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National Legal Aid

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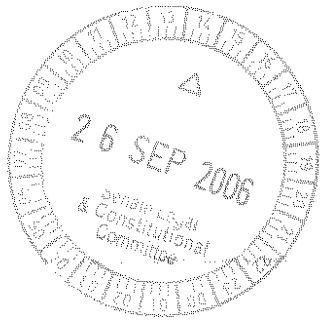

26th September '06

Dear Sir or Madam,

Re: National Legal Aid (NLA) Submission to the Inquiry into the Crime Amendment (Bail and Sentencing) Bill 2006

Background to National Legal Aid (NLA)

National Legal Aid represents the Directors of the eight State and Territory Legal Aid Commissions. Legal Aid Commissions provide legal services such as legal information, advice, assistance, duty lawyer services, and community legal education to people. We also refer people to non-legal services as appropriate. These services are generally not means tested and are available to everyone. Grants of legal aid for primary dispute resolution services, and legal representation, either by our inhouse practitioners or by private practitioners, are provided to applicants for aid who meet means, merits and guidelines tests. The majority of our business is in the areas of family and domestic violence laws and criminal law. In the course of this business we assist victims, witnesses and alleged perpetrators.

We wish to make the following submission to the Inquiry into the Crime Amendment (Bail and Sentencing) Bill of 2006.

Introduction

The Explanatory Memorandum to the Bill states that the Bill's purpose is to amend 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 following the Intergovermental Summit on Violence and Child Abuse in Indigenous Communities. At that Summit the Australian government called on all Australian jurisdictions to 'take action against the perpetrators of violence and abuse, and to improve the safety and security of the general community.' We understand that COAG agreed that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. We understand further that all jurisdictions agreed that their laws would reflect this agreement if necessary by future amendment of those laws.

The Bill purports to apply to all people, and does not relate solely to Indigenous Australians. It also purports to apply to any offence against a law of the Commonwealth, ie it is not limited to offences involving violence or sexual abuse. It removes "cultural background" from the Commonwealth Crimes Act 1914 as a matter to which the Court is to have regard when passing sentence.

We make this submission not only on the basis of the direct impact which these amendments will have on persons being charged with offences against the Commonwealth, but due to the likelihood of changes to state and territory legislation across Australia.

We appreciate the opportunity to make this submission although we have some concern about the relatively short time frame available in which to provide it. We suggest that more time is required to enable organisations and individuals to grasp and fully consider the changes being proposed, their actual and potential impact and to develop and articulate any concerns identified. We are concerned that we have not had sufficient time to fully consider the implications of the Bill. Our submission is provided in this context.

15 AB (1) (a)

We support requirements that authorities consider the protection and welfare of the community as part of the determination of whether to grant bail. Such requirements are included as criteria to be considered in bail applications in State and Territory jurisdictions, Eg under section 24(1)(c)(ii) of the *Bail Act* (NT):

> 24. Criteria to be considered in bail applications
>
> (1) In making a determination as to the grant of bail to an accused person, an authorized member or a court shall take into consideration so far as they can reasonably be ascertained the following matters only:
>
> ...(c) the protection and welfare of the community, having regard only to –
>
> (i) whether or not the person has failed, or has been arrested for an anticipated failure, to observe a reasonable bail condition previously imposed in respect of the offence;
>
> *(ii) the likelihood of the person interfering with evidence, witnesses or jurors;*
>
> (iii) the likelihood that the person will or will not commit an offence while on bail; and
>
> (iv) where the offence is alleged to have been committed against or in respect of a child within the meaning of the *Community Welfare Act* , or a juvenile within the meaning of the *Juvenile Justice Act* , the likelihood of injury or danger being caused to the child or juvenile; and
>
> (d) where the offence alleged against the accused person involves the contravention of, or a failure to comply with, an order under the *Domestic Violence Act* , the likelihood of -

(i) personal injury being caused, or threats being made, to a person for whose benefit, expressly or impliedly, the order exists;

(ii) damage to property in the possession of or being used by a person referred to in subparagraph (i) occurring; or

(iii) a breach of the peace involving the accused person occurring.

(our emphasis)

The proposed amendment requires the bail authority to consider the 'potential impact' of granting bail on victims, witnesses and potential witnesses. We are concerned that the wording of the proposed amendment is too broad.

The phrase 'impact' is undefined and could be interpreted extremely broadly, to the point where it might seriously impede on the presumption of innocence and substantially increase the remand rate.

The second reading speech to the Bill provides background to the context and purpose of the Bill. In terms of background, the Bill is a result of the Intergovernmental Summit on Violence in and Child Abuse in Indigenous Communities. The purpose of the bail provisions of the Bill is to ensure that 'adequate protection' is given to alleged victims and potential witnesses.

We submit that this could be done by making the proposed amendments more specific, for example, rather than requiring the bail authority to consider the 'potential impact', they could be required to consider a range of factors such as those listed in section 24 (1)(c) (ii) including (for the purposes of the intention of the amendment):

- Whether the offence was violent;
- Whether the offence involved children; and
- the likelihood of the person interfering with witnesses;

The explanatory Memorandum to the Bill states that there is no financial impact from the provisions of the Bill. We submit that there are financial impacts arising from the Bill. This Bill is likely to result in an increase in the number of persons denied bail, and therefore held on remand. The direct financial cost resulting from this is that arising from the transport of accused persons from communities to remand centres and the further cost of detaining them in custody. Remand centres in Australia are already at capacity and therefore an increase in the number of people held in remand may require infrastructure to deal with this. There are also potential financial impacts to Legal Aid Commissions. This is because the time and complexity, and therefore cost, of bail applications would be likely to increase. There are also often costs of travel and/or waiting time involved in the provision of legal assistance to people who are in custody. These are not always completely alleviated where there are video link facilities available.

15AB(1)(b) & 16A(2A)

We agree with the statement in the Second Reading Speech that all Australians should be treated equally under the law.

There have been numerous court decisions which outline the approach which the Courts has had to violence against Indigenous women and children. In summary, this approach is that 'Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so'[1] Coates has paraphrased this approach as meaning 'that just because you are from a deprived community does not mean that you will be deprived of the laws of protection'[2]

The above approach, however, is not inconsistent with the sentencing principles which enable Courts to take into account factors which exist because of the offenders ethnic or cultural background. Courts throughout Australia apply the principles identified in *Neal v The Queen* (1982) 149 CLR 305 when sentencing Aboriginal offenders:

> 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 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 justice.[3]

Numerous commentators have pointed out clearly and loudly that there is no 'customary law defence'. To this extent, much of these proposed amendments appears superfluous. Unfortunately, since May this year a volatile combination of media and politics has resulted in some belief within the community that there is such a defence and the reality of the fact that the sentencing principles outlined above apply to all Australians has been ignored. We believe that this misconception forms a substantial basis of these amendments.

The proposed amendments will take away the ability of the court to consider all the factors of an Accused's background and circumstances when considering bail and or sentencing.

The Law Council of Australia provided COAG with a submission entitled "Recognition of Cultural Factors in Sentencing" prior to COAG's meeting on the 14th July 2006. NLA refers to and endorses that submission. Particularly, we note paragraphs 66-68 under the heading "One Law for all" of the submission. On this basis the Bill appears to us to be indirectly discriminatory.

Under s.16A(2)(m) the court must have regard to other factors including character, antecedents, age, means and mental and physical condition of the person. To omit "cultural background" from such factors leads to a risk of sentencing outcomes for

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[1] *Queen v Inness Wurramara* [1999] 105 A Crim R 512 @ 520

[2] Richard Coates, DPP, *Indigenous Sentencing: A Northern Territory Perspective* Balance, 4/2006, 24 @29.

[3] @ 326

people from diverse cultural backgrounds being affected by assumptions based on dominant cultural norms.

As noted, clearly there is no defence of "customary law", but it is a separate matter to disregard a person's cultural background, which may be a relevant factor a court should properly take into account. In effect, a defendant of Anglo-Celtic background already has their culture taken into account because theirs is the dominant culture. Defendants from other cultures are therefore at a disadvantage, should their background not be taken into account.

15AB(2)

We support mechanisms to ensure that victims and witnesses are protected. To this end, we believe there is an urgent need to provide comprehensive community legal education to remote and culturally linguistically diverse communities so that they understand the legal system and are informed about their rights and responsibilities. Established legal services such as the Legal Aid Commissions, Aboriginal and Torres Strait Islander Legal Services, Community Legal Centres, and Family Violence Prevention Legal Services are best placed given adequate resources to work collaboratively to provide such legal education.

We are concerned however that a person should not be disadvantaged in making a bail application specifically by reason of the residence of a victim or witness in a remote community. Rather, we suggest that more objective criteria be considered when a determination of bail is being made such those suggested above. Other criteria could include:

- the support available to the victims or witnesses;
- the physical proximity of the accused to the victims or witnesses;
- the likelihood of interference with the victim or witness, either directly or indirectly.

The explanatory memorandum states that "'remote community" is not a defined term. 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." We note that some definitions of "remote" have included eg all of the Northern Territory excluding Darwin, and all of the State of Tasmania. The above suggested criteria would address the issue (ie protection of the victim and potential witnesses) without importing the difficulties of a determination about what is "remote" and the discriminatory aspects attached if remoteness per se were to be a factor in considering bail.

The decision of the Queensland court of Appeal in *John Major Clumpoint v Director of Public Prosecutions (Queensland) [2005] QCA 43*[4] highlights some of the inevitable difficulties that can be occasioned to accused persons and their families residing in remote communities when bail is refused or is made subject to exclusion orders. We suggest that *Clumpoint* also demonstrates that the Queensland "bail

[4] http://www.courts.qld.gov.au/qjudgment/QCA%202005/QCA05-043.pdf

authorities" at all levels were able to take effective action to protect the community, without the need for a reference in the bail legislation to a "remote community".

In *Clumpoint*, the accused (one of many charged with riot offences arising from incidents on Palm Island in November 2004) was granted bail by the Chief Magistrate subject to a number of strict conditions, effectively banishing him from Palm Island, where he had previously lived with his wife and children, and where he had permanent employment.

Before the Court of Appeal, Mr Clumpoint swore that compliance with his special bail conditions had caused both him and his family extreme personal and financial hardship. In allowing the appeal and varying the appellant's bail conditions to enable him to return to his community and family, the Court noted a number of matters in its conclusion (paras [27] to [33] of the judgment) that are relevant to the proposed amendments.

In noting that there was no suggestion that the appellant had breached his bail conditions by interfering with witnesses, the Court noted that the appellant had retained his links with Palm Island and if he were minded to have breached his bail in this way, he could have done so from outside the community "almost as effectively" as within.

The Court also noted the onerous nature of the special bail conditions that effectively banished Mr Clumpoint from his community: "[31] We turn now to consider under s 11(2A) whether the present conditions imposed under s 11(2) are more onerous than necessary having regard to the nature of the offence, the circumstances of Mr Clumpoint, and the public interest. The charged offence is extremely serious. The condition imposing banishment from Palm Island was a condition directly related to the nature of the offence. As noted, whilst it was entirely appropriate when imposed a few days after the events of 26 November 2004, with the passage of time and in the light of the information now before this Court, the justification for such a condition has greatly lessened. Mr Clumpoint's personal circumstances demonstrate that the condition of banishment from Palm Island is exceedingly onerous; it deprives him of the companionship and support of his wife, his ability to be a father to his children, his employment and financial independence and the right to live in his own home which he has built in his chosen community. Apart from actual imprisonment, it is difficult to imagine a more onerous bail condition. It is unquestionably in the public interest that there be no repetition of the events of 26 November 2004 on Palm Island. It is also in the Palm Island community's interest that Mr Clumpoint be permitted to return to his home, family and job and to rejoin their society. Because this will be seen as a demonstration of the easing of tensions between the police and the community and will assist his children's welfare and that of the family unit, his return to Palm Island now is likely to be in the interests not only of the Palm Island community but also the wider Queensland community. While it is impossible to be certain that if Mr Clumpoint returns to Palm Island he will not breach his bail, the balancing exercise that on the evidence before it this Court must undertake under the *Bail Act* (including the presumption of innocence and the principle that no person should be punished without conviction which underlies s 9) favours the conclusion that the bail condition preventing Mr Clumpoint from living on Palm Island is now more onerous than necessary. It should be removed.

[32] Of course, if the respondent becomes aware of materially changed circumstances, it can apply to a court for a variation of the conditions of Mr Clumpoint's bail or even revocation of that bail under s 30 of the *Bail Act*."

Other matters

We urge the Inquiry and the Intergovernmental Committee to consider a response to these issues which is broader than a criminal justice response.

From a philosophical perspective, not least of the issues is the lack of knowledge, understanding and participation which Indigenous people living in remote communities have of and with the criminal justice system. They have been let down by this system on many occasions. They feel removed from and excluded by this system and passive to its whims. Worst of all they feel disempowered and irrelevant.

We have seen through some recent initiatives[5] that when people living in remote communities understand this system and feel that they can truly participate in decisions that are made in relation to their community, they are more likely to take ownership of the decisions that are made and work as a community to resolve them.

On a more practical level, increased resources to communities is required in a range of areas from infrastructure, services such as police, clinics, witness support, sport and recreation and schools to wellbeing programs such as men's centres; anger management and rehabilitation programs. A primary aim should be to address the issues that contribute to offending behaviour.

Conclusion

We thankyou for the opportunity to make this submission. We would be happy to provide any further information required.

Yours faithfully,

N. Reaburn, Director Legal Aid Commission of Tasmania
for the Chairperson, National Legal Aid.

[5] For example, Nhulunbuy Community Court; Nguiu Indigenous Family Violence Offenders Program