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VALS submission to the Senate Legal and Constitutional Affairs Committee in response to the Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006.

'Culture is not the enemy - Culture is a tool towards achieving justice'

sent 27 September 2006

Introduction

Thank you for the opportunity to comment on the Crimes Amendment (Bail and Sentencing) Bill 2006. However, VALS is concerned by the inadequate amount of time to provide comment, especially as the Bill originated from the National Summit on Indigenous Violence (26th June 2006), where there was no or limited Indigenous Australian presence.

It is ironic that at a time when the Commonwealth Government is advocating the importance of being aware of our history and culture that amendments to the Crimes Act 1914 are being proposed which seek to deny the importance of culture.

The proposed Crimes Amendment (Bail and Sentencing Bill) 2006 removes the requirement to consider cultural background and includes a new section to proscribe (preclude) any possibility of culture being used to justify a more lenient sentence.

The Bill is based on several demonstrably false assumptions and as a result it will fail to achieve its stated objectives. Accordingly VALS calls for a moratorium on the Bill in order to enable the Indigenous Australian community to understand the Bill better and provide comment on it.

Please see Appendix A, which contains a media release of Aboriginal and Torres Strait Islander Legal Services titled 'Aboriginal and Torres Strait Islander Legal Services Support Customary Law' (29th June 2006).

Unwarranted Assumptions

1. Consideration of cultural background by Courts is leading to lenient sentences

The first unwarranted assumption in the Bill is that the consideration of cultural background by Courts is leading to lenient sentences. In our experience, the inappropriate use of cultural background by Courts to justify more lenient sentences is extremely rare. Over the last decade we are aware of a handful of cases where the issue of lenient sentences and cultural

background has been problematic. These cases have speedily been appealed by the Director of Public Prosecutions. The continuing and worsening level of Aboriginal over-representation in the criminal justice system might be expected to have created a corresponding larger number of cases where Courts had been too lenient in sentencing; however there is no evidence of this (see below). The Commonwealth Government proposal is to introduce legislation to prevent something happening which hardly ever happens.

Also, the enthusiasm the Government has for removing cultural background as a factor in sentencing gives the impression that culture is regularly used as a 'get out of jail free' card for Aboriginal and Torres Strait Islander peoples. The fact that prison numbers across Australia are rapidly increasing and that Aboriginal people now constitute 22% of all prisoners, an increase from 14% in 1991 is surely an indication that the criminal justice system is already highly effective at placing people in jail.1 As of 30 June 2004, Indigenous Australian offenders were 11 times more likely to be incarcerated than non-Indigenous offenders.

VALS agrees with the Law Council of Australia Submission (Aboriginal Customary Law (29 May 2006) that the notion that a 'customary law defence' exists, is a fallacy. Customary law has 'never been accepted as a defence or justification for abusive or violent behaviour'2[1]. However, at common law the recognition of traditional law in sentencing has been well established. Though it is important to note that '*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.*'

Also, evidence exists that support for punitiveness is superficial and when Australians have more access to circumstances surrounding a court case than the media provides, they change their mind and no longer consider certain outcomes lenient. According to the Sentencing Advisory Council:

- In the abstract, the public thinks that sentences are too lenient.

- Despite apparent punitiveness, the public favours increasing the use of alternatives to imprisonment.3

According to Professor Larissa Behrendt in an article titled "*Politics clouds issues of Culture and* Customary Law" despite the fact that many reports have been written documenting sexual assault in the Aboriginal community for decades, many by Aboriginal women, when

1 National Prisoner's Survey as quoted in
Calma Tom, **'***From rhetoric to reconciliation* - Addressing the challenge of equality for Aboriginal and Torres Strait Islander peoples in criminal justice processes' The Elliott Johnston Tribute Lecture 23 May 2006 as at http://www.hreoc.gov.au/speeches/social_justice/reconciliation20060523.html
2 Paragraph 77, Aboriginal Customary Law – Law Council Submission, 29 May 2006
3 Gelb, Dr Karen, 'Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing (Sentencing Advisory Council) July 2006, p v, as at http://www.sentencingcouncil.vic.gov.au/CA256902000FE154/Lookup/SAC_PDFs/$file/Public_Opinion_Research_Paper.pdf

a Public Prosecutor raised the issue it sparked a media frenzy. Notably, the Public Prosecutor was non-Indigenous.4

In summary, there has been a misrepresentation of the issue. Customary law is not a shield behind which violent Aboriginal people hide. It is incorrect to view customary law as vehicle through which an offender can receive a lenient sentence.

2. The primary problem with sentencing is that it is not harsh enough

The second unwarranted assumption in the Bill is that the primary problem with sentencing is that it is not harsh enough. This has become a national preoccupation over the last decade in spite of the evidence that harsher sentences have a negligible impact on re-offending rates or crime rates. Harsher sentences have largely replaced a focus on appropriate and rehabilitative sentences and crime prevention. Sadly, successive State Governments have a "tough on crime" bidding war at each election. We are yet to hear some proposals to prevent crime or to promote diversion and rehabilitation.

3. The existing requirement to consider cultural background will lead to too great an emphasis being placed on culture in the consideration of sentencing

The third unwarranted assumption in the Bill is that the existing requirement to consider cultural background will lead to too great an emphasis being placed on culture in the consideration of sentencing. The Explanatory Memorandum states that "…this amendment removes an unnecessary emphasis on the "cultural background" of convicted offenders".5 The quote is a value judgement that cultural background has been given too great a weight in past sentencing or culture is a vehicle for lenient sentencing. As we have stated above there is no evidence for this. Removing the requirement to consider cultural background implies that a significant part, an essential part, an integral part of a person's identity no longer retains important for Courts making sentencing decisions. This is not dissimilar to trying to remove a person's identity.

Justice Geoffrey Eames of the Victorian Supreme Court – Court of Appeal said in 2002 (R v Fuller-Cust [2002] VSCA 168)

"Sentencing principles are the same for all Victorians. Race is not a basis for discrimination in the sentencing process. Nothing I say in these reasons should be taken as suggesting that Aboriginal offenders should be sentenced more leniently than non-Aboriginal persons on account of their race…To ignore factors personal to the applicant and his history, in which his Aboriginality is a factor, and to ignore his perception of the impact on his life of his Aboriginality would be to sentence him as someone other than himself".

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4 Behrendt Larissa 'Politics clouds issues of culture and 'customary law'' Proctor 26(6) Jily 2006:14

5 Explanatory Memorandum of Crimes Amendment (Bail and Sentencing Bill) 2006, p.3

The Commonwealth's proposed legislation is a proposal to do exactly this, a proposal to sentence people as though they were someone else. Culture is inseparable from individuality and it is unrealistic to strip away culture from a person. Any notion that this is plausible is based on an over-simplistic conceptualisation of culture. Culture is integral to a person's world-view.

Associated with the assumption that consideration of cultural background will lead to too great an emphasis being placed on culture in the consideration of sentencing is the under valuing of culture.

The demonisation or under valuing of Aboriginal culture is becoming a culture in itself and apparent in the following:

a. Mainstreaming of service delivery, which means removing the cultural expert.

b. Cultural awareness training is minimally attended by those who need the training the most. It is the VALS' Chief Executive Officer's experience that often the majority of Judicial Officers who attend the cultural awareness training are the converted and it is others who need to be preached to.

c. Notion that self-determination has failed (Tony Abbott), but it has not been properly tried.

d. Continued paternalism of the Government

e. Assumption that culture is not a dynamic living thing, but a thing of the past (ie: cultural museum – Amanda Vanstone).

f. Claim that culture should not be taught in schools. This is evident in the Menzies Research Centre Report titled "Aboriginal Education: Remote Schools and the Real Economy" at the VALS website: www.vals.org.au

g. Culture is only seen as a negative or an enemy to justice (refer to discussion on the Koori Courts below).

h. The culture of the media and Government is to only represent the worst stories about Indigenous culture. If a truly balanced representation of Indigenous Australians was represented it will be broader than is currently offered and include:

    i. Balance of blame of individuals and acknowledgment of the failure of the Government in addressing issues of disadvantage stemming from the colonisation of Australia.

    ii. Good news stories about how Indigenous Australians are attempting to solve problems (ie: awards for good governance, sobering-up centres, night patrol, time-out houses).

i. The onus is placed on newly arrived migrants to learn about Australian culture, but a similar onus is not placed on Australians to learn about the culture of migrants or Aboriginal people.

j. The loud and clear message that violence is not a part of Aboriginal culture is falling on deaf ears. The debate around customary law and family violence, and indeed the introduction of the Bill, highlights the continued misunderstanding about culture and the causes of violence in the Aboriginal community.

The demonisation of Aboriginal culture above contrasts with the situation in New Zealand where culture is valued as social capital. Build bridges/bonds between two cultures/work collaboratively. The following Court cases, along with Fuller-Cust, place value on Indigenous Australian culture by considering it relevant.

Neal v The Queen [1982] HCA 55

"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" per Brennan J (Neal v The Queen 149 CLR 305)

R v Norris, Norris & Bodere [2006] VSC 75

"..Given the well recognised socio-economic disadvantages that confront many members of the Aboriginal community and contributes to their disproportionate involvement in the criminal justice system, a sentencing judge is bound to consider the impact, if any, of your Aboriginality on each of you when addressing both the cause and context of your offending and your prospects for rehabilitation"
per Eames J – R v Norris, Norris & Bodere [2006] VSC 75 (6 September 2006)

4. *Cultural background is somehow the enemy of the justice system.*

The fourth unwarranted assumption of the Bill is that cultural background is somehow the enemy of the justice system. Most State Governments and Governments in Canada and New Zealand have developed Court initiatives which better include cultural knowledge and experience of Indigenous peoples. The outcomes of such initiatives highlight that cultural background is not an enemy of the justice system. Victoria's Koori Court, for example, uses Elders and Respected Persons to help the Magistrate decide on the most appropriate sentence (ie: cultural expertise).

Koori Courts are not a panacea but they have resulted in significantly lower re-offending rates. Only 14 of the 152 people who appeared before the Shepparton Koori Court, in its first 18 months had re-offended.7 Four years after the introduction of a Circle Sentencing

6 www.austlii.edu.au/au/cases/vic/VSC/2005/75.html

7 Sykes: Koori Court nominated for crime prevention award, Friday, 15 April 2005 as a thttp://www.vicnats.com/news/default.asp?action=article&ID=2348

program in Nowra, only two of 24 offenders had re-offended.8[2] Moreover, the program reduced the number of Koori offenders appearing on list days at the local court from 23 percent to 6 percent9[3]. This highlights one of the positive effects of including Aboriginal and Torres Strait Islander knowledge and perspectives. The Koori Court is not a soft option as it is arguably more confronting for Aboriginal people to appear before their Elders and Respected Persons than a culturally alienating Magistrates' Court. There are many other examples across Australia of Aboriginal and Torres Strait Islander peoples working collaboratively to address health education and environment problems using cultural background as a strength not a liability (ie: Victim of Crime Assistance Tribunal Koori List).

The framework of the legal system is to treat culture as only an issue in relation to mitigating circumstances. This is a framework based on a "tough on crime" approach that measure of success of the sentence in terms of the severity of it. The framework should be looking out the measure of success being the appropriateness of the sentence in terms of rehabilitation or recidivism reduction.

The Bill is at risk of undermining positive initiatives, such as the Koori Court and Circle Sentencing. Rather than attacking something that works (ie: consideration of cultural background), the flaws in the justice system should be attacked (ie: caused by the systemic racism of the dominant monoculture). The Bill assumes that the Western legal system has an equal effect on all Australians, however, this is not the case. If the Victorian Government enacts similar provisions to the Bill then this will be a backwards step from the Victorian Aboriginal Justice Agreements (2002 and 2006). The Koori Courts make the legal system more meaningful to Indigenous Australians and improve the Aboriginal community's confidence in the criminal justice system.

5. *It is reasonable to take cultural background out of the factors which should be considered in sentencing*

The fifth unwarranted assumption of the Bill is that it is reasonable to take cultural background out of the factors which should be considered in sentencing. Consider some of the characteristics alongside of the 'cultural background' characteristic in the existing legislation. Age and mental capacity are two such neighbouring characteristics which have not been culled. Would it be acceptable to delete age from the matters to be considered in sentencing? Would it be fairer if we treated all people according to an average age? Would the justice system be better if we abolished Children's Courts and Juvenile Justice Centres and rolled them all into the adult system? Would it be fairer if we ignored issues of mental problems and simply treated all people as if they were all equally mentally able? We suggest not. Culture is an integral part of a person's identity and the proposal to abolish the need to consider it in sentencing is a recipe for both demeaning the value of peoples' cultures and reducing the effectiveness of the justice system. VALS would go as far to say that cultural background is more important that the other factors in section 16(m).

Unintended consequences

The unintended consequences of the Bill are as follows:

8[2] Lavelle, Keren. '*Circle sentencing breaks cycle'*. Law Society Journal 42(8) September 2004: 18:21
9[3] Lavelle, Keren. '*Circle sentencing breaks cycle'*. Law Society Journal 42(8) September 2004: 18:21

- It will be more difficult for non-Indigenous Australians to appreciate the diversity of and the positive effects of Aboriginal and Torres Strait Islander culture.

- A continued preoccupation with harsher sentencing at the expense of achieving improved rehabilitation and prevention.

- Whilst Magistrates and Judges will still have the discretion to consider cultural background, some would be most likely to be reluctant to do so. The media hysteria following the case of GJ and the Government's demonising culture as the villain has created a climate where Magistrates and Judges will hesitate in considering culture for fear of possible backlash.

Further arguments:

- **International Legal Principles:**

  The Law Council of Australia has highlighted 'the imposition of western value systems on Indigenous cultures may also be seen as an infringement of basic human rights, such as the right to self-determination'. (p.8, Aboriginal Customary Law – Law Council of Australia Submission).

- **Underlying issues:**

  A law and order approach does not address underlying issues. However, even a narrowly focussed law and order approach will be ineffective if it fails to appreciate the importance of culture as a source of pride and strength rather than a liability.

- **White Australia Policy:**

  At the same time as celebrating and finding identity as a multicultural county the diversity within Australia is denied by this amendment. Australia is not a monocultural society, yet in effect the Bill is deeming Australia a monocultural society in a similar manner as the earlier White Australia Policy.

- **Bail:**

  The changes to bail provisions are exceptionally broad and should be reviewed. There will be considerable cost implications for Legal Aid providers if harsher and more complicated bail conditions are introduced. The arguments raised above about sentencing are applicable to bail. Please see VALS' submission to the Victorian Law Reform Commission in response to the 'Review of the Bail Act Consultation Paper' (November 2005), sent 22nd February 2006 at http://www.vals.org.au/news/submissions/62%20VALS%20Submission%20re%20bail%20sent%20220206.pdf.

- **Cultural Awareness Training:**

  VALS notes that cultural awareness training will be provided. VALS seeks further information about this training in light of the Bill removing reference to cultural background.

APPENDIX A

For immediate release, 29 June 2006

MEDIA RELEASE

Aboriginal and Torres Strait Islander Legal Services
Support Customary Law

The Chairpersons, CEOs and Principal Legal Officers of all Aboriginal and Torres Strait Islander Legal Services across Australia are calling on the Australian Government to involve them in any discussion on changes in legal policy for Indigenous peoples.

The call comes after a Forum in Adelaide, 28 & 29 June and discussion of details of a Communiqué from the Indigenous Affairs Ministerial Summit in Canberra, 26 June.

Although commending Ministers on wanting to do something, on behalf of the Forum, Chairperson, Mr Frank Guivarra said there were specific concerns about a number of issues.

1. The proposal that section 16A of the *Commonwealth Crimes Act* be amended to delete mandatory consideration of cultural background of offenders and exclude it from sentencing discretion, is contrary to fundamental principles of equality as enunciated by the High Court and the *Racial Discrimination Act*;

2. 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;

3. The Forum endorses the Law Council submission to the WA Law Reform Commission on Aboriginal Customary Law that removal of the court's power to consider all factors relevant to the state of mind of an accused is against the principles of Australian law.

4. The removal of cultural background from the codified list of sentencing factors in Section 16A would be inappropriate for all ethnic and racial minorities.

5. A significant issue within Customary Law is double jeopardy – where, whilst Australian law applies, so may a perpetrator be dealt with under Customary Law.

6. Application of Customary Law restores harmonious relations within communities.

7. We support the Law Council's recognition that Customary Law is highly complex and cannot be simply categorised.

8. Recognition of Customary Law is consistent with the approach of the Australian Law Reform Commission in Report 31 and with the approach adopted by Superior Courts of Record for the last half century.

9. 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.

The Forum noted that the important developments of Aboriginal courts in the criminal justice system and the proposed changes conflict with these developments.

We believe the application of Customary Law facilitates a reduction in crime in Aboriginal communities.

The Forum suggests that ill-informed and simplistic approaches should not be applied, nor should the Commonwealth rush into ill-considered legislation.

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