



Victorian Aboriginal Legal Service Co-operative Ltd.

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Dear Senator,

RE: Cultural Background as a factor in sentencing

The Victorian Aboriginal Legal Service Co-operative Limited [VALS] is extremely disappointed that, contrary to findings in the Report of the Senate Standing Committee on Legal and Constitutional Affairs, the Crimes (Bail and Sentencing) Bill 2006 (Bill) the Senate passed the Bill on 8th November 2006. VALS understands that the Bill is again before the Senate after the House of Representatives passed the Bill with amendments. VALS urges you to not support the Bill on the basis of arguments in the Committee Report

The Bill aims to remove cultural background from a list of factors to be taken in account during the sentencing process. The Senate Committee Report recommends that: *the Bill be amended to remove Item 4 so as to retain the phrase 'cultural background' in the list of factors that a court must take into account in sentencing an offender, if relevant and known to the court, in paragraph 16A(2)(m) of the Crimes Act 1914 (Recommendation 2).*

The above recommendation is motivated by consideration of the following:

- The proposed legislation could discriminate against Aboriginal and Torres Strait Islanders.
- The cultural background of an offender should remain an essential consideration in sentencing.

VALS does not support the Bill and calls for the Government to act in accordance with the recommendations of the Senate Committee. Also, VALS does not support the amendments to the Bill by the House of Representatives.

Please see attached more information about the Senate Committee Report and arguments against the Bill

Yours faithfully,

Victorian Aboriginal Legal Service Co-operative Limited

Frank E Guivarra
Chief Executive Officer

FINDINGS OF THE SENATE COMMITTEE¹

- **Discrimination:** The Bill will inevitably impact most on Indigenous Australians and those with a multicultural background. The committee notes the Department's assertion that the Bill is not discriminatory – that the Bill may be drafted in a way that accords with principles of formal equality but, clearly, in practice it is likely to apply only to certain categories of offenders. It does not therefore provide substantive equality to Indigenous offenders or offenders with a multicultural background (page 31).
- **Equality:** The Committee does not accept the Department's explanation that this will ensure the law applies equally to all persons. Evidence received in the course of the committee's inquiry strongly suggests that, in practice, this will not be the case. (page 32).
- **Implications:** While the Bill's stated aim is to address violence and child abuse in Indigenous communities, its implications are much wider (page 32).
- **Cultural background relevance:** The term 'cultural background', inserted into the Crimes Act in 1994 and based on a recommendation by the ALRC in its 1992 report, Multiculturalism and the Law, is a relevant matter to be considered by the courts in the sentencing of Federal offenders where appropriate. The Committee endorses the reasons behind the ALRC's recommendation that 'cultural background' be specifically inserted into the Crimes Act (page 32).
- **Aim:** The Bill will do little, if anything, to achieve its stated aim (page 30).
- **Practical initiatives:** Practical initiatives are imperative to address family violence in Indigenous communities in a meaningful way (page 30).
- **Offending:** Strategies to address the issues that contribute to offending behaviour in the first place are urgently required (page 32).
- **Consultation:** The Committee has concerns in relation to the haste with which the proposals in the Bill have been drafted and introduced into Parliament, without adequate, if any, consultation with Indigenous and multicultural groups (page 30).
- **ALRC Report:** The response to the ALRC report would have provided the Federal Government with a timely opportunity to address the issues (page 31).
- **Superfluous:** In some respects the Bill is superfluous because it does little to change the reality of the current situation – particularly in relation to notions of customary law as a 'defence', and to the consideration by courts of the circumstances of offenders outside their criminal behaviour (page 31).
- **Symbolic:** The most concerning feature of the Bill is the symbolic message that it sends to the judiciary (and the community at large), and the judicial uncertainty it may create (page 31).
- **RCIADIC:** The Committee is also mindful of evidence arguing strongly that the Bill conflicts with every major inquiry into the role of cultural background and customary

¹ The Committee Report is available at:
http://www.apf.gov.au/senate/committee/legcon_ctte/crimes_bail_sentencing/report/index.htm

law in the Australian legal system [ie: Royal Commission into Aboriginal Deaths in Custody (page 32)].

OTHER ARGUMENTS AGAINST THE BILL

VALS

- Consideration of cultural background by Courts is not leading to lenient sentences. It is the experience of VALS that the use of cultural background by courts to justify more lenient sentences is extremely rare.
- Removing the requirement to consider cultural background implies that an integral part of a person's identity no longer retains importance for Courts making sentencing decisions. This is not dissimilar to trying to remove a person's identity.
- Cultural background is not the enemy of the justice system. Court initiatives, such as Koori Courts, highlight the positive effects of including Aboriginal and Torres Strait Islander knowledge and perspectives (ie: reduced re-offending).
- Age and mental capacity are two neighbouring characteristics with cultural background in s 16A of the Crimes Act (Cth) 1914, yet the former have not been culled. Would it be fairer if we treated all people according to an average age?
- If a Court makes a wrong decision and delivers a sentence which is too lenient there is an appeal process in place to remedy this. The appeal process has hardly ever been used to overturn decisions which involved consideration of cultural factors. This indicates that inappropriate use of cultural background is a red herring and not a problem. VALS argues that rather than solving a problem, the Bill will create new problems.

Law Council of Australia²

- "Courts must have access to all available sentencing and bail options, particularly when dealing with Indigenous offenders" (President Tim Bugg)."
- "The Government should stop demonising Aboriginal culture and work together with State and Territory Governments, Indigenous community leaders and other key stakeholders to address Indigenous disadvantage" (President Tim Bugg).

The Social Justice Commissioner, Human Rights and Equal Opportunity Commission

- "All Australians, regardless of their ethnic background, have cultural values and may engage in cultural practices that may be relevant to sentencing for a criminal offence. It does not offend equality before the law for such matters to be taken into account in all cases where they are relevant: on the contrary, such an approach provides equality before the law."³

² Law Council of Australia 'Law Council's Criticism of Sentencing Laws Backed by Scathing Senate Report' 18 October 2006 as at <http://www.lawcouncil.asn.au/read/2006/2428625958.html>

³ Submission of The Human Rights And Equal Opportunity Commission to The Senate Legal And Constitutional Affairs Committee On the Crimes Amendment (Bail And Sentencing) Bill 2006, para 16 as at http://www.aph.gov.au/senate/committee/legcon_ctte/crimes_bail_sentencing/submissions/sub05.pdf

- The Bill 'suggests that only certain people have culture and that other things are just the status quo'. This presents a danger in that 'the practice of the majority may be seen as the standard or the norm and can therefore be taken into account, while the practices of minority cultures and cultural groups are seen as cultural and therefore excluded from being considered in sentencing'.⁴

Aboriginal and Torres Strait Islanders Legal Services in a Joint Media release (29 June 2006)⁵

- The proposal is contrary to fundamental principles of equality as enunciated by the High Court and the Racial Discrimination Act;
- In accordance with case law principles, in particular *Neal v R* 1982, equality before the law implies and requires recognition by Courts of cultural difference in relation to sentencing matters;
- The removal of cultural background from the codified list of sentencing factors in Section 16A would be inappropriate for all ethnic and racial minorities.
- Judges have been to date highly circumspect and careful in their considered determinations in cases in which Customary law has risen with proper evidence from anthropologists and other experts.

⁴ The Senate Standing Committee on Legal and Constitutional Affairs Crimes Amendment (Bail and Sentencing) Bill 2006 Report (October 2006), 18

⁵<http://www.vals.org.au/news/submissions/74%20Media%20release%20ATSILS%20%20Customary%20Law%20290606.pdf>
