CHAPTER 3

KEY ISSUES

3.1 While strongly supportive of real initiatives to prevent family violence and child abuse in Indigenous communities, all submissions and witnesses (with the exception of the Attorney-General's Department and Victoria Police) expressed concerns in relation to various aspects of the Bill and its likely practical operation.

3.2 This chapter considers the main issues and concerns raised in the course of the committee's inquiry, including:

- lack of consultation with respect to the Bill;
- arguments that the Bill is misguided and ill-conceived, and will do little, if anything, to address violence and child abuse in Indigenous communities in a practical sense;
- the discriminatory nature of the Bill;
- arguments that the Bill runs contrary to the findings of major relevant inquiries in Australia, such as the Royal Commission into Aboriginal Deaths in Custody;
- arguments that the Bill will restrict judicial discretion; and
- arguments that the Bill undermines important initiatives involving Indigenous customary law, such as circle sentencing.

Lack of consultation

3.3 Several submissions and witnesses noted the haste with which the Bill has been introduced into Parliament, without thorough, let alone adequate, consultation.[1]

3.4 HREOC noted that '(d)espite the complexity of the issues raised by [the] Bill, consideration of it is being rushed unnecessarily'; there has not been any consultation with Indigenous people 'who practice customary law and therefore no opportunity for feedback from the people who are purportedly the subjects' of the proposed amendments contained in the Bill.[2]

3.5 The North Australian Aboriginal Justice Agency commented on 'a lack of integrity in the government's timetable for consultation on the proposed amendments'.[3]

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1 HREOC, *Submission 5*, p. 2; Catholic Social Services Australia, *Submission 8*, p. 4; North Australian Aboriginal Justice Agency, *Submission 12*, p. 1.

2 *Submission 5*, p. 2.

3 *Submission 12*, p. 1.

Department response

3.6 A representative from the Attorney-General's Department (Department) confirmed that 'there was no direct consultation' with respect to the Bill, apart from general discussions with all Aboriginal legal services about customary law issues arising out of the Intergovernmental Summit.[4] He explained that:

> The major form of consultation was through the summit and the outcomes of the summit and then on to COAG. The issues there relate to the publicity of those issues. That consultation was in relation to Indigenous issues. We have not approached any ethnic groups.[5]

Arguments that the Bill represents a misguided approach

3.7 Much of the evidence received by the committee focused on arguments that the Bill represents a misconceived approach to addressing, in any meaningful way, the problems of violence and child abuse in Indigenous communities. Indeed, many were of the view that the Bill may in fact create problems in this context.

Relevance of Commonwealth offences

3.8 Many submissions and witnesses pointed out that the Bill will have limited effect in achieving its stated purpose. This is because the majority of offences, particularly those offences most relevant to violence and child abuse in Indigenous communities, are committed and dealt with under relevant state and territory criminal laws – not Federal legislation. As the Aboriginal and Torres Strait Islander Social Justice Commissioner and Acting Race Discrimination Commissioner (Social Justice Commissioner) told the committee:

> The Commonwealth Crimes Act 1914, which is amended by the bill, does not apply to offences of violence such as assault, murder or rape. They are covered by state and territory laws.
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> …
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> … this amendment does not address anything to do with Indigenous violence. Under federal legislation there is nothing in the Crimes Act that addresses issues like assault, rape or sexual violence. So why, then, do we have this in the Commonwealth Act? As Minister Brough has indicated, he has an intent to negotiate with the states to change their complementary legislation to rule it out, and most of those offences are really state offences and are judged under there.[6]

3.9 Ms Raelene Webb QC, appearing on behalf of the Law Council of Australia (Law Council), expressed a similar view:

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4 *Committee Hansard*, 29 September 2006, pp 32 & 39-40.

5 *Committee Hansard*, 29 September 2006, p. 32.

6 *Committee Hansard*, 29 September 2006, pp 2 & 5.

> It is acknowledged that the bill will have immediate impact only in relation to Commonwealth offences and not directly in relation to issues of particular concern identified in the explanatory memorandum—that is, high levels of family violence and child abuse in Indigenous communities. Offences relating to these issues are generally committed and charged under the relevant criminal statutes of the states and territories.[7]

3.10 Mr John McKenzie from the Aboriginal Legal Service (NSW/ACT) also noted that the Crimes Act 'does not cover many of the offences that may in fact be relevant … out in the remote communities'.[8]

3.11 Despite the limited reach of the amendments proposed by the Bill and evidence indicating that only a very small proportion of Indigenous offenders are charged with Federal offences,[9] the committee heard that the Bill may nevertheless have an adverse practical impact on Indigenous persons, primarily in relation to offences under the *Social Security Act 1991*. As Mr McKenzie explained:

> … the one federal offence where we are most concerned that this bill will have a real impact upon our clientele in a very practical way is that which, in our circles anyway, is known as the Centrelink fraud prosecutions, which are conducted by the Commonwealth DPP, for people who do not properly declare casual income and are on a pension, unemployment benefits, parenting pensions and that type of matter.[10]

3.12 Mr McKenzie noted that this would have a very real impact on his organisation's clientele base:

> … when it comes to the proposal of this bill there will be an outright prohibition on the courts taking any consideration not only of customary law but also of what is termed in the bill 'cultural practice'—and I am unaware of how that may be defined. In our regard it is an extremely broadbrush approach to use the term 'cultural practice'. We foresee that it will affect a large part of what ordinarily our lawyers would be putting, on behalf of our clients, in mitigation of sentence in response to a conviction for that type of fraud charge. It will very much give the opportunity for the prosecution to object to any matters that may be able to be nominated or called cultural practice being properly considered by the magistrate or the judge who is dealing with that matter.[11]

3.13 Mr Nicholas Parmeter from the Law Council made a similar point:

> There are going to be examples that have not been tested yet where, for instance, breaches of the Social Security Act might be impacted or

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7 *Committee Hansard*, 29 September 2006, p. 11.

8 *Committee Hansard*, 29 September 2006, p. 25.

9 Law Council of Australia, *Submission 3*, p. 3.

10 *Committee Hansard*, 29 September 2006, p. 25.

11 *Committee Hansard*, 29 September 2006, p. 25.

> influenced by an individual's culture. There are certain aspects of Aboriginal culture, including caring for community and the like, which might have some influence on an individual's decision to commit social security fraud or something like that. It is unclear what weight the court would give in those circumstances but it seems a little outrageous to prevent the court from considering those factors if they are relevant.[12]

3.14 Submissions and witnesses also anticipated much broader implications if the states and territories uniformly adopt a similar approach to that taken in the Bill, as encouraged by the Federal Government.[13] As Mr Parmeter noted, '(i)f that happens then it will be state and territory laws, where the vast majority of violence offences occur, that determine whether or not a person's culture can be considered a relevant aspect of an offence'.[14]

3.15 In this context (and in strongly opposing the measures contained in the Bill), Catholic Social Services Australia submitted that it is the Commonwealth's responsibility to lead by good example:

> It is incumbent on the Commonwealth Government to ensure that any legislative action it develops in response to the July 2006 COAG Communiqué is measured, just, and not liable to have unintended consequences which might further disadvantage some of the most vulnerable people in the Australian community. This is important not only directly for federal offences, but also indirectly for State/Territory offences to the extent that the Commonwealth model is followed elsewhere.[15]

No link between customary law and lenient sentences

3.16 National Legal Aid, amongst others, pointed out that there is no 'customary law defence' in Australia. To this end, it argued that 'much of these proposed amendments appear superfluous'. It noted, however, that this view may not accord with community beliefs:

> 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 … sentencing principles … apply to all Australians has been ignored. [National Legal Aid] believe(s) that this misconception forms a substantial basis of these amendments.[16]

3.17 The Social Justice Commissioner also stressed the point that customary law is not a defence:

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12 *Committee Hansard*, 29 September 2006, p. 15.

13 For example, see Law Council of Australia, *Submission 3*, p. 3.

14 *Committee Hansard*, 29 September 2006, p. 15.

15 *Submission 8*, p. 4.

16 *Submission 2*, p. 4.

> Let us also be very clear that customary law is not a defence anywhere in Australia. An offender cannot get off because of customary law. Nobody is suggesting that people who are convicted of criminal offences should not be appropriately punished, but appropriate punishment 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.[17]

3.18 In any case, considerations of customary law and cultural practice must be consistent with other human rights, including the human rights of Indigenous women and children to be free of violence and discrimination:

> … the right to enjoy culture m[ust] be consistent with other human rights and, in particular in the present context, the rights of women and children. The sentencing process involves a similar process of balancing the rights, interests and circumstances of the community, the victim and the offender. For the law to automatically exclude cultural practice from the matters to be taken into account is to distort this balancing process in a way inconsistent with the right to enjoy a culture. To automatically exclude customary law and cultural values from sentencing is also contrary to Australian commitments to cultural diversity.[18]

3.19 The Law Council also noted that 'courts recognise that Aboriginal customary law and cultural practices will only be relevant in limited circumstances and will not justify or condone abuse of women and children'.[19] The Law Council also pointed out that:

> … despite significant misinformation reported about individual cases where trial sentences have appeared lenient, very few have involved submissions regarding customary law or cultural practices. Indigenous community leaders have consistently abhorred any suggestion that violence against women and children is justified or condoned in any way by customary law.[20]

3.20 Professor Weisbrot from the ALRC pointed out that cultural background and customary law 'never works' as a defence, but 'in explaining behaviour and fashioning an appropriate sentence, it sometimes is relevant in understanding the motivation'.[21] That is, in some cases courts may 'look at Aboriginality in terms of disadvantage and therefore apply some reductions rather than actually going through a more lengthy and difficult process of ascertaining genuine Aboriginal custom and then applying that'.[22] Professor Weisbrot also pointed out that, in his view, the Bill 'is an overreaction to

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17 *Committee Hansard*, 29 September 2006, p. 3.

18 Social Justice Commissioner, HREOC, *Committee Hansard*, 29 September 2006, p. 3.

19 *Submission 3*, p. 2.

20 *Submission 3*, p. 2.

21 *Committee Hansard*, 29 September 2006, p. 20.

22 *Committee Hansard*, 29 September 2006, p. 19.

some particular cases. [However,] the particular triggering cases were ones in which Aboriginal custom was not accepted by the courts anyway'.[23]

3.21 The Victorian Aboriginal Legal Service Co-operative noted that the 'inappropriate use of cultural background by Courts to justify more lenient sentences is extremely rare. Over the last decade we are aware of a handful of cases where the issue of lenient sentences and cultural background has been problematic'.[24]

3.22 Professor Larissa Behrendt and Ms Nicole Watson from the Jumbunna Indigenous House of Learning at the University of Technology, Sydney expressed the view that the most effective means of ensuring that proper sentences are given to those who perpetrate family violence is judicial education.[25]

Department response

3.23 The committee sought clarification from the departmental representatives about the wording used in proposed paragraph 15AB(1)(b) and proposed subsection 16A(2A) – namely, that customary law or cultural practice cannot be used 'as a reason for excusing, justifying, authorising, [or] requiring' criminal behaviour. The committee put it to the representatives that this wording in fact amounts to a statement that customary law or cultural practice cannot be used as a defence.

3.24 A representative of the Department conceded that the wording in the Bill might be interpreted in this way but explained that the phrase is also intended to be interpreted in the context of mitigation:

> The colloquially used word 'defence' is one which, as you will be aware, is used in many ways by different people. What we are clarifying here is the breadth of what is endeavoured to be prohibited. In terms of defence to guilt or innocence, again, it can be interpreted like that; but also in terms of saying, 'You should excuse me from this,' in a plea of mitigation, or wanting to justify your actions in a plea of mitigation. It can certainly be interpreted in that way. I think the words 'lessens the seriousness' also add to that, and make it clear that this is about mitigation as well.[26]

3.25 The committee also notes, with concern, confirmation from the Department that the inclusion of the words 'rendering less serious' in proposed paragraph 15AB(1)(b) and proposed subsection 16A(2A) effectively means that a court could take into account customary law or cultural background to *increase* a penalty. The representative stated that these provisions have been drafted in a non-neutral way as a

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23 *Committee Hansard*, 29 September 2006, p. 20.

24 *Submission 6*, pp 1-2.

25 *Submission 9*, p. 1.

26 *Committee Hansard*, 29 September 2006, p. 37.

matter of 'principle about protection of victims and the emphasis being placed on those types of needs'.[27]

Distraction from 'real' solutions

3.26 Many submissions and witnesses argued that the Bill distracts from the implementation of real solutions to the problem of family violence in Indigenous communities.

3.27 The Social Justice Commissioner told the committee that real solutions are needed to address in a meaningful way the problems of 'poverty, overcrowding, substance abuse, low levels of education and unemployment'.[28] He argued that urgent changes need to be made on the ground to address these issues:

> It is a concern that there have been many reports over a number of years indicating what the experts suggest should happen in relation to addressing family violence, and yet nothing has happened. In particular, since Minister Brough's summit—in June, I think—we have seen nothing come out in relation to addressing any of these issues. If we are putting all of our hope on this amendment to address and change family violence, I think that is misconceived. It will do nothing to address any of those issues. They are issues that have to be dealt with on the ground. Part of what I endeavour always to do is to try and encourage governments to look at putting in place programs that will intervene early so that we do not get issues where people are incarcerated.[29]

3.28 The Social Justice Commissioner noted that complementary programs mooted at the Intergovernmental Summit in June 2006 and COAG in July 2006 have not, to his knowledge, been advanced any further since those meetings:

> I have not seen anything demonstrate publicly that there have been any measures. There was a discussion in the COAG meeting that talked about establishing an advisory body to COAG on Indigenous affairs. I understand that the National Indigenous Council, who were advising the government, have also raised concerns about family violence, child abuse and so forth and want to get other measures put in place. I have yet to see anything announced publicly. In fact that is a concern—that nothing is happening and yet we have identified it as a major priority and we have had the summit. When is action going to start?[30]

3.29 National Legal Aid also stressed the importance of practical initiatives to help combat problems in Indigenous communities:

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27 *Committee Hansard*, 29 September 2006, p. 44.

28 *Committee Hansard*, 29 September 2006, p. 2.

29 *Committee Hansard*, 29 September 2006, p. 5.

30 *Committee Hansard*, 29 September 2006, p. 7.

> We have seen … that when people living in remote communities understand [the criminal justice] 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.
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> … 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.[31]

3.30 In relation to protection of victims and witnesses, National Legal Aid expressed the view that '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'.[32]

3.31 Catholic Social Services Australia made a similar argument:

> … changing sentencing rules is [not] an effective way of addressing the causes of violence in Indigenous communities. That requires action to address poverty, social exclusion and the deficiencies of current support arrangements for families in crisis.[33]

Department response

3.32 At the hearing, in response to questioning by the committee about how the Bill will specifically address the problems of Indigenous violence, and sexual and child abuse, the departmental representative told the committee that the Bill 'reflects and has come out of the very real concern about family violence and sexual abuse within Indigenous communities' and is consistent with the approach agreed to at the Intergovernmental Summit which was 'to take effective, clear and definitive action as quickly as possible, and to provide leadership in relation to those types of issues'.[34]

3.33 He stated that the Federal Government is taking a position of 'leadership and modelling' through the measures proposed by the Bill. He noted that the tenor of the principles contained in the Bill are those that were also agreed at COAG:

> [The Bill] is an application of those principles, and it is showing how those principles can be put into practice broadly across the jurisdictions. There is a wide variation across jurisdictions in relation to both sentencing and bail legislation, and a disparity between the particulars of how each of those

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31 *Submission 2*, p. 7.

32 *Submission 2*, p. 5.

33 *Submission 8*, p. 12.

34 *Committee Hansard*, 29 September 2006, p. 37.

> jurisdictions approaches very similar issues. One of the positions that we are able to adopt is the strength of harmonising those kinds of issues.[35]

3.34 However, the committee notes that there are no Commonwealth laws relating to violence and child abuse in Indigenous communities upon which the Bill has any impact.

3.35 The committee notes also that the COAG Communique stated that the Standing Committee on Attorneys General (SCAG) was to report to the next COAG meeting on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities. SCAG was also to recommend any changes required. The committee is concerned that the Federal Government appears to have pre-empted that process through its introduction of the Bill.

3.36 The representative also drew the committee's attention to 'a number of other initiatives', including the National Indigenous Violence and Child Abuse Intelligence Task Force, community legal education, traditional education and judicial education that are being pursued on a bilateral basis with the states and territories.[36]

3.37 In this regard, the committee notes, and commends, the opening on 5 October 2006 of the Alice Springs office of the National Indigenous Violence and Child Abuse Intelligence Task Force.[37]

Is the Bill discriminatory?

3.38 Many submissions and witnesses argued that the Bill is discriminatory.

3.39 For example, the Law Council argued strongly that the Bill will have a discriminatory impact on Indigenous Australians and Australians of multicultural descent. As Ms Raelene Webb QC told the committee:

> … even focusing just on the bill relating to Commonwealth offences, it is clear that [it] will impact not just on Indigenous offenders but also on offenders from different cultural backgrounds. Only offenders from the dominant Anglo-Saxon Australian culture will not be impacted by the amendments or will perhaps be impacted to a lesser extent.[38]

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35 *Committee Hansard*, 29 September 2006, p. 37.

36 *Committee Hansard*, 29 September 2006, p. 33.

37 Senator the Hon. Chris Ellison, Minister for Justice and Customs, Media Release, *Central location for Indigenous Task Force*, 5 October 2006 at: http://www.ag.gov.au/agd/WWW/justiceministerHome.nsf/Page/Media_Releases_2006_3rd_Quarter_5_October_2006_-_Central_location_for_Indigenous_Task_Force (accessed 6 October 2006).

38 *Committee Hansard*, 29 September 2006, p. 11.

3.40 In the context of the Bill's application to Federal offences only, the Law Council made the pertinent observation that the majority of those who have been incarcerated in Australian prisons following commission of a Federal offence are non-Australian citizens (Australian citizens comprise only 43 per cent of such prisoners). The Law Council concluded that this indicates that in practice the Bill 'will have a greater impact upon non-Australians; it also gives rise to the concern that the Bill will have effect on people and circumstances that have not been properly considered in the rush to implement' the Bill.[39]

3.41 The Law Council argued that the Bill may breach the provisions of the *Racial Discrimination Act 1975* (RDA) since it 'will require courts to treat Indigenous offenders or offenders of particular ethnic origin as if they did not belong to a particular Indigenous or ethnic group'. Further, the RDA 'embodies a concept of discrimination which seeks to ensure substantive rather than merely formal equality before the law';[40] this is something that, arguably, the Bill does not achieve.[41]

3.42 The Social Justice Commissioner articulated HREOC's views about the possible discriminatory effect of the Bill in a similar vein:

> The argument that this bill provides equity before the law is misconceived and premised on a false assumption that only some people—other people—have culture. All Australians, regardless of their ethnic background, have cultural values and may engage in cultural practices which 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 law.[42]

3.43 The Social Justice Commissioner also noted that the Bill 'suggests that only certain people have culture and that other things are just the status quo'. This presents a danger in that 'the practice of the majority may be seen as the standard or the norm and can therefore be taken into account, while the practices of minority cultures and cultural groups are seen as cultural and therefore excluded from being considered in sentencing'. HREOC's view is that this approach is fundamentally wrong.[43]

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39 *Submission 3*, p. 3.

40 *Submission 3*, p. 3.

41 In responding to a question on notice from the committee, the Law Council provided the committee with a number of examples of cases in which a non-Indigenous offender's cultural origins, customary laws or cultural practices have been considered relevant in the sentencing processes. Most commonly, the cultural background of an offender has been raised as relevant to the plea of provocation, as a partial or total defence to a charge of murder, manslaughter or assault. In all cases, the Law Council noted that the court only gave weight to the cultural background of the offenders when appropriate, having regard to all relevant facts: see further *Submission 3A*.

42 *Committee Hansard*, 29 September 2006, p. 2.

43 *Committee Hansard*, 29 September 2006, pp 4 & 7.

3.44 The Victorian Aboriginal Legal Service Co-operative expressed concern at the Bill's proposal 'to sentence people as though they were someone else. Culture is inseparable from individuality and it is unrealistic to strip away culture from a person. Any notion that this is plausible is based on an over-simplistic conceptualisation of culture'.[44]

3.45 Professor Weisbrot from the ALRC also agreed that the Bill could be seen to be discriminatory '(i)nsofar as it singles out a particular group as having their custom and culture excluded in a particular provision'.[45]

Department response

3.46 The representative from the Department disagreed with assertions that the Bill is discriminatory in relation to any particular group in Australia. He maintained that it 'applies across the board to all Australians' and is consistent with the Racial Discrimination Act.[46]

The Bill's deviation from findings of major relevant inquiries

3.47 Many submissions and witnesses contended that the Bill is not based on, or supported by, any evidenced research. On the contrary, as HREOC argued, the Bill is in conflict with every major inquiry into the role of cultural background and customary law in the Australian legal system, including five reports of the ALRC.[47]

3.48 The ALRC argued that the Bill's proposed insertion of subsections 16A(2A) and (2B) into the Crimes Act is 'diametrically opposed to the recommendations of the ALRC in numerous reports' and is 'also in conflict with the recommendations of the Royal Commission into Aboriginal Deaths in Custody, which the Government indicates it considered when drafting these provisions'.[48]

3.49 The committee notes the following ALRC reports which have particular relevance with respect to cultural background and customary law in Australia:

- *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006) which recommended the retention of cultural background in the factors listed in paragraph 16A(2)(m) of the Crimes Act and also recommended that Aboriginal and Torres Strait Islander customs should be among the specifically enumerated factors in that paragraph;
- *Multiculturalism and the Law* (ALRC 57, 1992) which recommended that an offender's cultural background should be expressly included as a factor to be

44 *Submission 6*, p. 4.

45 *Committee Hansard*, 29 September 2006, p. 20.

46 *Committee Hansard*, 29 September 2006, pp 41-42.

47 *Submission 5*, p. 2.

48 *Submission 1*, p. 10.

taken into account in sentencing under paragraph 16A(2)(m) of the Crimes Act (at the time of that report, paragraph 16A(2)(m) did not include 'cultural background' as a specific factor);

- *Sentencing* (ALRC 44, 1988) which also recommended that an offender's cultural background be listed in the relevant legislation as a factor to be taken into account in sentencing; and
- *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) which concluded that Aboriginal customary laws are a relevant factor in mitigation of sentence.

3.50 The committee also notes that, in 1994, the Federal Parliament gave bipartisan support to the insertion into the Crimes Act of the requirement that courts consider the cultural background of an offender in sentencing. This committee, in its report on the Crimes and Other Legislation Amendment Bill 1994, also unanimously recommended that the proposal to insert this requirement should proceed. The proposal was supported by the majority of submissions received by the committee in the course of that inquiry and was not opposed by the Commonwealth Director of Public Prosecutions.[49]

Royal Commission into Aboriginal Deaths in Custody

3.51 Many submissions and witnesses pointed out that the Bill is at odds with the recommendations of the Royal Commission into Aboriginal Deaths in Custody (Royal Commission). As Professor Weisbrot from the ALRC told the committee:

> [Those recommendations] were quite specific in saying that we need to reduce the Aboriginal prison population and that, as part of that, Aboriginal cultural practice should be taken into account in determining sentences, including whether a custodial sentence was required at all or whether other options might be more sensible, or in reducing the amount of time—again, where relevant.[50]

3.52 The Law Council noted that there has not been significant progress since the Royal Commission and that average prison terms for Indigneous Australians have increased since that time, 'a fact that runs contrary to assertions by proponents of the Bill that Indigenous people are treated more leniently than non-Indigenous people'.[51] Moreover, in the Law Council's view, rates of Indigenous incarceration will increase under the Bill and sentencing options for courts will be limited in their attempt to address recidivism and Indigenous disadvantage under the legal system.[52]

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49 See further: Senate Standing Committee on Legal and Constitutional Affairs, *Crimes and Other Legislation Amendment Bill 1994*, September 1994.

50 *Committee Hansard*, 29 September 2006, p. 19.

51 *Submission 3*, p. 8.

52 *Submission 3*, p. 9.

3.53 The Social Justice Commissioner also noted the Bill's divergence from the Royal Commission's recommendations:

> The royal commission recommendations encourage both the states and the federal government to look at measures to address some of the factors that contribute towards incarceration and offending by Indigenous people. They put a lot of onus on governments to address issues like housing, employment, education and so forth. This bill is not doing that. What are also not being considered are the issues that were raised in the commission's recommendation in relation to looking at incarceration, or at least looking at alternatives to arrest, and taking into consideration that customary law or cultural practices in fact are used quite widely, by Indigenous peoples particularly, in getting together and being able to exchange information about life and about culture. So there is an inconsistency if we try to disregard that.[53]

3.54 Mr John McKenzie from the Aboriginal Legal Service (NSW/ACT) argued that the Bill represents a departure from the general spirit of the recommendations of the Royal Commission:

> What we have in this bill, if it becomes law, will effectively mean that one of the considerations that may reduce the amount of time Aboriginal offenders remain in jail will be, if not removed, then certainly lessened in its importance. More important, though, is that a very fundamental thrust of the royal commission was that we in the non-Aboriginal part of the community need to be open and learn lessons that the Aboriginal people can teach us about how things might be able to operate in that field.[54]

3.55 Mr McKenzie continued in this vein:

> By bringing in a prohibition on things to do with cultural practice or customary law, we are making a very symbolic statement that that is really not important any more and that we—the non-Aboriginal people and government agencies—know best as to what to do in relation to Aboriginal issues. I think that although I am not going to say it offends any particular recommendation, it offends those overall general recommendations, because we believe this will [lead] to certainly increased time in custody for a number of our clients but, more importantly, to a downgrading in the importance of Aboriginal culture in the whole operation of the criminal justice system.[55]

3.56 HREOC provided the committee with an analysis of some specific recommendations of the Royal Commission relating to bail and sentencing, and their consistency with the Bill. Most relevantly to the Bill, HREOC pointed to Recommendations 104 and 111, namely that:

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53 *Committee Hansard*, 29 September 2006, p. 3.

54 *Committee Hansard*, 29 September 2006, p. 30.

55 *Committee Hansard*, 29 September 2006, p. 30.

- there be consultation between sentencing authorities and Aboriginal communities and organisations in sentencing – both generally and in specific cases subject to preserving the civil and legal rights of offenders and victims; and
- in reviewing options for non-custodial sentences, governments should consult with Aboriginal communities and groups.[56]

3.57 HREOC observed that such recommendations and other findings of the Royal Commission 'are consistent with [HREOC's] view that positive engagement with Indigenous customary law and practice is essential to improving the way in which Indigenous people relate to the criminal justice system'.[57]

Department response

3.58 The departmental representative informed the committee that the Royal Commission's recommendations relating to policing, court structures, and youth issues, as well as those that emphasised the importance of families and family relationships, were considered generally in the formulation of the Bill. He noted recommendations in relation to victims and communities, and incarceration, and those that called for a holistic response to all these issues:

> … that is partly the balance placed in this legislation. The work arising from the summit recognises a lot of the other issues—for example, legal education, which is what we are involved with. There are also issues around better care, better probation services and better policing, which of course place a context for any of this legislation to operate in. Some of the particular bail legislation will certainly not be affected—for example, reporting to Aboriginal legal services … (C)ertainly the thrust of the bail legislation, where the concerns about incarceration were endeavoured to be balanced, takes into consideration the needs of victims and the community.[58]

3.59 The representative noted further that:

> The royal commission's recommendations, as I indicated, run very broadly. The emphasis upon those recommendations is a matter that is considered in a whole raft of ways in terms of the work undertaken in the branch that I administer—we administer Aboriginal legal services, family violence prevention legal services, and preventative and diversionary programs—so they are integral to the kind of work we do on a daily basis.[59]

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56 *Submission 5A*, p. 2.

57 *Submission 5A*, pp 2-3.

58 *Committee Hansard*, 29 September 2006, p. 35.

59 *Committee Hansard*, 29 September 2006, p. 38.

3.60 In response to assertions by several submissions and witnesses that the Bill will result in a greater number of Indigenous people in custody, the representative conceded that this is possible but that '(w)hether that will happen will depend on a whole range of factors that may yet come into play'.[60]

Preservation of judicial discretion

3.61 Many argued that the amendments contained in the Bill will unnecessarily and inappropriately restrict the discretion of courts, resulting in potential injustice for Indigenous Australians and Australians of multicultural descent. Most submissions and witnesses centred their comments on proposed amendments to the sentencing process, as contained in Items 4 and 5 of the Bill (new paragraphs 16A(2)(m) and subsection 16A(2A).

3.62 Catholic Social Services Australia provided the committee with a summary of the general concerns in this regard:

> … the current law strikes an appropriate balance by including "cultural background" among a long list of factors which must, to the extent that they are relevant and known to the court, be considered in sentencing for federal offences. If made law, the Bill would remove the reference to "cultural background". This would create an imbalance and risk injustices stemming from inadequate consideration of cultural factors.[61]

3.63 Even more significantly, by specifically prohibiting any consideration of cultural practices or customary law, the Bill 'would further disadvantage some of the most vulnerable people in our community because some relevant cultural factors would not be allowed to be weighed on the scales of justice'.[62]

3.64 The Aboriginal Legal Service (NSW/ACT) made a blunt assessment of the likely impact of the Bill, stating that '(s)uch a move would spell disaster for Aboriginal defendants whose offending is largely symptomatic of broader problems such as dislocation from land, poverty and lack of opportunity for education and employment'.[63]

Cultural background as a sentencing factor

3.65 Cultural background and customary law practices have long been considered to be a relevant factor in sentencing offenders in a number of jurisdictions, including

60 *Committee Hansard*, 29 September 2006, p. 39.

61 *Submission 8*, p. 7.

62 Catholic Social Services Australia, *Submission 8*, p. 9.

63 *Submission 10*, p. 4.

the Commonwealth – even before the insertion of the term 'cultural background' into paragraph 16A(2)(m) of the Crimes Act in 1994.[64]

3.66 As the Social Justice Commissioner explained:

> The bill … overturns common law sentencing principles which apply to everybody and have been carefully developed over many years. The courts have recognised that it is necessary to take into account relevant factors about the offender's cultural background in order to ensure just sentences. This bill abandons that principle and it does so for no good reason.[65]

3.67 Submissions and witnesses noted that subsection 16A(2) of the Crimes Act is a non-exhaustive list of sentencing factors and that the Bill's removal of 'cultural background' from the list does not preclude it from being considered by courts in making sentencing decisions – a point noted in the EM to the Bill and by the departmental representative. However, many were of the view that this would result in less emphasis being placed on the need to consider cultural background as a relevant factor in the future, impeding the courts in determining appropriate sentences and leading to less transparency and certainty in the sentencing process.[66]

3.68 The general view was that the approach taken in the Bill is not an appropriate development in the law. As Mr Jonathon Hunyor from HREOC noted:

> … there are two aspects to the bill. One is the removal of cultural background, which can currently be taken into account. The other is the introduction of these notions of customary law and cultural practice, which a court is specifically excluded from taking into account. We do not think the looseness of saying that a court can take into account cultural background is a problem, because the court, in the sentencing process, will just take into account those matters that are relevant. Courts have done that for as long as they have been sitting. But introducing these new concepts, which are not defined, and preventing a court from taking them into account adds a whole new dimension. Failing to define those things makes it very hard for us to assess what effect they are going to have. Also, it creates problems for a court which is prohibited from taking those things into account. The court must obviously know what those things are.[67]

3.69 The ALRC has long held the view that cultural background is an important factor that should be included in any legislative list of sentencing factors:

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64 ALRC, *Submission 1*, pp 9-10. For example, the Aboriginal Legal Service (NSW/ACT) provided the committee with a useful analysis of the NSW case of *R v Fernando* (1992) 76 A Crim R 58, which laid down a set of principles relating to express consideration of Aboriginal disadvantage in the sentencing of Aboriginal defendants: see *Submission10*, pp 1-4.

65 *Committee Hansard*, 29 September 2006, p. 2.

66 See, for example, ALRC, *Submission 1*, p. 10; Social Justice Commissioner, HREOC, *Committee Hansard*, 29 September 2006, p. 4.

67 *Committee Hansard*, 29 September 2006, p. 6.

> … the consideration of traditional laws and customs to explain an offender's reasons or motives for committing the offence is merely one factor to be considered in the sentencing process. The weight to be attached to the factor always should be a matter for the court's discretion, consistent with the application of Australia's obligations under international law and our own human rights instruments. It must be considered together with a large range of other factors, and applied so as to impose a sentence that is consistent with the sentencing principles and the purposes of sentencing, and appropriate in all the circumstances of the case. Prohibiting consideration of this particular factor limits the judicial discretion to consider and weigh up all relevant factors of the case.[68]

3.70 In any case, as the Law Council and others pointed out, courts have generally been 'getting it right' with respect to the balancing of different concerns in bail and sentencing; in cases where mistakes have been made in sentencing at trial, 'those mistakes have been invariably rectified on appeal'.[69] Mr McKenzie from the Aboriginal Legal Service (NSW/ACT) noted that 'that is exactly why we have the appellate structure within the courts' – to launch appeals against inadequate sentences.[70]

3.71 Mr McKenzie expressed concern about the 'very real symbolic message' that the Bill sends 'that cultural background is not to be given the importance that it formerly was'. Further:

> [The Bill] is not a prohibition on the court having reference to it. Our concern is this: it has been a legislative direction, which gives it a certain status …
>
> … if you remove what was once a legislative direction to all magistrates and judges to take this into account, that in itself is a very important symbolic move to not only the members of the judiciary but also to everyone else involved in the criminal justice system, especially the prosecution. We work in an adversarial system. They would only be doing their job if they stood up and objected to anything cultural practice or customary law related that any of our lawyers put in any Commonwealth case.[71]

Department response

3.72 The committee sought an explanation from the Department of the rationale for removing 'cultural background' from paragraph 16A(2)(m) of the Crimes Act. The departmental representative maintained that this proposal makes clear the Federal Government's position that the law applies equally to all persons and that 'everyone

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68 ALRC, *Submission 1*, p. 10.

69 *Submission 3*, p. 2.

70 *Committee Hansard*, 29 September 2006, p. 29.

71 *Committee Hansard*, 29 September 2006, p. 27.

should have the same protection'.[72] The representative stated that courts would not be prevented 'from considering any other matter they saw as relevant, so they could consider cultural background if they saw it as relevant at that time'.[73]

3.73 While a belief or a claim of customary law or cultural practice could not be used as an excuse or justification for an offence, it could be considered in relation to other circumstances of the offender.[74] For example, the fact that an offender may face traditional punishment for the offence could be considered. However, the committee notes that this is the current situation in any event.

3.74 The committee is also concerned about the seemingly contradictory argument that the amendment will remove the phrase 'cultural background' from the Crimes Act, but still allow it to be taken into consideration in relation to an offender's 'other circumstances'. Indeed, in this context, it is also unclear to the committee why 'cultural background' should be removed while the term 'antecedents' in paragraph 16A(2)(m) is to be retained.

Cultural background as a factor in bail proceedings

3.75 While the Bill's proposed application to sentencing procedures attracted the most criticism, some submissions and witnesses argued that its application to bail proceedings could also be problematic.

3.76 National Legal Aid (NLA) noted that the Bill's requirement for the bail authority to consider the 'potential impact' of granting bail on victims, witnesses and potential witnesses is very broad and could be interpreted 'to the point where it might seriously impede on the presumption of innocence and substantially increase the remand rate'.[75]

3.77 NLA argued that, contrary to the statement contained in the EM, this will result in direct financial implications 'arising from the transport of accused persons from communities to remand centres and the further cost of detaining them in custody'. There may also be potential financial impacts to Legal Aid Commissions due to the time and complexity and, therefore, cost of bail applications.[76]

3.78 However, Mr Jonathon Hunyor from HREOC indicated that HREOC did not have specific concerns with the Bill's application to bail proceedings:

> The safety of members of the community is always taken into account. The potential for someone to interfere with a witness is always taken into

72 *Committee Hansard*, 29 September 2006, p. 38.

73 *Committee Hansard*, 29 September 2006, p. 38.

74 *Committee Hansard*, 29 September 2006, p. 40.

75 *Submission 2*, p. 3.

76 *Submission 2*, p. 3.

> account by bail courts … I speak mostly from experience in state and territory jurisdictions but, having worked in criminal law, it would surprise me enormously if those sorts of factors were not taken into account by courts granting bail in the case of Commonwealth offences as a matter of course. So it may be that this part of the bill does not necessarily add anything in relation to the point … about people not being returned to remote communities where there may be concerns about violence towards witnesses or other members of the community …[77]

3.79 The Aboriginal Legal Rights Movement (ALRM) made an interesting observation about paragraph 15AB(1)(b) of the Bill which requires a bail authority to not take into account customary law or cultural practice:

> Matters of mitigation are not normally taken into account in relation to bail applications, since the bail discretion, may be applied whether the person would be pleading guilty or not guilty and is made in the context of the presumption of innocence. In that circumstance, a provision which prevents a court from taking into account customary law or cultural practice as a reason for excusing, justifying etc alleged criminal behaviour, in relation to a bail application for the offence charged may not be relevant to the consideration of bail in any event.[78]

3.80 ALRM submitted further that 'either the … paragraph is too narrowly drawn to achieve what was intended, or else … it is not clear what actually was intended by the provision'.[79]

3.81 Mr Nicholas Parmeter from the Law Council noted that there might be a slight change in the focus of the courts in bail proceedings as a result of the Bill's specific enunciation of certain principles:

> [At present,] the vast majority of cases will tend to gloss over the detail in bail proceedings, largely due to the resources of the courts and the time frames allowed for consideration of those bail proceedings. What we may see is courts indicating that they have specifically excluded certain considerations and, as a result, have refused bail to a certain offender on the basis of that consideration or, in the more positive sense, that the court has considered the interests of the victim and made a determination that the prisoner can only be released on certain conditions and under supervision.
>
> I think that part of the misconception about aspects of the bill which affect bail is that cultural practices and customary law will not be taken into account as a mitigating factor in a bail proceedings. It may influence the court's decision about whether or not bail should be granted …[80]

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77 *Committee Hansard*, 29 September 2006, pp 8-9.

78 *Submission 7*, pp 1-2.

79 *Submission 7*, p. 2.

80 *Committee Hansard*, 29 September 2006, pp 15-16.

Undermining important initiatives involving customary law

3.82 The committee received evidence that the Bill will undermine important initiatives, such as circle sentencing, which have sought to engage with aspects of Indigenous customary law and practice in a positive way. As HREOC submitted:

> 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.[81]

3.83 The Social Justice Commissioner reiterated this point at the hearing:

> [The Bill] … undermines the important initiatives such as circle sentencing and Koori courts that have been sought to engage with aspects of Indigenous culture, customary law and practice in a positive way. These have been reported to have been having a very positive impact on repeat offending and should be supported, not undermined.[82]

3.84 The Law Council also submitted that the Bill 'has the potential to neutralise recent constructs, including Aboriginal courts that have been established with outstanding success in a number of jurisdictions'. It argued that any undermining or deterioration of community governance structures may increase the problems of violence and child abuse in Indigenous communities.[83]

3.85 HREOC expressed uncertainty about how the Bill might impact upon, or interact with, certain elements of customary law in situations where there has been, or will be, 'payback'. It suggested that if such matters cannot be taken into account, this may result in Indigenous people facing greater punishment than is currently the case.[84]

3.86 Mr John McKenzie from the Aboriginal Legal Service (NSW/ACT) also expressed concern about the Bill's possible negative impact on circle sentencing:

> What we foresee with this bill going through is that all Commonwealth offences will simply not be allowed to go through to the circle because there will be that disjointedness, if you like, between the respect that will be asked of the offender to the people in the circle, and the people in the circle sitting in judgement on him or her not being allowed to take into account any cultural practice of the offender. And that disjuncture of respect, which must be mutual for it to flourish and to be able to support this process, could spell the end of that process.[85]

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81 *Submission 5*, p. 5.

82 *Committee Hansard*, 29 September 2006, p. 2.

83 *Submission 3*, p. 7.

84 *Submission 5*, p. 6.

85 *Committee Hansard*, 29 September 2006, p. 27.

3.87 In Mr McKenzie's view, if the states and territories were to follow the Commonwealth's lead and amend their legislation in a similar way, circle sentencing will not survive in total:

> What we would then be looking at is wholesale removal of all of those principles set by the common law—the court-made law.[86]

Department response

3.88 The departmental representative told the committee that the Bill would not stop alternative sentencing mechanisms, such as circle sentencing, from operating. The representative stated that circle sentencing and other alternative sentencing forums occur within the proceedings of the criminal justice system itself. The Bill will not impact on these forums in and of themselves; its effect will only relate to the imposition of penalties:

> What is being said here is that, in terms of a penalty, they can still impose any broad penalty that the court feels appropriate having gone through that circle. But what they are saying is that there can be no mitigation because the offender says, 'Look, I did this because I had a belief that I was entitled to do it on the basis of customary law.' The discussion about customary law, the explanation about customary law, can all occur, but the legislation is drawing a line and saying, 'You can't get a lesser sentence because you say you've justified your activities on the basis of customary law.'[87]

3.89 The representative noted that alternative sentencing mechanisms include various factors which reach beyond the guilt or innocence of an offender. He stated that none of these factors would be adversely affected by the Bill's application:

> The processes involved include restoration of harm, which goes beyond the guilt or innocence of the offender. They involve the impact that it has had on the victim and the impact in particular that it has had on the community … None of these amendments stop that from happening. This amendment will stop the offender obtaining mitigation based upon a customary law, belief or practice but it will not stop an explanation being given or an understanding given to victims or the community about what happened. It will stop the sentence being decreased, effectively.[88]

Committee view

3.90 The committee recognises that the measures contained in the Bill are intended to reflect agreements made by the Federal Government and state and territory

86 *Committee Hansard*, 29 September 2006, p. 27.

87 *Committee Hansard*, 29 September 2006, p. 43.

88 *Committee Hansard*, 29 September 2006, p. 34.

governments at the Intergovernmental Summit and at COAG in June and July 2006.[89] While the committee is aware that the Bill comprises only one element of the Federal Government's commitment to targeting the problems of violence and child abuse in Indigenous communities, the committee considers that the Bill's focus is misdirected. The committee is of the view that the Bill will do little, if anything, to achieve its stated aim. In this context, the committee notes the absence of any Federal laws relating to violence or sexual abuse in Indigenous communities that will be affected or changed as a result of the Bill.

3.91 The committee agrees with evidence presented during the course of the inquiry that practical initiatives are imperative to address family violence in Indigenous communities in a meaningful way. The committee also notes the importance of protecting victims, witnesses and other members of the community, particularly those in remote communities, from threat and intimidation. Strategies to address the issues that contribute to offending behaviour in the first place are urgently required. The committee commends initiatives such as the National Indigenous Violence and Child Abuse Intelligence Task Force but notes that all witnesses and submissions to the inquiry seek 'on the ground' practical solutions to addressing violence. It is not clear how this Bill will assist in that aim.

3.92 The committee has concerns in relation to the haste with which the proposals in the Bill have been drafted and introduced into Parliament, without adequate, if any, consultation with Indigenous and multicultural groups. While the committee recognises the Federal Government's role in providing leadership in relation to addressing urgent problems in Indigenous communities, the issues raised by the Bill are complex and require careful consideration. The committee suggests that the Department give consideration to developing consultation mechanisms prior to introducing future amendments into Parliament.

3.93 The committee also notes advice from the ALRC that, in relation to its *Same Crime, Same Time* report into Federal sentencing, the Federal Government made a series of submissions. However, the Federal Government did not suggest in any of those submissions that custom or cultural background be removed from the Crimes Act as a sentencing factor. Indeed, the ALRC advised that a February 2006 submission from the Attorney-General's Department 'makes positive reference to initiatives that can be developed to assist the courts to take into consideration the cultural background of Aboriginal and Torres Strait Islanders in the sentencing phase'.[90]

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89 However, in this context, the committee notes correspondence it received from the Queensland Department of the Premier and Cabinet on 5 October 2006, informing the committee that the Queensland Government has concerns regarding the content of the Bill and that the Premier will be writing to the Prime Minister accordingly.

90 *Submission 1A*, p. 1.

3.94 The committee notes that the Federal Government is still considering the ALRC's report and is yet to make a response. The committee is of the view that, given that the report relates to an area directly relevant to the Bill, the response to this report would have provided the Federal Government with a timely opportunity to address the issues.

3.95 The committee accepts that there was general support among submissions and witnesses for the provisions of the Bill relating to bail applications and is not inclined to comment further, subject to the discussion in paragraph 3.98 below about proposed paragraph 15AB(1)(b).

3.96 In relation to sentencing, the Bill has a limited (but not insignificant) scope in its application to Federal offences. Further, in some respects the Bill is superfluous because it does little to change the reality of the current situation – particularly in relation to notions of customary law as a 'defence', and to the consideration by courts of the circumstances of offenders outside their criminal behaviour. However, the committee considers that the most concerning feature of the Bill is the symbolic message that it sends to the judiciary (and the community at large), and the judicial uncertainty it may create.

3.97 The Bill is also likely to have significant consequences if a similar approach is adopted in the states and territories.[91] As evidence to the inquiry strongly indicated, the Bill will inevitably impact most on Indigenous Australians and those with a multicultural background. The committee notes the Department's assertion that the Bill is not discriminatory – that the Bill may be drafted in a way that accords with principles of formal equality but, clearly, in practice it is likely to apply only to certain categories of offenders. It does not therefore provide substantive equality to Indigenous offenders or offenders with a multicultural background.

3.98 The committee repeats its concern expressed earlier in this chapter that the inclusion of the words 'rendering less serious' in proposed paragraph 15AB(1)(b) and proposed subsection 16A(2A) effectively means that a court could not take into account customary law or cultural practice to render criminal behaviour less serious but could consider these factors if it rendered criminal behaviour more serious. The committee considers this to be undesirable and recommends that these provisions be amended to prevent this outcome. The committee also recommends that these provisions be amended to clarify the scope of their operation.

3.99 The committee is also concerned about the Bill's removal of the phrase 'cultural background' from paragraph 16A(2)(m) of the Crimes Act. The committee does not accept the Department's explanation that this will ensure the law applies

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91 In a response to a question on notice, the Department advised that bilateral negotiations on the COAG Indigenous outcomes have been held with South Australia (9 August 2006), Western Australia (16 August 2006), New South Wales (8 September 2006), and the Northern Territory (4 October 2006), with all jurisdictions being encouraged to follow the Federal Government's lead on the issue: *Submission 11A*, answer to Question No. 2.

equally to all persons. Evidence received in the course of the committee's inquiry strongly suggests that, in practice, this will not be the case. The proposal is at odds with well-established common law principles relating to the relevance of cultural background and customary law to sentencing decisions. The committee notes further that the Federal Parliament gave bipartisan support to the insertion into the Crimes Act of the 'cultural background' requirement in 1994. The committee is concerned about the complete absence of consultation in the present case in relation to removing the phrase, despite its specific introduction in 1994. In addition, the committee notes that, while the Bill's stated aim is to address violence and child abuse in Indigenous communities, its implications are much wider.

3.100 The committee considers that the term 'cultural background', inserted into the Crimes Act in 1994 and based on a recommendation by the ALRC in its 1992 report, *Multiculturalism and the Law*, is a relevant matter to be considered by the courts in the sentencing of Federal offenders where appropriate. In the form it currently takes in the Crimes Act, 'cultural background' is not relevant to guilt or innocence but in determining an appropriate sentence.

3.101 In forming this view, the committee notes the ALRC's position in its 1992 report that consideration of 'cultural background' is 'useful' and 'ensure(s) that the offender's cultural background is not overlooked where it is relevant'.[92] The committee endorses the reasons behind the ALRC's recommendation that 'cultural background' be specifically inserted into the Crimes Act, namely that:

- obeying the law may involve violating cultural norms and, conversely, practising cultural customs and beliefs may constitute a breach of the criminal law;
- justifiable lack of knowledge should be taken into account in certain circumstances;
- the subjective or mental element of the test for criminal liability should take account of different cultural values in certain circumstances; and
- the objective standard for determining criminal liability may be inappropriate since, in practice, objective standards often reflect the values of the dominant group in society and may disadvantage individuals from different cultural backgrounds who may have different values.[93]

3.102 The committee notes that the reasons underlying the ALRC's recommendation relate to offenders from a multicultural background as well as to Indigenous offenders. The committee is concerned that the Bill, as it impacts upon offenders from a multicultural background, has not been fully considered.

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92 *Multiculturalism and the Law,* ALRC 57, 1992, p. 173.

93 *Multiculturalism and the Law,* ALRC 57, 1992, pp 169-170.

3.103 The committee is also mindful of evidence arguing strongly that the Bill conflicts with every major inquiry into the role of cultural background and customary law in the Australian legal system, including several ALRC reports and recommendations of the Royal Commission into Aboriginal Deaths in Custody.

Recommendation 1

3.104 The committee recommends that the Bill be amended to replace the words 'excusing, justifying, authorising, requiring or rendering less serious' in proposed paragraph 15AB(1)(b) and proposed subsection 16A(2A) with the words 'mitigating or enhancing the seriousness of' to clarify the scope of their operation.

Recommendation 2

3.105 The committee recommends that the Bill be amended to remove Item 4 so as to retain the phrase 'cultural background' in the list of factors that a court must take into account in sentencing an offender, if relevant and known to the court, in paragraph 16A(2)(m) of the *Crimes Act 1914*.

Recommendation 3

3.106 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Chair