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

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Introduction

1. The Human Rights and Equal Opportunity Commission ('the Commission') provides this submission to the Senate Legal and Constitutional Affairs Committee ('the Committee') in its inquiry into the *Crimes Amendment (Bail and Sentencing) Bill 2006* ('the Bill').

2. Relevant to the Commission's submission, the Bill amends the *Crimes Act 1914* (Cth) to:

   - delete 'cultural background' from the matters that a court is to take into account into sentencing; and

   - preclude 'any form of customary law or cultural practice' from being taken into account as a mitigating factor in sentencing, or in the context of granting bail.

Summary: the Bill should not be passed

3. The Commission submits that the Bill should not be passed. The Bill and the process surrounding its introduction are fundamentally flawed.

4. This Bill is purportedly a response to family violence and abuse in Indigenous communities. The Commission makes clear its view that family violence and the abuse of children or women should not be tolerated in any community. The Commission supports taking concrete action to prevent family violence and abuse of children or women. This Bill does not do that.

5. In summary, the Commission submits that:

   - Consideration of the Bill is being unnecessarily rushed.

   - The Bill is not based on, or supported by, evidenced research.

   - The Bill does not address family violence in Indigenous communities.

   - 'Cultural practice' and 'customary law' are broad terms and are not defined.

   - The Bill does not promote 'equality before the law'.

   - Enjoyment of culture is a human right and Australia has prided itself on its cultural diversity: the Bill is contrary to those values.

   - The Bill undermines important initiatives involving customary law.

   - The Bill is not necessary: culture is only *a* factor in sentencing and inappropriate sentences can be appealed.

6. The Commission's submissions focus on those aspects of the Bill relevant to sentencing and do not consider separately those aspects relating to the granting of bail.

Consideration of the Bill is being rushed unnecessarily

7. Despite the complexity of the issues raised by this Bill, consideration of it is being rushed unnecessarily. There is not, with respect, sufficient time for the Committee to adequately consult with the range of people who may be able to make an important contribution to debate about this Bill.[1]

8. There has, to the Commission's knowledge, been no consultation with Indigenous people who practice customary law and therefore no opportunity for feedback from the people who are purportedly the subjects of these amendments.

The Bill is not based on, or supported by, evidenced research

9. So far as the Commission is aware, the Bill is not based on, or supported, by any 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 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders'* (Report 103, 2006) recommended the retention cultural background in the factors listed in section 16(1)(2)(m) of the *Crimes Act 1914* (Cth).[2]

- The New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders* (Report 96, 2000) recommended that evidence concerning customary laws of both the offender and the victim be taken into account in sentencing.[3]

- The Australian Law Reform Commission, *Multiculturalism and the Law* (Report 57, 1992) recommended an offender's cultural background should be expressly included as a factor to be taken into account in sentencing under s 16 A(2)(m) of the *Crimes Act 1914* (Cth).[4]

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[1] The Bill was referred to the Committee on 14 September 2006, for report on 16 October 2006. Submissions were made due by 25 September 2006 (although the Commission acknowledges and appreciates the extension given to it until midday on 27 September 2006).
[2] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders'* Report No 103 (2006) [6.94].
[3] New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report No 96 (2000), [3.89].
[4] Australian Law Reform Commission, *Multiculturalism and the Law* Report No 57, 1992, [8.14].

- The Australian Law Reform Commission, *Sentencing* (Report 44, 1988) recommended that an offender's cultural background be listed in the relevant legislation as a factor to be taken account in sentencing.[5]

- The Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) concluded that Aboriginal customary laws are a relevant factor in mitigation of sentence.[6]

10. The Commission also notes that most recently the West Australian Law Reform Commission in its *Aboriginal Customary Laws Discussion Paper* has proposed that the cultural background of the offender and relevant Aboriginal customary law be included as a relevant factor in sentencing under *Sentencing Act 1995* (WA).[7]

11. The Bill also is contrary to common law sentencing principles that have developed over many years to require courts to take into account material facts about the offender's cultural background in order to ensure just sentences.[8]

The Bill does not address family violence in Indigenous communities

12. It is claimed that the Bill is a response to family violence in Indigenous communities.[9] The Bill does not, however, address that problem in any meaningful way.

    - The *Crimes Act 1914* (Cth) **does not apply** to offences such as assault, murder or rape: they are covered by State and Territory criminal laws, not Commonwealth criminal laws, and are subject to State and Territory sentencing and bail laws.

    - The Bill distracts from the real solutions to the problem of family violence in Indigenous communities: solutions that address poverty, overcrowding, substance abuse, low levels of education and unemployment.[10]

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[5] Australian Law Reform Commission, *Sentencing*, Report No 44 (1988), [94].
[6] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986), [507-509].
[7] West Australian Law Reform Commission, *Aboriginal Customary Laws Discussion Paper*, (2006) [203-230].
[8] *Neal v The Queen* (1982) 42 ALR 609, 626 (Brennan J); See *Rogers and Murray v The Queen* (1989) 44 A Crim R 301, 307 (Malcom J); *R v Fernando* (1992) 76 A Crim R 58 , 62-63(Wood J).
[9] See the Explanatory Memorandum and Second Reading Speech.
[10] For an overview of the range of factors that contribute to, and impact upon, family violence in Indigenous communities see further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence in Indigenous communities: Key issues. An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001 – 2006,* Available online at: www.humanrights.gov.au/social_justice/familyviolence/.

‘Cultural practice’ and ‘customary law’ are broad terms and are not defined

13. The Bill prevents a Court from taking into account in sentencing ‘any form of customary law or cultural practice’ that may be a factor in mitigation. The terms ‘customary law’ and ‘cultural practice’ are not defined.

14. ‘Cultural practice’ would appear to be a very broad term and the Bill confirms that ‘any form’ of such practice is covered. The terms potentially covers all aspects of what might be considered to be Australian practices and values. By way of example, it is often said that ‘mateship’ is an important part of Australian culture. Would helping a mate be considered a ‘cultural practice’ in Australia and therefore irrelevant in sentencing for a Commonwealth offence?

15. In the case of Aboriginal ‘customary law’, this will also cover a very broad range of social behaviour, including family obligations. It is not clear why matters such as family obligations existing under customary law should not be relevant to sentencing.

The Bill does not promote ‘equality before the law’

16. The second reading speech to the Bill argues that the Bill will ensure equality before the law by removing cultural considerations from the sentencing process.[11] This argument is misconceived and premised on a false assumption that only some (other) people have ‘culture’.

17. 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.

18. State and Territory courts that take into account the cultural background of an offender or issues of Indigenous customary law in sentencing do so applying ordinary sentencing principles. It is not a feature of any statutory sentencing regime, or the common law, for different sentencing principles to apply in relation to culture or customary law. This has been expressed as follows:

> 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.[12]

[11] See the Second Reading Speech.
[12] *R v Neal* (1982) 42 ALR 609, 626 (Brennan J).

Enjoyment of culture is a human right

19. The right of minorities to 'enjoy their own culture' is a recognised human right: see article 27 of the *International Covenant on Civil and Political Rights* (ICCPR). This provision applies to indigenous peoples and creates a positive obligation on States to protect such cultures.[13]

20. This does not mean that the right to enjoy culture comes at the expense of the rights of others. The exercise of the right to enjoy culture must be consistent with other human rights in the ICCPR and the rights of women and children as protected by the *International Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child.*

21. The sentencing process involves a similar process of balancing the rights, interests and circumstances of the community, the victim and the offender. It distorts this balancing process in a way inconsistent with the right to enjoy culture for the law to automatically exclude cultural practices from the matters to be taken into account.[14]

22. Australia is also a country that has prided itself on its cultural diversity. The Australian Government's key statement on cultural diversity describes it as '[o]ne of the greatest strengths of our nation.'[15]

23. The Commission submits that it is contrary to a commitment to cultural diversity and the right to enjoy culture to automatically exclude customary law and cultural practice from sentencing.

The Bill undermines important initiatives involving customary law

24. The Bill will undermine important initiatives, such as circle sentencing, that have sought to engage with aspects of Indigenous customary law and practice in a positive way.

25. Customary law can provide a means through which Indigenous communities can exercise greater self-governance and take greater control over the problems facing their communities. It should not be automatically excluded as irrelevant in the context of sentencing. To do so undermines its legitimacy.

26. It is not clear whether the Bill would prevent a court from taking into account customary law in cases where there has been, or will be, 'payback'. If such

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[13] Human Rights Committee, General Comment 23, [7].

[14] It is noted that the Commission sought to intervene in *The Queen v GJ* [2005] NTCCA 20 to argue, amongst other things, that in the sentencing process Aboriginal customary law needs to be balanced against the rights of women and children. The Commission was refused leave to intervene on the basis that the Court already took such matters into account as a part of the sentencing process. The Commission's submission is available at: http://www.humanrights.gov.au/legal/intervention/queen_gj.html.

[15] *Multicultural Australia: United in Diversity* (May 2003).

matters cannot be taken into account this may result in Indigenous people facing greater punishment.

The Bill is not necessary: culture is only *a* factor in sentencing and inappropriate sentences can be appealed

27. People who are convicted of criminal offences should be appropriately punished. This is best achieved by ensuring that courts can consider the full range of factors relevant to the commission of the offence, including a person's culture.

28. A court is not obliged to give significant weight to cultural factors in reaching an appropriate sentence – they may be outweighed by other factors, such as the need for general deterrence. In *The Queen v GJ*, for example, the NT Court of Criminal Appeal made it very clear that Aboriginal customary law is simply *a* factor relevant in sentencing. Southwood J observed:

> It has never been the case that the courts of the Northern Territory have given precedence to Aboriginal customary law when it conflicts with the written law of the Northern Territory.[16]

29. In the event that a judge makes an error in sentencing, the sentence can be appealed.[17]

30. To ensure that courts only sentence people on the basis of reliable evidence as to customary law and cultural practice, safeguards similar to those in the Northern Territory can be introduced. Under the *Sentencing Act* (NT), an offender seeking to rely on Aboriginal customary law in mitigation is required to give notice to the other parties to the proceedings and must present any information to the court in the form of evidence on oath, an affidavit or a statutory declaration: s 104A.

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[16] *The Queen v GJ* [2005] NTCCA 20, [71].
[17] In *The Queen v GJ* [2005] NTCCA 20, for example, the NT Court of Criminal appeal unanimously held that the original sentence (a total of 24 months imprisonment suspended after one month) was manifestly inadequate. The sentence was set aside and a new sentence of 3 years and 11 months imprisonment, to be suspended after serving 18 months, was imposed.