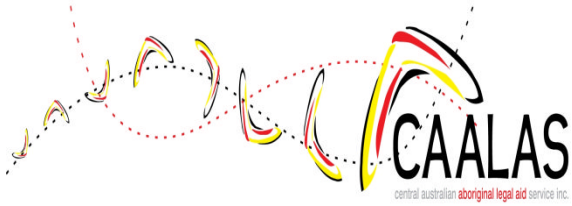
NATSILS SUBMISSION ON PROPOSED CHANGES TO THE CRIMES ACT 1914 (CTH) REGARDING CONSIDERATION OF CUSTOMARY LAW

February 2012

Victorian Aboriginal Legal Service Co-operative Ltd

Aboriginal Legal Service of Western Australia

Aboriginal Legal Rights Movement Inc



Introduction

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander justice issues in Australia. The NATSILS have almost 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The NATSILS are the experts on justice issues affecting and concerning Aboriginal and Torres Strait Islander peoples.

The NATSILS are comprised of the following Aboriginal and Torres Strait Islander Legal Services:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld)**;**
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS);

NATSILS Concerns and Recommendations

The NATSILS support the amendments contained in the Stronger Futures Bill[1] to the *Crimes Act 1914* (Cth) (the Act) which would allow a court to take into account customary law or cultural practice in making bail and sentencing decisions regarding laws involving the protection of Aboriginal and Torres Strait Islander cultural heritage.[2] However, ss 15AB (1)(b), 16A(2A) and the proposed new 16AA (1) of the Act will continue to preclude the consideration of customary law or cultural practice in making such decisions in the context of any other criminal offence involving an Aboriginal and Torres Strait Islander person. To confine these amendments to those offences relating to cultural heritage is to sustain legislative provisions that are illogical, contradictory and contrary to fundamental notions of fairness.

Prior to the amendments made to the Act in 2006, the law was clear. Cultural factors had to be taken into account and customary law and cultural practices could be taken into account in appropriate cases. This was the regime of functional recognition of customary law, as recommended by the Australian Law Reform Commission.[3] Functional recognition meant that there was a judicial discretion to take into account the effect of customary law, or not

[1] *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011.*
[2] Ibid, Schedule 4.
[3] Australian Law Reform Commission, Report No 31 on the Recognition of Aboriginal Customary Laws, AGPS 1986, (2 Volumes)

to do so, in appropriate cases, in sentencing for offences by Aboriginal and Torres Strait Islander peoples, against the ordinary law.[4]

Since the adoption of these amendments however, the effect has been to create significant confusion. The current process of restoring customary law considerations to cultural heritage offences is welcomed, but the partial amelioration rather than whole sale reconsideration of the sentencing provisions will do little to correct the negative effects of past and currently proposed amendments. The NATSILS strongly recommend that such a whole sale reconsideration take place, and offer their assistance to the Hon Nicola Roxon, Attorney-General, for that purpose.

By way of further explanation, the NATSILS would like to elaborate more specifically on the following points of concern:

1. The Act, as amended in 2006 by the previous Government, removed compulsory consideration of cultural factors from s 16A (m) regarding factors to be considered in sentencing. However, courts are still able to consider cultural factors, since they were recognised by the common law, as is established in *Neal v the Queen (1982).*[5] The NATSILS recommend that cultural factors be restored to s 16A (m) of the Act.

2. The amendments of 2006 also imposed ss 15AB (1)(b) and 16A (2A) which prohibit a court from taking into account, as part of bail and sentencing discretion, "any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates". The currently proposed new s 16AA (1) also employs this wording. The wording as currently formulated however, is flawed from the beginning as it conflates matters which might give rise to a criminal defence (excuse, justify, authorise and require) with matters of mitigation and aggravation (lessening the seriousness or aggravating the seriousness of the criminal behaviour)[6].This is all in the context of a section which explicitly refers to sentencing discretions. As it happens, there is thought to be no customary law defence in general law.[7]. Hence, the NATSILS recommend that words 'excuse, justify, authorise and require' be replaced with words that only refer to matters of mitigation, so as to clarify this conflation of concepts.

3. In *R v Wunungmurra*[8], Southwood J held that the effect of section 91 of the *Emergency Response Act* (the equivalent of section 16A(2A) of the Act) was that it

> precludes a sentencing court from taking into account customary law or cultural practice as a basis for finding that an offender, who acted in accordance with it, is less morally culpable,

[4] As to the application of *Neal v the Queen* principles in the recognition of customary law, see the Full Court of the Federal Court judgment in *Jadurin v the Queen* (1982) 44ALR at 429.
[5] *Neal v The Queen* (1982) 149 CLR 305 at 326 (Brennan J).
[6] In the case of Wunungmurra [2009]NTSC24 at paragraph 22 , Southwood J held that these latter two expressions are synonymous with determining the gravity of the offence at some lower or higher level than would otherwise be the case.
[7] *Walker v NSW* [1994] 126 ALR 321 at 323-4.
[8] [2009] NTSC 24.

> because of that fact. That would be a consideration going to the criminal behaviour constituting the offence. To take into account customary law or cultural practice in that way would be for the purpose of justifying or lessening the seriousness of that criminal behaviour[9]

Those were the "objective factors", yet it is clear that from the judgment in *R v Wunungmurra*[10] itself that "subjective factors" disclosed in an affidavit, sought to be tendered on behalf of the accused from his local community, would not be excluded from consideration. For example, questions of rehabilitation and a lack of propensity to offences of a similar type. Indeed, the effect of *R v Wunungmurra*[11] has been to interpret the legislation so as to exclude consideration of customary law and cultural practice, but not from the purely subjective aspects of the case. This view is reinforced by the definition of 'criminal behaviour' in the legislation. At paragraph 29 of the judgment Southwood J states

> The affidavit of Ms Laymba Laymba may be read for the other purposes referred to in para 3 above. The relevant principles to be applied in the interpretive process are that section 91 of the *Emergency Response Act* may only be construed to encroach upon general sentencing principles so far as a strict reading of the provisions would allow. Penal statutes should be read strictly and courts must only apply the actual commands of the legislation. The purpose and operation of section 91 of the Act is not to remove all consideration of customary law and cultural practice from the sentencing process.[12]

4. However, how can a court distinguish subjective and objective factors in cases where the Aboriginal and Torres Strait Islander identity of an offender is inextricably linked to both the subjective and objective factors of the case? In a sense, an Aboriginal or Torres Strait Islander person's identity is moulded within the matrix of objective and subjective factors. On the one hand the social and cultural milieu of beliefs and practices which make up their culture and customary law, and on the other, the purely subjective factors relevant to their own enculturation and motivation and potentially their handicaps and impairments.

   At paragraph 25 of *R v Wunungmurra*,[13] Southwood J quite properly criticised section 91 of the *Emergency Response Act* because it "precludes the sentencing court from taking into account information highly relevant to determining the true gravity of the offence and the moral culpability of the offender". At Paragraph 27 he concluded that the section obliges the sentencing court to give proportionally more weight to the physical elements of the offence and the extent of the invasion of the rights of the victim and less weight to the motivation for committing the offence.[14] Again the objective and the subjective elements are inextricably linked. In relation to the concept 'moral culpability' it may be observed that it has traditionally been considered an aspect of personal responsibility and liability for punishment, being reduced on account of mental illness or other mental impairment.[15]

[9] Para 24 of judgment [2009] NTSC 24.
[10] [2009] NTSC 24.
[11] [2009] NTSC 24.
[12] [2009] NTSC 24, 29.
[13] [2009] NTSC 24, 25.
[14] [2009] NTSC 24, 27.
[15] Mason-Stuart v R (1993) 68 AustCrim R163; Jamie T Nuske v R [1997] SASC 5982.

By way of further explanation, we invite the reader to consider the following hypothetical:

> An extended family structure with continuing internal family movement is an acknowledged feature of Aboriginal and Torres Strait Islander communities and can create difficulties in strict compliance with Social Security legislation. By way of illustration, a hypothetical case could see a single parent who, following separation, asks their children's grandparents to care for the children while she or he re-establishes themselves (a not uncommon contemporary scenario in both Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander families). These grandparents would, legitimately, apply to Centrelink for payment of benefits in relation to the children now in their care for an unspecified period.
>
> As an unexpected circumstance, one of the grandparents dies, initiating extended family attendance at the funeral and the observance of mourning, a prominent characteristic of Aboriginal and Torres Strait Islander cultural practice. Understandably, it is then agreed that the children's parent or another trusted family member care for these children for the time being. The grandparent may well neglect to advise Centrelink of this change (even if they gave notification of their partner's death), and so would continue to receive benefits for the children, although, very probably, passing on the payments to whoever was caring for the children at the time.
>
> Their continuing receipt of these payments however, an offence under Part 6 of the *Social Security (Administration) Act 1999* (Cth), constitutes an 'offence against the Commonwealth', prosecuted under the *Crimes Act 1914* (Cth) and carrying the potential risk of imprisonment. As s 16A of the Act implies, a just determination in sentencing is one 'appropriate in all the circumstances of the offence.' Yet s 16A(2A), as it currently stands, precludes a court from considering the cultural practices, unless they are forced into the mould of the ' subjective factors' , relevant to the offender's background.

The NATSILS submit that the distinction between subjective and objective factors is a difficult and perhaps arbitrary one. The NATSILS further suggest that interpretation of the provisions is therefore going to be difficult and fraught with potential injustice. As such, the NATSILS call for a reconsideration of the entire package of amendments.

5. While confused wording and interpretation are important issues, there are more fundamental problems with ss 15AB (1)(b), 16A (2A) and the currently proposed 16AA (1). In some cases the moral culpability of Aboriginal and Torres Strait Islander offenders will have directly arisen only by virtue of their membership of their Aboriginal or Torres Strait Islander society and a particular language/tribal group. Thus, the effect of the current system and the proposed amendments, in prohibiting the consideration of such, is to treat Aboriginal and Torres Strait Islander offenders less favourably than non-Aboriginal and Torres Strait Islander offenders. It is clear from *R v Wunungmurra*[16] that matters arising from customary law can be regarded

[16] [2009] NTSC 24.

as being important factors going to the 'objective factors' of sentencing including, proportionality, the gravity of the offence itself and the moral culpability of the offender. We provide a further example by way of explanation.

> A person is before the court for driving while disqualified. Ordinarily, it will be highly relevant in sentencing to consider why the person was driving. If the person was driving in order to fulfil a cultural obligation, for example to assist a senior family member to travel to a significant ceremony, this would ordinarily be taken into account upon sentence. The court would be expected to distinguish the moral culpability of such an offender from another who may simply have had no regard for the law. However, the current legislation and proposed amendments prohibit the court from taking such an approach. As a result, it is difficult to see how this can produce a just outcome.

Under the legislation, the sentencing court would be obliged, on the authority of *R v Wunungmurra*,[17] to give less weight to the objective importance of the obligation upon the accused to fulfil the cultural obligation to take an elder to ceremonies. Restricting a court or an administrative decision-maker from taking into account the circumstances of a person's cultural obligations and his society's cultural practices runs counter to fundamental principles of the common law and the protection of basic rights of equality under the rule of law. It is fundamental to equality before the law that equality means properly taking into account relevant cultural differences. This proposition comes from, and is precisely the effect of, the dicta of Brennan J in *Neal v the Queen*[18], referred to above. This principle is further evidenced in *Fuller-Cust v the Queen.*[19]

R v Fernando also recognised that in sentencing Aboriginal and Torres Strait Islander persons, it was proper for courts to recognise the issues facing Aboriginal and Torres Strait Islander peoples and communities and the background against which an offence may be committed.[20] Furthermore, the 2006 amendments were adopted despite the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs that the amendments be revised to retain the phrase 'cultural background' in the list of factors that a court *must* take into account in sentencing.[21]

Restricting a court, or indeed an administrative decision-maker, in this way also runs counter to fundamental principles of the common law and the protection of basic rights under the principle of legality.[22] It generates an internal contradiction within the legislation, whereby a court is required in determining a sentence to consider 'all the circumstances of the offence',[23] while also prohibiting it from taking into account

[17] [2009] NTSC 24.
[18] (1982) 149CLR at 326 per Brennan J.
[19] (2002) 6 VR 496 [79, 80].
[20] *R V Fernando* (1992) 76 A Crim R 58, [59 – 63].
[21] Commonwealth, *Senate Committee Report, Crimes Amendment (Bail and Sentencing) Bill 2006* (Senate Printing Unit, Parliament House, Canberra, 2006), ix, Recommendation 2.
[22] The principle of legality was acknowledged in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19], Gleeson CJ.
[23] *Crimes Act 1914* (Cth), s16A(1).

'any form of customary law or cultural practice.'[24] As noted above, in *R v Wunungmurra*,[25] Southwood J was most concerned about this potential for unfairness. Concerning similar provisions in the Northern Territory he stated that it;

> precludes an Aboriginal offender who has acted in accordance with traditional Aboriginal law or cultural practice from having his or her case considered individually on the basis of all relevant facts which may be applicable to an important aspect of the sentencing process, distorts the well established principle of proportionality, and may result in the imposition of what may be considered to be disproportionate sentences.[26]

The NATSILS assert, from the judgment of Southwood J in *R v Wunungmurra*,[27] that the effect of section 16A (2A) is to enact an implied repeal of the *Racial Discrimination Act 1975* (Cth) for Aboriginal and Torres Strait Islander offenders. This occurs because equal application of the principle of proportionality in sentencing cannot occur properly for Aboriginal and Torres Strait Islander offenders by virtue of the legislation. The NATSILS call for the restoration of racial equality in sentencing.

Conclusion

The NATSILS support the amendments contained in the Stronger Futures Bill[28] which would allow a court to take into account customary law or cultural practice in making bail and sentencing decisions regarding laws involving the protection of Aboriginal and Torres Strait Islander cultural heritage.[29] However, ss 15AB (1)(b), 16A(2A) and the proposed new 16AA (1) of the Act will continue to muddy the waters of appropriate sentencing practices. Therefore, the NATSILS make a further recommendation that the Attorney-General's Department go beyond the current review and continue to work with the NATSILS and other relevant parties to conduct a broader evaluation and develop a more just and proper outcome.

[24] *Crimes Act 1914* (Cth), s 16A (2A).
[25] [2009] NTSC 24.
[26] [2009] NTSC 24, 25.
[27] [2009] NTSC 24.
[28] *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011.*
[29] Ibid, Schedule 4.