



## Crimes Amendment (Bail and Sentencing) Bill 2006

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Law and Bills Digest Section

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## Crimes Amendment (Bail and Sentencing) Bill 2006

**Date introduced:** 14 September 2006

**House:** Senate

**Portfolio:** Attorney-General

**Commencement:** The day after the Bill receives Royal Assent.

### Purpose

The bill amends the sentencing and bail provisions in the *Crimes Act 1914* in accordance with the [decisions](#) made by the Council of Australian Governments (COAG) on 14 July 2006. COAG agreed that ‘no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment’.<sup>1</sup>

COAG also asked the Standing Committee of Attorneys-General (SCAG) to report to the next COAG meeting on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities and to recommend any changes required.

The COAG meeting followed the recommendations of the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities on 26 June 2006.<sup>2</sup>

This bill passed through the Senate on 8 November 2006 with two Government amendments.

### Background

#### Basis of policy commitment

In the second reading speech, it is stated that the amendments have been linked to the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities. The Minister for Families, Community Services and Indigenous affairs, The Hon Mal Brough MP, expressed concern at that Summit about the high level of violence and child abuse in indigenous communities. The bill is stated to be one element in the Australian Government’s approach to addressing the difficult issues of family violence and child abuse in Indigenous communities.

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When introducing the Bill, Senator McDonald emphasised that through these amendments the Government is seeking to ensure that all Australians will be treated equally under Australian law regardless of their cultural background.

All Australians should be treated equally under the law. Every Australian may expect to be protected by the law, and equally every Australian is subject to the law's authority.

Criminal behaviour cannot in any way be excused, justified, authorised, required or rendered less serious because of customary law or cultural practice. The Australian Government rejects the idea that an offender's cultural background should automatically be considered, when a court is sentencing that offender, so as to mitigate the sentence imposed.

Likewise, this bill will preclude any customary law or cultural practice from being taken into account, in the process of granting bail to an alleged offender, in such a way that the criminal behaviour concerned is seen as less culpable. All Australians, regardless of their background, will thus be equal before the law...<sup>3</sup>

The bill appears to be designed as a model to encourage the States and Territories to adopt similar sentencing and bail provisions.

### The concept of 'cultural background' in the Crimes Act

State and territory criminal laws cover the vast majority of conduct that requires the censure of criminal law. State and territory law is concerned with offences involving personal violence or violation of property (such as murder, assault and robbery), public order offences, regulatory offences in areas such as environmental protection and occupational health and safety, and traffic offences. However, there are significant areas of overlap with Commonwealth criminal law concerned with, for example, social security and tax fraud, illegal drug importation and migration matters.

Paragraph 16A (2)(m) of the *Crimes Act 1914* requires the court to consider 'the character, antecedents, cultural background, age, means and physical or mental condition of the person' as one of the factors in sentencing.<sup>4</sup>

Section 19B mentions cultural background as a consideration relevant to not recording a conviction.

The term 'cultural background' was inserted into section 16A of the *Crimes Act 1914* in 1994, along with a range of amendments introduced with the Crimes and other Legislation Amendment Bill 1994 (the COLA Bill).<sup>5</sup> The then Parliamentary Secretary to the Attorney-General, the Hon. Peter Duncan MP stated in his second reading speech<sup>6</sup> that the amendment was being made to implement recommendations of the Australian Law Reform Commission (ALRC) report 'Multiculturalism and the Law' regarding sentencing of federal offenders.<sup>7</sup>

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The amendments were carried with bipartisan support. Mr Peter Slipper MP, a member of the Coalition opposition 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.<sup>8</sup>

In 2005, the ALRC released an Issues Paper [Sentencing of Federal Offenders](#)<sup>9</sup> raising a series of questions about the sentencing and management of offenders convicted of federal criminal offences. The Issues Paper analysed the limited data available regarding federal offenders. More than 4,000 persons are convicted of federal offences each year, the bulk of these being summary social security offences. There are no available data on the sentencing outcomes for all federal offenders, but as at 1 September 2006 there were 687 federal offenders in state and territory prisons.<sup>10</sup> Over time the number of federal prisoners has generally increased at a rate that has kept pace with the growth in the total sentenced prison population. There is wide variation in the number of federal prisoners by type of offence. The bulk of current federal prisoners (69%) have been convicted of drug offences. Of the remainder, 12% were serving prison terms for offences under the Commonwealth *Crimes Act 1914* (including offences such as damaging Commonwealth property and child sex tourism); financial offences (7%); illegal fishing (5%); and social security offences (4%).<sup>11</sup>

In the recently released ALRC report, [Same Crime, Same Time: sentencing of federal offenders](#),<sup>12</sup> [Appendix 1](#) provides a statistical overview of federal prisoners. There is no data collected which shows whether offenders are indigenous Australians or not. Data is collected on federal prisoners' country of birth or nationality. An extract from the appendix is shown below.

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**Figure A1.13: Country of birth or nationality of Australian prisoners**

Country of birth or nationality	Federal		Australia	
	No.	%	No.	%
Australia	302	43	17,954	74
Asia–other	59	8	312	1
Indonesia	50	7	82	0
Africa*	30	4	57	0
Europe–other	30	4	583	2
Hong Kong (SAR of China)	27	4	65	0
United Kingdom and Ireland	27	4	638	3
North America/Canada	24	3	56	0
Latin America	20	3	0	0
Middle East#	16	2	180	1
Netherlands	15	2	52	0
China (excludes Hong Kong SAR & Taiwan)	14	2	144	1
New Zealand	14	2	606	3
Vietnam	11	2	668	3
South Pacific	5	1	270	1
Other	1	0	842	3
Unknown	50	7	1,662	7
<b>Total</b>	<b>695</b>	<b>100</b>	<b>24,171</b>	<b>100</b>

*Source:* Federal Prisoners 2004 (AIC file); ABS, Prisoners in Australia 2004. \*ABS data place African countries except South Africa in ‘other’. # ABS data place Middle East countries except Lebanon in ‘other’.

As part of the ALRC inquiry into sentencing of federal offenders, the ALRC considered the operation of section 16A of the Crimes Act, and in particular the sentencing of Aboriginal and Torres Strait Islander (ATSI) offenders. The ALRC’s recommendations in its *Same Crime, Same Time* report included the following recommendations:

- Cultural background should be considered by a court when sentencing a federal offender.
- Legislation should endorse the practice of considering traditional law and customs, where relevant, in sentencing an ATSI offender.<sup>13</sup>

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## Senate Report

The bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs on 14 September. The Committee's [report](#) on the bill was tabled on 16 October 2006. The Committee received 14 written submissions on the bill and held a public hearing on 29 September 2006.

The report notes a series of criticisms of the bill, including that the 'Bill's focus is misdirected', because of the 'absence of any Federal laws relating to violence or sexual abuse in Indigenous communities that will be affected or changed as a result of the Bill'.<sup>14</sup>

The Committee also voiced concerns about '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'.<sup>15</sup>

Finally, the Committee considered that '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'.<sup>16</sup>

The Committee made the following recommendations:

### Recommendation 1

3.104 The committee recommends that the Bill be amended to replace the words 'excusing, justifying, authorising, requiring or rendering less serious' in proposed paragraph 15AB(1)(b) and proposed subsection 16A(2A) with the words 'mitigating or enhancing the seriousness of' to clarify the scope of their operation.

### Recommendation 2

3.105 The committee 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 3

3.106 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.<sup>17</sup>

The majority of written submissions from organisations such as the Law Council of Australia, the ALRC, National Legal Aid and the Human Rights and Equal Opportunity Commission expressed concern in relation to various aspects of the bill and its likely practical operation. The Committee identified the following key concerns:

- lack of consultation with respect to the Bill;

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- arguments that the Bill is misguided and ill-conceived, and will do little, if anything, to address violence and child abuse in Indigenous communities in a practical sense;
- the discriminatory nature of the Bill;
- arguments that the Bill runs contrary to the findings of major relevant inquiries in Australia, such as the Royal Commission into Aboriginal Deaths in Custody;
- arguments that the Bill will restrict judicial discretion; and
- arguments that the Bill undermines important initiatives involving Indigenous customary law, such as circle sentencing.<sup>18</sup>

While the bill's proposed application to sentencing procedures attracted the most criticism, some submissions and witnesses argued that its application to bail proceedings could also be problematic.

In particular, at paragraph 3.76 the Committee notes the argument of National Legal Aid (NLA) that the bill's requirement for the bail authority to consider the 'potential impact' of granting bail on victims, witnesses and potential witnesses is very broad and could be interpreted 'to the point where it might seriously impede on the presumption of innocence and substantially increase the remand rate'.<sup>19</sup>

### *GJ v R*

The political impetus for the Summit and the bill originated in public debate around the sentencing decision in the *GJ v R* case involving customary law in the Northern Territory (NT).

In the Supreme Court of the Northern Territory the 55 year-old defendeant pleaded guilty before Chief Justice Brian Martin to two offences against a young girl aged 14. The offences involved unlawful assault and sexual assault on the girl. The maximum penalty for the first offence was five years imprisonment. For the second offence it was 16 years imprisonment. The defendant contended that the complainant had been promised to him as his wife when she was four years old and that what he did conformed to his culture and traditions.

The original sentence was handed down in the NT Supreme Court by Chief Justice Martin on 11 August 2005.<sup>20</sup> It was not reported because the accused pleaded guilty but there is a transcript of the sentencing decision reported in the Sydney Morning Herald on 28 September 2005.<sup>21</sup>

Chief Justice Martin described the case as one involving 'not just a clash of laws or of culture [but] a clash of generations':

This is an extremely difficult case. You are a 55-year old traditional Aboriginal man. You believed that traditional law permitted you to strike the child and to have

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intercourse with her. On the other hand, the law of the Northern Territory says that you cannot hit a child. The law of the Northern Territory also says that you cannot have intercourse with a child.

...Part of the evidence I have heard this morning concerns your traditional law and how your traditional law views the rights of a man to whom a young girl has been promised. I accept that evidence. It gives me a small insight, but only a small insight, into the traditional law. It is a very complicated area, which involves far more than a simple question of marriage and sexual relationships between a younger man and a younger woman. It goes to the heart of community relationships.<sup>22</sup>

The Chief Justice convicted the applicant and sentenced him to five months imprisonment on the first count and 19 months imprisonment on the second count but ordered that the sentence be suspended upon the applicant's entering into a recognisance in the sum of \$250 to be of good behaviour for two years. Only one month was actually to be served.

The prosecution appealed. On 22 December 2005, the Court of Appeal of the Northern Territory allowed the appeal and substituted a sentence of three years six months imprisonment on the second count, making a total term of imprisonment of eighteen months which it ordered be actually served.<sup>23</sup>

The applicant then sought special leave to appeal to the High Court on the basis that the Court of Appeal erred in the weight it gave to the traditional beliefs of the applicant and that, in re-sentencing, it failed to observe the usual principles of moderation applicable to successful prosecution appeals.

The High Court of Australia dismissed the accused's appeal against the harsher sentence on 19 May 2006. The transcript for *GJ v The Queen* is available at <http://www.austlii.edu.au/au/other/HCATrans/2006/252.html> (19 May).

The High Court followed the principle laid down by Justice Brennan in *Neal v The Queen* when his Honour said:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, 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. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance...<sup>24</sup>

The issues raised by this particular case have been discussed extensively in the media. Minister for Health, Tony Abbott stated in the context of a recent Quadrant article that the Chief Justice's original sentencing decision in this case had come to 'symbolise the triumph of political correctness over justice'.<sup>25</sup>

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See further:

Nassim Khadem, '[Making courts culture free](#)', *The Age*, 14 July 2006, p. 13.

Larissa Behrendt, '[No quick fix](#)', *Australian Policy Online*, 1 June 2006.

Stewart O'Connell, '[Black law breakdown](#)', *National Indigenous Times*, v. 5(106), 1 June 2006, pp. 8–10.

*Canberra Times*, '[Editorial: Customary law is a mitigating factor](#)', 27 May 2006, p. 6.

### Aboriginal Customary Law

The ALRC looked at the issues involved with customary law in detail in its 1986 report *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) ([Summary](#)). Three State jurisdictions have also looked at the issue in detail:

- WA Law Reform Commission [Discussion paper on Aboriginal Customary Law](#) and [Final Report](#) (2006)
- Northern Territory Law Reform Committee (NTLRC) [Report on Customary Law](#), 2003 (pdf)
- Law Reform Commission NSW, - [Sentencing: Aboriginal offenders](#), Report 96 (2000)

The laws vary between States and Territories in relation to the weight accorded to customary law. It can be referred to either expressly or as one factor in the judge's general sentencing discretion. For example, the sentencing guidelines under section 5 of the NT *Sentencing Act* merely allow the judge discretion to consider the offender's background in the context of the seriousness of the offence. Under section 104A, the process in which the judge receives any information on customary law is regulated.

Issues around customary law are also affected by Australia's international obligations. The International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, includes provisions dealing with the criminal justice system. It requires states parties to ensure that all persons are equal before the law and are entitled, without discrimination, to the equal protection of the law.'

More specifically, it provides that 'all persons shall be equal before the courts and tribunals' and that in the determination of any criminal charge 'everyone shall be entitled to a fair and public hearing'. It requires states parties to incorporate safeguards against arbitrary arrest and imprisonment into their law.<sup>26</sup>

While the norm of equality might be the clear goal of a legal system, issues of how formal and substantive equality play out in real-world examples are complex, especially when the issues involve intersections of race and gender.

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The Law Reform Commission NSW report states that Aboriginal customary law can become relevant within general criminal proceedings in a number of ways:

Evidence may be submitted in mitigation of sentence that the offender has already received, or will receive, traditional punishment. A court could even consider suspension of a sentence to enable the Aboriginal offender to undergo traditional punishment.

Where an offence has been committed in pursuance of, or as required by, Aboriginal customary laws, these circumstances may be raised in mitigation of the offence.<sup>41</sup> For example, where a person has carried out a traditional punishment, such as a payback spearing, he himself may be charged with assault. These circumstances may also be raised as a defence to the charge, although this aspect is not relevant to this reference.

Evidence that an offence was provoked by the victim's breach of a customary law will usually have implications for mitigation of sentence.

Although it may not strictly be a matter of Aboriginal customary law, evidence of traditional customs or beliefs may help to explain the defendant's conduct and act in mitigation.

Evidence of Aboriginal customary law may affect the exercise of the prosecutorial discretion, vested in both police and the Crown, as to whether an accused person is charged with an offence at all, or as to the nature of the offence with which he or she is charged.

An Aboriginal offender may be subject to customary law obligations which have some relevance to determining what is an appropriate sentence. An example can be found in the convicted person's duty in relation to forthcoming tribal ceremonies.

Less directly, a consideration of Aboriginal customary law may arise if the offender's Aboriginal community seek to inform the court of its perceptions of the seriousness of the crime and its attitude towards the offender. If there is to be recognition of Aboriginal customary law, the further issue arises as to whether the community's views should be relevant to the court's sentencing.<sup>27</sup>

See further Chapter 3 of Law Reform Commission NSW, [Sentencing: Aboriginal offenders](#), Report 96, 2000 which gives a précis of important cases where customary law has been discussed.

The 1986 ALRC report noted a number of arguments in favour of greater recognition of Aboriginal customary law:

- recognition would advance the process of reconciliation between Aboriginal and non-Aboriginal Territory residents
- non-recognition can lead to injustice in specific situations where traditional law governs a person's conduct

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- the present legal system has failed to deal effectively with many Aboriginal disputes and there are disproportionately high levels of Aboriginal contact with the justice system
- traditional authority may be more efficient in maintaining order with Aboriginal communities, and thus be more cost-effective
- courts are recognising Aboriginal customary law within their discretionary powers, and more formal recognition would clarify the law
- non-recognition is consistent with principles of 'assimilation' and 'integration', whereas principles of 'self-management' or 'self-determination' are more appropriate
- Australia's international standing and reputation would benefit from its giving recognition to the laws and traditions of its indigenous peoples.

The ALRC Report identified a number of arguments against recognition:

- customary law may incorporate rules and punishments that are unacceptable to the wider Australian society
- some aspects of customary law are secret, and disclosure on a confidential basis is inconsistent with the judicial function within our legal system
- Aboriginal people may lose control over customary law if it were incorporated within the general legal system
- customary law may not adequately protect Aboriginal women
- recognition of customary law might create 'two laws' within our society
- Aboriginal customary law may no longer be relevant to some Aboriginal people, and some may prefer the present legal system
- recognition should be restricted to those Aborigines living in a strictly traditional manner.<sup>28</sup>

### Constitutional issues

The amendments contained in the bill introduced by the Commonwealth would limit judicial discretion in sentencing matters. The constitutionality of this arose in the mandatory sentencing debate as to whether limiting or completely usurping judicial discretion in sentencing constitutes an impermissible interference with the judicial power. This occurs when the legislature vests in a court capable of exercising the federal judicial power, a power which is incompatible with the judicial process.<sup>29</sup> This could mean the amendments could be open to a constitutional challenge.

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## ALP policy position

ALP Senators on the Senate committee which examined the bill produced a dissenting report. The Labor Senators recommend that the bill not proceed.

Labor Senators note that the overwhelming view among those who provided evidence to the committee was that the Bill represents a completely misguided approach to addressing, in any meaningful way, the endemic problems of violence and child abuse in Indigenous communities.<sup>30</sup>

During the second reading debate on 8 November in the Senate, ALP Senator for Queensland Joe Ludwig, a member of the Committee which had considered the bill was scathing in his assessment:

This bill purports to tackle ‘the relatively high level of violence and abuse in Indigenous communities.’ But it will achieve nothing of that sort. What I have heard in the committee’s hearings on this bill leaves me in little doubt that this bill is nothing more than a legal fig leaf to cover the inadequacies of the minister purportedly responsible for Indigenous affairs. The legislation is in fact not worth the paper upon which it is written. It is a distraction; it is a waste of the time and energy of this parliament.<sup>31</sup>

Senator Chris Evans called the bill an ‘obnoxious and badly motivated piece of legislation’.

It is ironic that today, following the release of the most recent statistics on Aboriginal imprisonment in Australia, we are dealing with a bill that effectively has at its core an argument that we are not locking up enough Aboriginal people...

One of the things that frightens me most about this bill is that it seeks to perpetrate the myth that somehow violence against children and women is endorsed or perpetuated by Aboriginal customary law. That is wrong. It is a lie. There is no evidence for it. And the danger in this bill is that it seeks to perpetuate that myth. That is why it is so abhorrent, and that is why the Senate ought to reject it.<sup>32</sup> [Just as an aside, if the Senator is correct, it would seem that, on the basis on the excerpt from Justice Martin’s statement, that GJ was wrong about his understanding of traditional law].

## Australian Democrat/Australian Greens/Family First policy position

Senator Andrew Bartlett stated in the second reading debate on 8 November that the bill was a ‘disgrace’, racially discriminatory in its effect if not its intent, and ‘a con’. He referenced the Parliamentary debate around the Crimes Act ‘cultural background’ amendment in 1994:

What has changed? What has changed is huge moral panic and media outrage about what is, I accept, a legitimate concern regarding some Aboriginal communities. That is being used as a smokescreen to completely reverse the solidly based, properly

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thought through and fully considered cross-party evidence based situation in the law—which is to be taken out to insert an ideologically driven, completely divorced from reality obsession with dismissing any cultural difference that does not reflect the dominant Anglo-cultural preference of those who promote this ideology. That, I would suggest, is a perversion of the law, and it introduces a reality that is racially discriminatory, where one group of people’s cultural background, which is automatically infused in the way the law is interpreted, has precedence of everybody else’s. This action will consciously take away the requirement to give automatic consideration.<sup>33</sup>

The Australian Greens in the Senate voted against the bill.

The Family First Senator, Steven Fielding voted for the bill.

## Financial implications

There are no financial implications from the provisions in the bill. However, the Minister for Families, Community Services and Indigenous affairs, The Hon Mal Brough MP has indicated that state and territory funding for indigenous programs will be linked to states and territories amending their laws so as to remove cultural background from mandatory consideration when sentencing offenders.

The funding linkage has been opposed by ACT Chief Minister, Jon Stanhope and the WA Attorney-General.<sup>34</sup>

## Main provisions

Schedule 1 – Amendment of the *Crimes Act 1914*

**Item 1** inserts a definition of ‘bail authority’ into subsection 3(1) of the Crimes Act. Section 3 of the Crimes Act is the interpretation section.

The inserted definition states that ‘bail authority’ means ‘a court or person authorised to grant bail under a law of the Commonwealth, a State or a Territory.’ This definition is the same as the definition which is currently in the Crimes Act at subsection 15AA(5). The Explanatory Memorandum states that the definition is being moved to the general interpretation section because it will not just be used in section 15AA.<sup>35</sup>

**Item 2** repeals the existing definition of bail authority from subsection 15AA(5).

**Item 3** inserts **new section 15AB** which is headed **Matters to be considered in certain bail applications** into the Crimes Act. It requires a bail authority, when considering granting bail or imposing bail conditions on alleged offenders in relation to federal

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offences, to consider the potential impact of the bail authority's actions on victims and potential witnesses. The Explanatory Memorandum states that this amendment gives primacy in the bail process to the protection of victims and potential witnesses, and will ensure that a bail authority takes the interest of such persons into account in cases that fall within the scope of the new section 15AB.

**New section 15AB** also requires that where victims and potential witnesses are living in or located in a remote community, the bail authority must take this into account when considering granting bail. The Explanatory Memorandum explains that this is because remote communities are typically small and isolated, and victims and potential witnesses in such communities face higher risks than others when alleged offenders are released into their communities on bail. The purpose of the amendment is to ensure that bail authorities give appropriate weight to the special circumstances of victims and potential witnesses in remote communities.<sup>36</sup>

'Remote community' is not a defined term. The Explanatory Memorandum states that it will be a matter for the bail authority to determine on the facts of the case whether an alleged victim or potential witness is located in a remote community.<sup>37</sup>

**New subsection 15AB(1)(b)** prohibits a bail authority from taking into account any form of customary law or cultural practice when considering whether to grant bail to an alleged offender. According to the Explanatory Memorandum, this amendment 'helps establish the principle that neither customary law nor cultural practice can be used to mitigate an alleged offender's criminal behaviour – and on that basis allow an alleged offender to be granted bail'.<sup>38</sup>

The Senate Committee found that the inclusion of the words 'rendering less serious' in proposed paragraph 15AB(1)(b) and proposed subsection 16A(2A) effectively means that:

a court could not take into account customary law or cultural practice to render criminal behaviour less serious but could consider these factors if it rendered criminal behaviour more serious. The committee considers this to be undesirable and recommends that these provisions be amended to prevent this outcome. The committee also recommends that these provisions be amended to clarify the scope of their operation.<sup>39</sup>

Two Government [amendments](#) were passed by the Senate on 8 November 2006 which change this item:

Schedule 1, item 3, page 3 (lines 24 to 28), omit paragraph 15AB(1)(b), substitute:

(b) must not take into consideration any form of customary law or cultural practice as a reason for:

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(i) excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates; or

(ii) aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates.

Schedule 1, item 5, page 4 (lines 20 to 23), omit subsection 16A(2A), substitute:

(2A) However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(b) aggravating the seriousness of the criminal behaviour to which the offence relates.<sup>40</sup>

**Item 4** omits the term ‘cultural background’ from paragraph 16A(2)(m) of the Crimes Act. The effect of the amendment will be that it will no longer be mandatory for a court to consider a person’s ‘cultural background’ when passing sentence on that person for committing a federal offence. The term ‘antecedents’ remains in the section however. It is not clear whether this term would still encompass the cultural background of the offender.

The Explanatory Memorandum states that subject to the change made by item 5, a court will still be able to take into consideration the ‘cultural background’ of an offender, in sentencing that offender, should it wish to do so. However, the amendment ‘removes an unnecessary emphasis on the ‘cultural background’ of convicted offenders.’<sup>41</sup>

**Item 5** inserts **new subsections 16A(2A) and (2B)** into the Crimes Act. New subsection 16A (2A) expressly prohibits a court from accepting a ‘customary law or cultural practice’ as an excuse or justification when sentencing a person for having committed a federal offence.

The Explanatory Memorandum explains that item 5 enacts COAG’s decision, made on 14 July 2006 that no ‘customary law or practice’ can provide a ‘reason for excusing, justifying, authorising, requiring or rendering less serious the criminal behaviour to which the offence relates.’<sup>42</sup>

In other words, item 4 allows (rather than requires) judicial discretion on the question of ‘cultural background’ in considering a sentence, but item 5 forbids judges from saying that customary law/practice makes an action less serious (and thus presumably warrants a lighter sentence). It is difficult to predict how these two provisions will work together in practice.

This item has also been amended in the Senate as per item 3 above.

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**Item 6** discusses the application of amendments. Items 1 to 3 will apply, immediately upon this Act's commencement, to persons who have already committed offences but who have not yet been granted bail.

**Items 4 and 5**, which relate to sentencing, will apply from the day after Royal Assent is received, though only in relation to offences committed after the commencement of this Act.

## Concluding comments

The Commonwealth Parliament does not have a general power to legislate with respect to criminal law in a manner which would bind the States and Territories. Most criminal offences are offences against State or Territory law and are investigated and prosecuted by State or Territory authorities.

In addition, most prosecutions for Commonwealth criminal offences are conducted in State and Territory courts, using the criminal procedures of that jurisdiction. For both federal and State or Territory offenders, determinations of bail are made according to the law of the State or Territory in which the person is arrested. Criminal trials are conducted according to State or Territory law and procedures (including rules of evidence).

The changes wrought by this bill will not affect Indigenous offenders such as in the case of *GJ v R*, as the data in the 'Background' section of this Digest attests. A key objection from the HREOC [submission](#) to the Senate inquiry to this bill was that:

The bill is not based on, or supported by evidenced research. It is in conflict with every major inquiry into the role of cultural background and customary law in the Australian legal system.

The Commonwealth can, however, bind itself. The bill is clearly framed by the Government as an attempt to provide leadership and set an example to the States in the context of ongoing negotiations. As Senator Ellis explained:

I put it to the Senate that if the Commonwealth did not provide leadership on this issue it would be found to be wanting. It would be negligent of the Commonwealth as the national government of this country not to set an example to the states and territories.<sup>43</sup>

This amendment is designed as a model, and its principal purpose is to form part of Commonwealth's effort to get the States and Territories to adopt the Commonwealth position.

The question Parliamentarians may wish to consider, therefore, is whether the model or example set by this bill is appropriate. The amendments made by the bill apply to all

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Australians, those of indigenous and other multicultural backgrounds. Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner made the point:

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.<sup>44</sup>

## Endnotes

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1. COAG Communiqué, 14 July 2006, p. 13.
2. Crimes Amendment (Bail and Sentencing) Bill 2006. Explanatory Memorandum, p. 1.
3. The Hon. Sandy Macdonald, Parliamentary Secretary to the Minister for Defence, Second Reading Speech, Senate *Debates*, 14 September 2006, p. 9. See also Attorney-General's Department. Submission no. 11A to Senate inquiry.
4. See further: Simon Bronitt and Kumaralingam Amirthalingam, 'Cultural blindness: Criminal law in multicultural Australia', *Alternative Law Journal*, (1996), April, p. 56.
5. For a more detailed discussion see Law Council of Australia submission to COAG meeting on 14 July 2006 Recognition of Cultural Factors in Sentencing [ Download File ]
6. Peter Duncan MP, 'Second Reading Speech: Crimes and Other Legislation Bill 1994', House of Representatives, *Debates*, 17 November 1994.
7. Australian Law Reform Commission 1992, *Multiculturalism and the Law*, Report No. 57, Australian Law Reform Commission, Sydney.
8. Peter Slipper MP, 'Second Reading Speech: Crimes and Other Legislation Bill 1994', House of Representatives, *Debates*, 17 November 1994.
9. Australian Law Reform Commission. 'Issues paper 29: Sentencing of Federal Offenders', (2005).
10. Attorney General's Department. Submission 11 A to Senate Inquiry.
11. Australian Institute of Criminology. 'Crime facts Information no. 92: Sentencing and administration of federal offenders', 1 March 2005  
<http://www.aic.gov.au/publications/cfi/cfi092.html> accessed 18 Oct 2006.
12. Australian Law Reform Commission. 'Same crime, same time: sentencing of federal offenders', ALRC 103 (2006).
13. See further Alfred Allan, Maria M Allan, Margaret Giles and Deirdre Drake, 'The relationship between bail decision-making and legal representation within the criminal justice system', A research project jointly sponsored by Edith Cowan University and the Western Australian Department of Justice, Perth, January 2003.
14. Senate Standing Committee on Legal and Constitutional Affairs. Crimes Amendment (Bail and Sentencing) Bill 2006. [Report] October 2006 p. 30.

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15. op. cit., p. ix.
16. *ibid.*, p. 31.
17. *ibid.*, p.
18. *ibid.*, p. 9.
19. *ibid.*, p. 26.
20. *The Queen and GJ* (Sentence) SCC 20418849 Transcript of proceedings at Yarralin on Thursday 11 August 2005.
21. 'Chief Justice Brian Martin's sentencing remarks', *Sydney Morning Herald*, 28 September 2005.
22. op. cit.
23. *The Queen v GJ* [2005] NTCCA 20
24. (1982) 149 CLR 305 at 326.
25. Tony Abbott, '[Paternalism reconsidered](#)', *Quadrant*, vol. 50(9) September 2006, pp. 30–34 at p. 31.
26. Article 9, ICCPR.
27. NSW Law Reform Commission, '[Sentencing: Aboriginal offenders](#)', Report 96, 2000, Chapter 3, para. 3.30.
28. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) ([Summary](#)).
29. See further D. Manderson and N. Sharp, Mandatory sentences and the Constitution: discretion, responsibility and the judicial process, *Sydney Law Review* (vol 22 no.4), 2000.
30. Dissenting Report by the Australian Labor Party, Senate Standing Committee on Legal and Constitutional Affairs. Crimes Amendment (Bail and Sentencing) Bill 2006. [Report] October 2006 p. 35.
31. Senate, Consideration in detail, Main Committee, *Debates*, 2 November 2006, p. 1.
32. op. cit., p. 7.
33. *ibid.*, p. 4.
34. See further Ross Peake 'Stanhope to defy Brough on law', *Canberra Times*, 10 July 2006, p. 3 and Alana Buckley-Carr, '[State stands firm as controversy rages](#)', *The Australian*, 16 June 2006, p. 24.
35. Senate Standing Committee on Legal and Constitutional Affairs. Crimes Amendment (Bail and Sentencing) Bill 2006. [Report] October 2006, p. 5.
36. Explanatory Memorandum pp. 2–3.
37. *ibid.*, p. 3.
38. *ibid.*, p. 3.

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39. Senate Standing Committee on Legal and Constitutional Affairs. Crimes Amendment (Bail and Sentencing) Bill 2006 Report, October 2006, p. 5.
40. Crimes Amendment (Bail and Sentencing) Bill 2006, *Senate Journals*, No. 116(3), 8 November 2006, p. 3019.
41. *ibid* p. 3.
42. *ibid* p. 3.
43. Senator Chris Ellison, *Debates*, Senate, 8 November 2006, p. 10.
44. See 'Opinion: Knee-jerk response will create injustice for Aboriginal defendants', *Sydney Morning Herald*, 3 October 2006, p. 13.

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