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TO WHOM IT MAY CONCERN

Inquiry Crimes Amendment (Bail and Sentencing) Bill 2006

I note that the Government actions including the proposed amendments to the Crimes Amendment (Bail and Sentencing) Bill 2006 are a response to media coverage in relation to so-called Aboriginal customary law defences and the spurious allegations contained therein. I also note that there is a lack of integrity in the government's timetable for consultation on the proposed amendments.

Notwithstanding these concerns with the premise and process for this exercise, I provide the following comments:

- These is a lack of understanding of what constitutes custom and what constitutes law in Aboriginal and indeed other cultures (for instance, it is the **custom** for brides to wear white at a marriage ceremony but if they do not there are no legal ramifications. On the other hand, it is against the **law** for the bride to marry more than one person with serious legal consequences.)
- The use of English customary law to establish what constitutes appropriate behaviour – the majority of matters in the Federal sphere that our clients have to deal with are those associated with Centrelink fraud. Under Aboriginal customary law, reciprocal relationships and sharing of goods are fundamental to peace and harmony; whereas western laws are premised on customs that promote individual ownership, acquisition of goods/money and exploitation of the physical and intellectual labours of others. Those who use Centrelink resources to meet a cultural imperative are at risk of serious consequences unless they can properly defend their matters based on what is required in the communities in which they live. That their actions are based on good faith and integrity will be dismissed if these amendments are permitted.
- Ignorance about the western law is a very real issue for our clients particularly those from remote communities. There has been no attempt (for instance in the GJ v R matter which dealt with sexual intercourse with a minor, it was not enough that the law states there is an age of consent for intercourse when there has been no attempt to educate people about these laws. Further it needs to be understood that in the remote community where GJ is a traditional owner, there are no calendars, no time pieces or even the notion of the western lineal concept of time in the Yarrallin community.)
- Aboriginal law is about process and procedure as much as it is about punishing wrongdoers. It is very similar to the principles of restorative justice where the object is to restore harmony to the community not meet a populist demand for punishment. There is a worrying trend in the current political thinking with the promotion of law and order remedies with more and more policing, laws and punitive outcomes rather than direct resources to

> restorative and social justice approaches. The latter are more successful in terms of due process and better outcomes in terms of addressing the increasing rate of incarceration and addressing re-offending. There is clear evidence that the current approach of locking people up or denying them due process does not work, particularly when that most prisoners have been in jail before. Conveniently changing the definition of recidivism does not match the reality that re-offending rates are extremely high in this country.

In contrast to the misinformed debate currently being fuelled by media hysteria, an example of customary law being accepted by the Courts is in Ebatarinja v R where Mildren J granted bail to a defendant who feared being 'sung to death' in jail if he was not allowed to receive traditional punishment from the deceased's relatives. This was his firm belief and by accepting the remedy under customary law while he still was imprisoned for the crime, he was not further punished by extreme fear that others who do not share his belief would endure. [The usual response to this that 'we don't use physical violence in this country as a remedy' is not borne out by the fact that Australians clearly condone the use of extreme violence, in Iraq and Afghanistan for instance. The message from those elected to provide leadership is that violence or the spilling of blood is acceptable when it is for something other than a desire to heal a community, put right a wrong or restore peace and harmony.]

The proposed amendments would operate to deny those whose cultural background is not British customary laws of a fair and just hearing of their matters. The administration of justice in this country demands that all relevant material including the beliefs of the accused, the motivations for their behaviour and cultural background is put before the Courts in order to ensure .

For your further information please see attached:
(1) a copy of the Ngarra Rom which is a declaration of Yolngu law as restated at a ceremony on Elcho Island in September 2005 which was attended by NAAJA lawyers as well as other non-Yolngu people; and
(2) a paper entitled 'What is Customary Law' which discusses the difference between lawful and deviant behaviour.

Thank you for the opportunity to provide these comments. I urge the Senate to use its powers to block the proposed amendments and ensure that the erosion of rights of those before the courts does not continue to stain the justice system in this country.

Yours faithfully

Sharon Payne
Chief Executive Officer
North Australian Aboriginal Justice Agency Ltd

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