones such behaviour.

16. This submission will now provide a detailed analysis of how cultural factors are considered by the courts and will demonstrate that Australian courts have been generally consistent in their treatment of serious criminal offenders across jurisdictions, regardless of culture or ethnicity.

Consideration of cultural factors in court proceedings

17. It is common for courts to consider a range of factors when determining an appropriate sentence for a person found guilty of an offence. Those factors might include the defendant's age, socio-economic circumstances, criminal history, evidence of contrition, mental state, family background, past history of violence, cultural background, gravity of the offence, prospects of rehabilitation and any other matters the court deems relevant. These matters are balanced against community concerns such as the importance of protecting vulnerable members of the community and providing a reasonable deterrent against such behaviour.

18. In the context of an Indigenous offender, it is relevant to consider whether the offender observes a traditional lifestyle and lives according to the customary laws of his or her community. In some cases, evidence of the customary background of the offender may mitigate the severity of the offence, and corresponding punishment. It may in some circumstances also be a relevant consideration that the offender has undergone traditional punishment in accordance with customary law.

19. In such cases, the offender will generally adduce evidence of the customary laws followed by the community and evidence that the offender observed those laws. Evidence may also be admitted concerning the offender's status in the community or that the offender had consented to, or received, 'payback' or other traditional punishment.

20. In the Northern Territory, the *Sentencing Act* (NT) was amended in 2005 to provide statutory requirements for the admission of customary law evidence relevant to the sentencing of an offender. At present, other jurisdictions do not

have corresponding statutory requirements – although the Law Reform Commission of Western Australia has proposed similar amendments to the *Sentencing Act 1995* (WA).

21. In NSW, the relevant principles have been espoused by Wood J in *R v Fernando* (1992) 76 A Crim R 58, at 62-63. An extract of those principles is set out below.

Case examples

22. There are a number of cases providing precedents as to how customary law and cultural factors are considered in the sentencing process. The following is a summary of some cases illustrating the circumstances in which cultural background evidence has been used:

R v Fernando (1992) 76 A Crim R 58 (Supreme Court of NSW)

23. *R v Fernando* is regarded as a landmark decision, which provides the common law basis upon which 'Aboriginality' is considered in the sentencing process.

24. The case concerned an Indigenous offender charged and convicted of malicious wounding after stabbing his friend, and sometimes *de facto* partner, in the leg and neck. The appellant was described as a semi-educated Aboriginal man from a large family and deprived background. Medical evidence was raised by the defence suggesting a certain degree of brain damage resulting from excessive alcohol abuse over a number of years.

25. After hearing extensive submissions and considering authorities concerning Aboriginality and sentencing, Wood J set out 8 propositions (which have subsequently been referred to as the "Fernando Principles") [at 62-63]:

    (1) 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;

    (2) 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;

    (3) 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;

    (4) 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;

(5) 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 environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves a 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 stress on them, reinforcing their resort to alcohol and compounding its worst effects;

(6) 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;

(7) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of 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;

(8) 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 in the midst of 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 (pp 62–63).

26. In sentencing the offender, Wood J took into account the deprived background of the offender, his involuntary removal at an early age to an isolated mission and his early introduction to alcohol and abuse of alcohol within a community where such behaviour was encouraged. Taking into account all relevant matters the judge held that the objective seriousness of the offence demanded imprisonment, as did the need to show the Aboriginal community 'in the interests of their protection that violent and drunken assaults are regarded very seriously by the law' (at 64). The defendant was sentenced to 4 years imprisonment with a minimum term of 9 months.

Jadurin v The Queen (1982) 44 ALR 424

27. The appellant was convicted of manslaughter after hitting his wife on the back with a piece of piping, causing her liver to rupture. Both had been drinking heavily at the time of the offence and the appellant had assaulted his wife earlier in the evening, hitting her with a piece of wood.

28. The appellant was sentenced to 4 years imprisonment with a non-parole period of 12 months. He appealed against the severity of the sentence.

29. On appeal, Federal Court (NT) commented that the suggestion on behalf of the appellant, that in Aboriginal society it is not unusual for women to be beaten if they do not obey their husbands, did no more than describe something that happens from time to time. The court did not accept that such conduct was an established or accepted part of Aboriginal society. The court concluded that it

should approach the matter on the basis that the appellant beat his wife in anger when they were drunk and that this caused her death.

The Queen v GJ [2005] NTCCA 20 (the 'promised bride case')

30. The appellant was a 55 year old Aboriginal elder charged and convicted of sexual intercourse with a minor and aggravated assault, after sexually assaulting a 14 year old girl and beating her with a boomerang. At trial, the appellant pleaded guilty to both charges and argued, in mitigation of his actions, that he was unaware that what he did was against the law and that he was exercising a customary right, with the approbation of his community, to take the girl as his bride.

31. The man was sentenced to a total of 24 months (5 months for aggravated assault and 19 months for intercourse with a minor), with 23 months suspended.

32. Martin CJ delivered his reasons on site at the Yarralin community, Northern Territory. The transcript of the judgment was translated into 3 different Aboriginal languages and distributed to the surrounding communities. In sentencing the man, Martin CJ gave weight to the fact that the man entered a plea of guilty, had not previously offended, was a respected elder in his community, was not a sexual predator, was unlikely to re-offend and did not understand English well. Martin CJ also accepted that the man was not aware that what he did was an offence and that he had lived a traditional lifestyle by the customary laws of his community for his entire life – without any exposure to the laws of the Northern Territory.

33. On appeal, the sentence was extended to 3 years with a mandatory 18 months to serve. The Court of Appeal agreed with the reasoning and considerations of the trial judge, but held that Martin CJ had not given sufficient weight to the objective seriousness of the offence. The High Court has refused an application for special leave to appeal from the decision of the Court of Appeal.

34. Recently, Martin CJ has publicly admitted his error in sentencing in a reported interview, but has warned Governments against moving to fetter the discretion of the judiciary in the sentencing process on the basis of this case.

Jabarula & Ors v Jambajimba & Ors (1989) NTR 26

35. Four Aboriginal males were convicted of assault. They appealed on the basis that the Magistrate had erred by rejecting the excuse of provocation.

36. It was held that when considering what an ordinary person would have done in terms of the excuse of provocation, the ordinary person may be defined with reference to aboriginality and cultural characteristics of the accused and their circumstances, such as living in a remote community. However, it was noted that the ordinary person is sober and not unusually excitable or pugnacious.

The Queen v Gondarra [2005] Unreported, Sup. Ct NT, SCC20407332

37. The offender was a 27 year old traditional Aboriginal man convicted under s.240(1)(b) for attempting to commit arson, after intentionally setting fire to clothes in his own home, resulting in the house being destroyed. The offender was intoxicated and committed the offence following an argument with his wife.

38. At trial, evidence was admitted that the offender had been placed in territorial asylum by the community for 7 months. 'Territorial asylum' meant that the offender was subject to conditions impose by the council of elders in his community, such as prohibition from drinking and smoking and was required to spend time on his clan's homeland, Barrkira, with the object of reflecting on the law of his country and the seriousness of his offending.

39. At the time of the trial, the offender had nearly passed through a 'traditional chamber of law', erected by the community for the purpose of enabling the offender to properly learn how to observe traditional laws and customs. Evidence was presented by an elder in the community that the 9 constituent elders of the chamber of law had been impressed with the offender's commitment and respectful participation in the instruction process. The elder also deposed that the community did not want the offender to serve a custodial sentence, but preferred that the offender continue his community work.

40. Southwood J convicted and sentenced the offender to 3 years imprisonment, suspended on condition that he abided by certain conditions, including that he remain under 12 months supervision and that he complete the third stage of the chamber of law.

The Queen v Riley [2006] NTCCA 10

41. This case was raised by Dr Nanette Rogers (a Northern Territory Crown Prosecutor who has recently spoken out against endemic violence and abuse in Aboriginal communities) as an example of the terrible crimes occurring in some Indigenous communities. Contrary to some misleading reports in the media, customary law was not considered, either at trial or on appeal, to be relevant to the proceedings.

42. The Respondent was a 26 year old Aboriginal male convicted of 2 counts of sexual intercourse without consent and one count of grossly indecent assault, after digitally penetrating a 2 year-old girl. At trial, he received a total sentence of 6 years and a non-parole period of 4 years.

43. The Crown appealed against the sentence as being manifestly inadequate. The Court of Criminal Appeal unanimously allowed the appeal and substituted a total sentence of 8 years with a non-parole period of 6 years and 6 months.

44. In sentencing, Martin CJ remarked: *"There is no suggestion that the respondent's crimes are in any way related to traditional Aboriginal law or culture. Nothing in the material before the sentencing Judge or this court suggests a lenient view could reasonably be taken of the respondent's moral culpability."*

The Queen v Inkamala [2006] NTCCA 11

45. This is another case raised by Dr Rogers, containing similar facts to those of *The Queen v Riley*, described above, but involving a victim aged 7 months. Again, there was no suggestion that the respondent's crime was in any way related to customary law.

Masciantonio v R (1995) 183 CLR 53

46. This case concerned an appeal from a conviction for murder. The appellant had stabbed his son in law several times during a violent altercation about a long history of bad behaviour by the victim toward the appellant's daughter. Evidence was adduced that the deceased had a long history of gambling, causing financial stress for his wife and 2 children, and that he had been violent toward the appellant's daughter on several occasions. On the day prior to the offence, the appellant has learned that the deceased was leaving his daughter and had demanded money so that he could travel overseas. The appellant confronted the deceased in the street to ask him to "do something better than he was doing", at which time the deceased abused the appellant and kicked him, causing injury to his arm.

47. The appellant was born and raised in Italy and remained strongly connected to the cultural aspects of his upbringing. Evidence was also adduced that the appellant had reacted in extreme fashion to stress since suffering a head trauma. The appellant pleaded guilty, but argued the defence of provocation should apply due to the extreme offence the son-in-law had caused him.

48. At trial, the appellant was convicted of murder after it was decided that the 'ordinary person' would not have lost control to the extent claimed by the appellant. On appeal, the appellant claimed that due regard had not been given to his personal characteristics.

49. The High Court allowed the appeal and stated "…the gravity of the conduct said to constitute provocation must be assessed by reference to the relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of the person's age, sex, ethnicity, physical features, personal attributes, personal relationships and past history."

50. McHugh J commented [at 33]: "If it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would answer that that must be the natural consequence of true equality before the law in a multicultural society when the criterion of criminal liability is made to depend upon objective standards of personhood."

Effect of customary law on the sentencing process

51. Courts have come under public scrutiny following some recent high-profile cases (generally involving sexual offences against minors), in which it has been claimed the sentence was manifestly inadequate and disproportionate to the seriousness of the offence.

52. Comparison of the ultimate outcome in such cases can be made to average sentences for comparable offences. It is useful to make these comparisons with other jurisdictions, such as NSW, where the suggestion has not been made that the courts are too "lenient" and where the admission of evidence concerning customary or cultural practices is less common.

Some relevant statistics

53. Statistics obtained from the Judicial Commission of NSW concerning offenders charged with the offence of sexual intercourse with a minor (s.66C of the *Crimes Act 1900* (NSW)) between 1998 and 2005 reveal the following facts:

All offences

- 53% of all convicted offenders received a custodial sentence, with the remainder receiving a suspended sentence, periodic detention or other penalty;
- the median term of all sentences under s.66C was 36 months for both consecutive and non-consecutive terms, while the majority received a non-parole period of either 12 or 18 months;

One count, no priors, pleaded guilty

- for cases involving an offender charged with one count, no prior convictions, and who pleaded guilty, only 41% received a custodial sentence;
- for offenders with no priors, charged with one count and who entered guilty plea, 40% received the median term of 36 months (the figure rose to 47% for non-consecutive terms only), while 66% were given a non-parole period of between 12 and 18 months;
- only 8 cases were recorded for offenders over the age of 50 and 6 of those offenders received a custodial sentence of which 3 received 36 months, 2 received 5 years and 1 received 18 months. 5 of those served non-consecutive terms, of which 2 received a non-parole period of 12 months, while 3 of the others received a non-parole period of 18 months, 24 months and 30 months respectively.

54. The new s.66C(3) was inserted into the *Crimes Act* in 2003, to differentiate between victims aged between 10-14 years and 14-16 years. For cases involving victims between 14 and 16 years and offenders pleading guilty to one count, 45% received a custodial sentence. All those imprisoned were sentenced to 18 months or less and all were eligible for parole within 12 months.

55. The Northern Territory Office of Crime Prevention's Statistical Summary for 2004-2005 does not provide a clear analysis of crimes committed according to the offence of sexual intercourse with a minor under the *Criminal Code* (NT). However, the Northern Territory has a mandatory term of actual imprisonment for all sexual offences under s.78BB of the *Sentencing Act* (NT). Accordingly, data in the Northern Territory since introduction of s.78BB will reflect that 100% of all sexual offenders received a custodial sentence.

56. However, on the basis of available data, the sentence handed down by the Northern Territory Court of Criminal Appeal in *The Queen v GJ* appears commensurate with average range for a comparable offences in NSW. These statistics do not support claims that Indigenous offenders have been treated more leniently than other offenders.

Observations

Cases involving sexual assault

57. Consent is not an element of sexual offences against minors. However, it is relatively more difficult to establish a guilty verdict for rape due to the requirement that the prosecution must prove beyond reasonable doubt that the victim did not consent and that the accused intended to have sexual intercourse without the person's consent. Section 192 of the *Criminal Code* (NT) provides a maximum sentence of life imprisonment for the offence of "sexual intercourse without consent", while the maximum penalty for intercourse with a minor is 16 years.

58. The actions of the offender in *The Queen v GJ* would appear, on their face, to support the more serious charges of rape, or aggravated sexual assault. Indeed, the Law Council has been advised that a charge of rape was initially filed against the offender, but was substituted for the (ostensibly) less serious charge of sexual intercourse with a minor.

59. Whether the Crown chose to substitute the charge to ensure a conviction, or whether it was considered to be in the public interest to do so having regard to the specific characteristics of the accused and the circumstances of the case, is not publicly known. However, it is apparent that proving lack of consent (including that the defendant did not know the victim was not consenting) is an issue which can frustrate a significant number of criminal trials for sexual assault.

60. In many cases, an acquittal may result due to the victim's failure to report early or to have the evidence of the assault recorded, as often there are no witnesses to the event. It is possible that customary law factors may also have some impact on the issue of consent, as the offender may argue that he believed the victim could not refuse if she was his wife, for instance. In such cases, the prosecution may opt for a different charge, where consent is not a relevant consideration. However, consent is relevant to an ultimate finding of guilt or innocence – i.e. *before* the offender is convicted. The Federal Government is advocating changes that will only affect judicial discretion in the sentencing process.

61. As demonstrated by the case summaries above, courts have only considered cultural factors relevant to a very limited number of cases involving sex offences or violent assaults; and have only admitted such evidence to assist in understanding the background of the accused and the circumstances in which an offence was committed. Many cases raised as justification for the Federal Government's position did not consider customary law or cultural factors relevant to the offence or the disposition of the accused. The Law Council submits that courts have generally been getting the balance right with respect to these issues and, where mistakes have occurred, the criminal appeal system has invariably ensured the restoration of that balance.

Periods of incarceration

62. Recent public discussion about sentencing issues has seen many commentators make sweeping statements about leniency for Aboriginal offenders. Some have suggested this is a reaction to sensitivities surrounding the Royal Commission into Aboriginal Deaths in Custody[12], or fears about imposing mandatory life

[12] See comments made by Dr Sue Gordon, 'Suicide Fear Frees Blacks', The Australian, 30 June 2006.

sentences[13], which apply in the Northern Territory for murder. However, these claims are disputed by the findings of the Productivity Commission, which indicates that since 2003, rates of imprisonment for Indigenous people have risen by 25% for women and 11% for men. Nationally, indigenous people are 11 times more likely to be incarcerated than non-indigenous people[14]. Moreover, the Northern Territory Director of Public Prosecutions has publicly rejected claims that decisions to prosecute are in any way affected by concerns about incarcerating Indigenous people[15].

63. In the Northern Territory, the vast proportion of indigenous people sentenced to custodial sentences are for traffic offences (30%) and common assaults (40%), which generally attract shorter prison terms of between 0 and 12 months[16]. Sex offences generally attracted longer terms, with 88% of indigenous people convicted of a sex offence sentenced to more than 2 years jail, compared to 64% of non-indigenous offenders[17]. 31% of non-indigenous offenders received a prison sentence of 12 months or less, compared to 12.5% of indigenous offenders.

64. These statistics indicate that, contrary to opinion expressed by some politicians and the media, Indigenous people are in fact serving *longer* sentences on average. There is no evidence of a 'soft' approach being taken by courts in the Northern Territory, where most of these claims of 'leniency' have been levelled. The data also suggest that the large number of shorter incarcerations for driving offences and common assaults may be distorting the reporting of overall incarceration periods.

65. The Law Council believes that community debates referring only to a brief, horrific description of certain offences and the sentence handed down are misinformed in the absence of any reference to the sentencing remarks of the court and details of all matters that may have been relevant.

"One law for all"

66. The present debate appears to be confused by the misconception that Indigenous Australians and other cultural groups are receiving 'special treatment' due to their culture. The Law Council submits that this is not the case.

67. All people are different, having lived in different places and having been subject to different levels of education, wealth, employment, socio-economic background, religion and cultural experience. Clearly, a court should be able to recognise the difference between a highly educated, wealthy professional residing on Sydney Harbour and a person who is poor, non-english speaking, barely literate and has resided in a remote Aboriginal community their entire life. Australian courts have always sought to observe these differences when reaching decisions about sentencing, bail and other matters to which the background of an offender can be regarded as relevant.

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[13] As suggested by Prof. Marcia Langton, Ibid.

[14] Steering Committee for the Review of Government Service Provision (SCRGSP) 2005, 'Overcoming Indigenous Disadvantage: Key Indicators 2005', *Productivity Commission*, Canberra.

[15] Richard Coats (NTDPP), Ibid 12.

[16] *Correctional Services Statistical Summary 2004-2005*, Office of Crime Prevention, Northern Territory Department of Justice

[17] Ibid

68. The consequence of preventing a court from considering 'cultural background' will be that a person (usually white Anglo-Saxon) whose 'culture' accords with mainstream beliefs and values will be at an advantage when compared with a person who has lived their entire life according to a different culture, with different values and beliefs.

Conclusion

69. The customary laws of Indigenous communities have never been part of the law of this country. Nor has there been any case in which a cultural rule or norm has been accepted by a court as justification or excuse for conduct contravening Australian law. The Law Council has demonstrated in this submission that courts have taken a balanced and sensible approach to considering cultural factors, where they are relevant.

70. The Law Council makes the following submissions:

- 'cultural background' is one of many considerations which may, or may not, be relevant to the sentencing process in any given case;
- there is no evidence that courts have permitted manipulation of 'cultural background' or customary law – and there has been no case in which the court has accepted such evidence as justification or excuse for violent or abusive behaviour;
- statistical data provided by State and Territory Government agencies clearly demonstrate that courts have not been 'soft' on Indigenous offenders, regardless of cultural considerations that may have been raised;
- removing the court's discretion to consider evidence of the cultural background of an offender will unfairly discriminate against Indigenous Australians and those of ethnic or cultural backgrounds different from the "mainstream";
- where sentencing judges have made mistakes, the decision has invariably been corrected on appeal, demonstrating that the system of checks and balances is working;
- banning consideration of cultural factors will not address the serious problems which are causing endemic levels of violence, abuse and misery in Indigenous communities.

71. The Law Council urges the Federal, State and Territory Governments to properly consider the available facts before embarking on a course of action that will impose unnecessary limitations on the discretion of the judiciary. The courts are not to blame for ongoing violence within Indigenous communities. The focus of this debate should be on the provision of better services, including policing and health services, housing, the development of job opportunities and measures addressing alcohol and substance abuse. It is submitted that this opportunity should be used to obtain real outcomes for desperately disadvantaged Indigenous Australians. However, to link increased Federal funding for better services to an agreement to delete cultural considerations from the sentencing process is unprincipled and betrays the weakness of the justification for doing so.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.