



North Australian Aboriginal Justice Agency

**Submission to the
Freedoms Inquiry**

March 2015

1. Introduction

The North Australian Aboriginal Justice Agency (NAAJA) makes this submission to the Australian Law Reform Commission's Freedom Inquiry. These submissions focus on a particular issue relating to the impact of provisions of the *Crimes Act* (Cth) upon Aboriginal and Torres Strait Islander people.

NAAJA is the Aboriginal and Torres Strait Islander Legal Service for the Top End of the Northern Territory. It is the largest legal practice in the Northern Territory and its criminal practice is the largest outside the Office of the Director of Public Prosecutions.

2. Right to a Fair Trial

NAAJA submits that the *Crimes Act 1914* (Cth), specifically ss 15AB (1)(b), 16A(2A) and 16AA(1), encroaches upon an Aboriginal person's right to a fair trial.

These provisions limit the circumstances in which criminal courts can take into account customary laws and cultural practice in bail and sentencing determinations. Section 15AB (1)(b), for instance, provides that in determining whether to grant bail, or the conditions to be placed on a grant of bail, a court:

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

- (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.

Mirror wording in sections 16A(2A) and 16AA(1) constrain the court's discretion to take into account customary law and cultural practice in sentencing.

On their face, these provisions purport to apply equally to all defendants. However, it is evident from the social and political context in which the restrictions were introduced that the provisions were aimed at Aboriginal defendants, based on a misconception about the manner in which Aboriginal defendants were dealt with in Northern Territory courts, and it is indeed Aboriginal people who are affected by these restrictions.¹

In its submission to the Council of Australian Governments (COAG) meeting in July 2006, the Law Council of Australia strongly opposed the proposed provisions on this basis, arguing:

¹ Goldflam, Russell, 'The (Non-) Role of Aboriginal Customary Law in Sentencing in the Northern Territory' (2013) 17(1) Australian Indigenous Law Review 71.

[P]roposals to prohibit courts from considering the “cultural background” of an offender as a relevant factor in sentencing are misconceived and will unnecessarily restrict the discretion of the court to consider matters which may be relevant, either to mitigate or aggravate, the seriousness of an offence... The consequence of preventing a court from considering “cultural background” will be that a person (usually white Anglo-Saxon) whose “culture” accords with mainstream beliefs and values will be at an advantage when compared with a person who has lived their entire life according to a different culture, with different values and beliefs... banning consideration of cultural factors will not address the serious problems which are causing endemic levels of violence, abuse and misery in Indigenous communities.²

In *R v Wunungmurra*,³ Southwood J considered ss 15AB(1)(b), 16A(2A) and 16AA(1) in their previous manifestation, s 91 of the *Northern Territory (National Emergency Response Act 2007) (Cth)* (“NTER”).

His Honour explained (at [17]):

At the time the *Emergency Response Act* was assented to by the Australian Parliament sentencing courts in the Northern Territory, in appropriate cases, took traditional Aboriginal law and cultural practices into account when such laws or cultural practices were relevant in determining the objective seriousness of an offence or the level of moral culpability of an offender and on occasion sentencing courts held that the moral culpability of an offender was lessened because he or she had acted in accordance with traditional Aboriginal law or cultural practices. Such matters were taken into account in accordance with established sentencing principles and the sentencing purposes and guidelines contained in the *Sentencing Act (NT)*.

However, his Honour found that s 91 was clear in its terms and the Court was bound by the restrictions imposed, notwithstanding that it might preclude;

an Aboriginal offender who has acted in accordance with traditional Aboriginal law or cultural practice from having his or case considered individually on the basis of all relevant facts which may be applicable to an important aspect of the sentencing process, distorts well established sentencing principle of proportionality, and may result in the imposition of what may be considered to be disproportionate sentences.⁴

Customary laws and cultural practices may be intertwined with both the objective and subjective factors of an individual’s bail or sentencing considerations. The restrictions on a court’s capacity to consider Customary Laws and cultural practices during the sentencing process deprives offenders of a fair trial, as the court is unable to take into consideration the full circumstances of the offence and the offender.

² Law Council of Australia, “Recognition of Cultural Factors in Sentencing” (Submission to Council of Australian Governments, 10 July 2006) as cited in Goldflam, R. ‘The (Non-)Role of Aboriginal Customary Law in Sentencing in the Northern Territory’ (2013) 17(1) Australian Indigenous Law Review 71.

³ *R v Wunungmurra* [2009] NTSC 24.

⁴ At [25].

3. Equality before the law and individualised justice

The common law right to a fair trial is supplemented by a right to equality before the law.⁵ Equality extends to an individual's right to have a court hear the full spectrum of factors relevant to them as an offender in relation to the offence committed, without unjustifiable restriction based on race or culture. To restrict the evidence of customary laws and cultural practices relevant to Aboriginal peoples creates inequality before the law.

Sentencing legislation across a range of Australian jurisdictions allows courts significant latitude to consider a range of factors relevant to the particular offender.⁶ As Southwood J explained in *R v Wunungmurra*, prior to the Northern Territory Emergency Response legislation, consistent with established sentencing principles, the court took into account customary law and cultural practices in appropriate cases.

Further to this, the common law acknowledges the concept of individualised justice. In *Wong v The Queen* (2001),⁷ the High Court held that it was the task of the court in sentencing to take into consideration "...all of the relevant factors and to arrive at a single result which takes due account of them all..."⁸

A court's duty to take into account particular and individual material facts was considered by the High Court in *Neal v The Queen* (1982). Brennan J held:

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.⁹

Brennan J's reference to the 'even administration of criminal justice' speaks directly to the importance of equality before the law.

The notion of individualised justice was extended to recognising the particular backgrounds of certain ethnic or culture groups in *R v Fernando* (1992) ("*Fernando*").¹⁰ The court in *Fernando* developed a set of guiding sentencing principles which took into account case law and sentencing considerations in relation to Aboriginal peoples, as well as taking into account the findings of the Royal Commission into Aboriginal Deaths in Custody.¹¹

⁵ *Nicholas v The Queen* [1998] 193 CLR 173.

⁶ For example – *Sentencing Act 1995* (NT) ss 5(2), 6, 6A.

⁷ *Wong v The Queen* (2001) 207 CLR 584.

⁸ *Ibid* at 611.

⁹ *Neal v The Queen* (1982) 149 CLR 305, 326 ('*Neal*').

¹⁰ *R v Fernando* (1992) 76 A Crim R 58.

¹¹ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

The *Fernando* principles include that it is proper for a sentencing court to recognise and consider the social and economic disadvantage suffered by many Aboriginal offenders in their upbringing as relevant mitigating factors that the court should hear and consider when sentencing an Aboriginal person. The court also made it clear that these were not principles to be applied only to Aboriginal peoples, but to any individual from a cultural background for which that background is relevant to the circumstances of the offender in assessing their culpability and the offence committed.

The *Fernando* principles have been widely accepted and are regularly referred to in the sentencing of Aboriginal offenders throughout Australia.

In *Bugmy v The Queen* (2013)¹², the High Court for the first time considered the application of the *Fernando* principles. The High Court found that the relevance of factors of social and economic disadvantages suffered by many Aboriginal peoples does not diminish over time and should be given full weight.¹³ The High Court found that it is these subjective factors that fundamentally make up the characteristics of an offender and are relevant to assessing the moral culpability of the offender.¹⁴

In *Bugmy*, the High Court stated that “background factors” including Aboriginality and social disadvantage must be given “full weight in the determination of the appropriate sentence in every case”.¹⁵

In our submission, ss 15AB(1)(b), 16A(2A) and 16AA(1) are directly at odds with the principles upon which Australia’s legal system is based. This is a view shared by the Law Council of Australia:

removal of the power of courts to consider all factors relevant to the state of mind of an accused in criminal matters would be inimical to the principles upon which the law in Australia is based. The disposition and circumstances of the accused will always be relevant to the commission of a crime, whether it is murder, assault or trespass. Removing the capacity of the court to consider customary law will not only offend that principle, but will further confuse the Indigenous communities that continue to live by and observe age-old customs and laws.¹⁶

4. Inclusion and recognition of customary laws

NAAJA notes that the complex issues surrounding Aboriginal customary laws have previously been considered at length by the Australian Law Reform Commission.¹⁷ We also note that 1986 ALRC report recommended further inclusion and recognition of customary laws.

¹² *Bugmy v The Queen* (2013) 249 CLR 571.

¹³ *Ibid* at 580.

¹⁴ *Ibid* at 595.

¹⁵ *Ibid* at 594.

¹⁶ Law Council of Australia *Aboriginal Customary Law* Submission to the Law Reform Commission of Western Australia 29 May 2006 p 20.

¹⁷ Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* Report 31 (1986).

In our view, such a recommendation is even more pressing today in light of the impact of the exclusion of consideration of Customary Laws in bail and sentencing proceedings, including the sky-rocketing incarceration rates of Aboriginal peoples across Australia¹⁸ and the widespread perception by a large number of Aboriginal people that the mainstream justice system does not offer them justice at all.

5. Conclusion

Sections 15AB(1)(b), 16A(2A) and 16AA(1) of the *Crimes Act 1914* (Cth) encroach upon an Aboriginal person's right to a fair trial. This is because they constrain a court's discretion to take into account all relevant information in bail and sentencing in relation to an Aboriginal defendant's customary law or cultural practice.

The effect of these provisions is to impair the right of Aboriginal peoples to equality before the law and further denigrate the customary laws and cultural practice practices of Aboriginal Australians.

NAAJA urges the ALRC to find that ss 15AB(1)(b), 16A(2A) and 16AA(1) of the *Crimes Act 1914* (Cth) are both discriminatory against Aboriginal people in the Northern Territory, people and unjustifiable in the limitations they cause to the right to a fair trial and equality before the law.

We also attach for the Commission's consideration a 2012 by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submission on the proposed changes to the *Crimes Act 1914* (Cth) regarding consideration of Customary Law.

¹⁸ In 1991, 14% of the Australian prison population was Aboriginal and 69% of the NT prison population was Aboriginal. In 2014-15, 28% of Australia's prison population is Aboriginal (doubled); and in the NT, 86% of the prison population is Aboriginal.