

Submission to Senate Legal and Constitutional Affairs Committee:

INQUIRY INTO THE CRIME AMENDMENT (BAIL AND SENTENCING) BILL 2006

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SUMMARY

This submission *recommends* that the Committee recommend that, to enable appropriate consultation and scrutiny, the Senate should refer the Crime Amendment (Bail and Sentencing) Bill back to the Committee with a report-to-referral timeframe of at least six months.

The substance of this submission is confined to sentencing.

This submission argues that the Bill will not address the problem of violence in Indigenous communities, but will create additional problems by increasing the potential for injustice in sentencing decisions. This submission *recommends* that the Committee recommend against adoption of Items 4 and 5 of the Bill.

This submission further *recommends* that the Committee report stress in its report the urgent need for action to address the underlying causes of violence in Indigenous communities – especially poverty, social exclusion and inadequate support for families in crisis.

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I Introduction

A About Catholic Social Services Australia

1. Representing 61 member organisations, Catholic Social Services Australia is the Catholic Church's peak national body for social services. It advises the Australian Catholic Bishops Conference on social policy issues as well as supporting the delivery of a wide range of social service programs.

2. For 50 years, Catholic Social Services Australia has assisted and promoted better social policy for the most disadvantaged people in Australian society. This continues a much longer tradition of such engagement by the Catholic Church in Australia.

3. Catholic Social Services Australia has the mission of promoting a fairer, more inclusive society that gives preference to helping people most in need. It is committed to an Australian society that reflects and supports the dignity, equality and participation of all people. To this end,

Catholic Social Services Australia works with Catholic organisations, governments, other churches and all people of goodwill to develop social welfare policies and other strategic responses that work towards the economic, social and spiritual well-being of the Australian community.

4. Our 61 members employ over 6,500 people and provide 500 different services to over a million people each year from sites in metropolitan, regional and rural Australia. Services provided by our members encompass aged care, community care, disability services, drug and alcohol addiction, employment and vocational programs (including Job Network, Disability Open Employment and Personal Support Program), family relationship services, housing, mental health, residential care and youth programs.

B Purpose and scope of this submission

5. The purpose of this submission is to comment on some issues of principle arising from the Crime Amendment (Bail and Sentencing) Bill 2006 ("the Bill"). This submission is confined in substance to those aspects of the Bill which concern sentencing.

C Relevance of this Bill to our mission

6. If adopted, the Bill would change the extent to which cultural factors can or must be considered in sentencing. The Bill raises fundamental issues of justice, fairness, equality and human dignity – issues which are at the heart of Catholic Social Service Australia's mission. Attachment A sets out extracts from relevant statements from Catholic Social Teaching.

7. Criminal justice is inextricably linked to social justice: Indigenous people and people from disadvantaged backgrounds are disproportionately represented in the prison population.¹ The Royal Commission into Aboriginal Deaths in Custody in 1991 stressed the importance of reducing the over-representation of Aboriginal persons in custody. However, the proportion of Indigenous people in the total prison population rose from 14% in 1991 to 22% in 2005.² Evidence suggests that experience of arrest and imprisonment reduces employment prospects.³ So the over-representation of Indigenous people in the criminal justice system is among the factors perpetuating Indigenous disadvantage. These issues are just the tip of the iceberg of those which should be taken fully into account in considering whether and how to change rules governing sentencing of those convicted of Federal offences.

8. Catholic Social Services Australia acknowledges the need for urgent action to address and reduce the incidence of violent crime in Indigenous communities. However, the Bill is not an effective means towards this end.⁴ Moreover, if made law the Bill would have very sweeping

¹ See e.g. Joanne Baker, "The scope for reducing indigenous imprisonment rates", *Crime and Justice Bulletin* No. 55, March 2001 at pp. 1 and 8-9; and Tony Vinson, *Community adversity and resilience: The distribution of social disadvantage in Victoria and New South Wales and the mediating role of social cohesion*, Jesuit Social Services, March 2004 at pp.48-49 (on spatial compression of disadvantage; finding for example that people in 14 Victorian postcodes, whose combined total population was under 10% of the Victorian population, were over-represented in imprisonment rates by a factor of 2.5 times).

² See Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia*, http://www.hreoc.gov.au/social_justice/statistics/index.html#toc9 under sub-heading 9(a).

³ See B. Hunter & J. Borland, "The effect of arrest on Indigenous employment prospects", *Crime and Justice Bulletin* No. 45, June 1999 at pp. 1, 4 and 6. See also Don Weatherburn, "What Causes Crime?", *Crime and Justice Bulletin* No. 54, February 2001 at pp.5-6.

⁴ See also paragraphs 46-47 below.

consequences, not necessarily all intended, across the entire Australian population and in relation to many, and in some cases all, Federal offences.

9. Although most crimes fall under State/Territory jurisdiction, the Commonwealth Government has an important agenda-setting role in the aftermath of the July 2006 decision by the Council of Australian Governments (COAG) which was recorded as follows:

The law's response to family and community violence and sexual abuse must reflect the seriousness of such crimes. COAG agreed that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment.⁵

10. In view of this COAG agreement, State and Territory Governments may see Commonwealth legislative action as a potential model for their own approaches. 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.

II Need for more extensive consideration, consultation and debate

A Catholic Social Services Australia's concerns

11. The Inquiry timeframe – with report due one month from date of referral – has precluded adequate public consultation. The short Inquiry timeframe means this submission is more narrowly focused, and subject to less extensive consultation, than we would have preferred. We understand that it has also made it impossible for some other interested bodies to lodge a submission at all.

12. In relation to Indigenous Australians, the Bill is in many respects at odds with the conclusions of several significant and relevant reports:

- (i) The 1991 report of the Royal Commission into Aboriginal Deaths in Custody⁶ included the following recommendations:

104. That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases.

62. That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for

⁵ Council of Australian Governments (COAG) Meeting Communiqué, 14 July 2006, p.12.

⁶ Australia, *Royal Commission into Aboriginal Deaths in Custody, National Report* (Five Volumes) (AGPS, Canberra, 1991-92).

governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.

- (ii) The 1986 report of the Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*,⁷ recommended a range of statutory measures for the recognition of Aboriginal customary laws. Clause 24 of the draft legislation proposed by the report related to sentencing, and provided for courts to take account of customary laws in sentencing. This ALRC report was described as a “significant, well-researched study” in Recommendation 219 of the report of the Royal Commission into Aboriginal Deaths in Custody.
- (iii) The 2000 NSW Law Reform Commission report, *Sentencing: Aboriginal Offenders*,⁸ recommended that:

Where a person, who is, or was at a relevant time, a member of an Aboriginal community, is convicted of an offence, in determining the sentence, the court shall have regard to any evidence concerning the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which the victim was a member at a relevant time.

- (iv) The December 2005 Discussion Paper by the Law Reform Commission of Western Australia, *Aboriginal Customary Laws*,⁹ made the following proposals:

31. That the Sentencing Act 1995 (WA) and the Young Offenders Act 1994 (WA) be amended to provide that when sentencing an Aboriginal offender a sentencing court must consider:
- any aspect of Aboriginal customary law that is relevant to the offence;
 - whether the offender has been or will be dealt with under Aboriginal customary law; and
 - the views of the Aboriginal community of the offender and the victim in relation to the offence or the appropriate sentence.
32. That the Sentencing Act 1995 (WA) and the Young Offenders Act 1994 (WA) should be amended by inserting the following provision:

That when sentencing an Aboriginal person the court must have regard to any submissions made by a representative of a community justice group or by an Elder or respected member of the Aboriginal community of the offender or the victim. Submissions for the purpose of this section may be made orally or in writing on the application of the accused, the prosecution or a community justice group. The court

⁷ Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws* (Report 31, 1986).

⁸ NSW Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000).

⁹ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper*, Project 94 (December 2005).

sentencing the offender must allow the other party a reasonable opportunity to respond to the submissions if requested.

13. It is not apparent that all the relevant issues comprehensively addressed in those reports and others have been adequately considered in the context of the Bill. The Bill appears to have been loosely based upon the three-sentence paragraph cited above in the 14 July 2006 COAG Communiqué (which refers specifically to “family and community violence and sexual abuse” – see paragraph 9 above).

14. In short, insufficient time has been allowed for the thorough scrutiny and public debate the Bill warrants.

B Recommendation 1

15. Catholic Social Services Australia recommends that the Senate Committee on Legal and Constitutional Affairs recommend in its report that:

- (a) The Bill not be adopted in its present form; and that
- (b) To enable appropriate consideration, consultation, scrutiny and debate, the Senate should again refer the Bill to the Committee on Legal and Constitutional Affairs – this time with a referral-to-report deadline of at least six months.

III Removal of “cultural background” as mandatory factor to be considered in sentencing if relevant and known

A What the Bill does

16. Currently, section 16A(2) of the Crimes Act provides that a court imposing a sentence for a federal offence “must take into account such of the following matters as are relevant and known to the court” – and the long list which follows can be paraphrased as:

- (a) Nature and circumstances of offence
- (b) Other offences
- (c) Whether offence forms part of a course of conduct
- (d) Personal circumstances of any victim
- (e) Injury, loss or damage resulting from offence
- (f) Degree of contrition shown
- (g) Fact of any guilty plea
- (h) Extent of co-operation with law enforcement agencies
- (j) Deterrent effect of sentence
- (k) Need to ensure adequate punishment
- (m) “the character, antecedents, cultural background, age, means and physical or mental condition of the person”**
- (n) Rehabilitation prospects
- (p) Probable effect of sentence on person’s family or dependants

17. The Bill would omit “cultural background” from s.16A(2)(m).

18. As described in the Bill’s *Explanatory Memorandum*:

Item 4 omits the term “cultural background” from paragraph 16A(2)(m). The effect of this amendment is that a court will no longer be expressly required to consider a person’s “cultural background” when passing sentence on that person for committing a federal offence.

Subject to the amendment to be made by item 5, a court will still be able to take into consideration the “cultural background” of an offender, in sentencing that offender, should it wish to do so, but this amendment removes an unnecessary emphasis on the “cultural background” of convicted offenders.

B Catholic Social Services Australia’s concerns

(1) Overview

19. Catholic Social Services Australia believes that 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.

(2) Balancing sentencing factors: Human dignity, equality before the law, and “cultural background”

20. As the law stands, “cultural background” must be considered in sentencing for federal offences only where it is “relevant and known to the court” (s.16A(2)). The reference to “cultural background” helpfully guides courts to consider this as one factor among many others in the balancing and weighing process that is an essential part of sentencing. Catholic Social Services Australia does not agree with the assessment evident in the Bill’s *Explanatory Memorandum* that the current law contains an “unnecessary emphasis” on “cultural background”.

21. We are concerned that the omission of “cultural background” may lead to injustice. There will be occasions where failure to take account of cultural background will mean that a person is not fairly sentenced. Removing the obligation to consider relevant “cultural background” issues does not ensure equality before the law. On the contrary, this removal devalues the significance of an essential component of ensuring equality before the law and thus ensuring justice.

22. International human rights treaties emphasise the need to eliminate indirect as well as direct discrimination. Relevant here are Articles 2.1(c) and 2.2 of the International Convention on the Elimination of all Forms of Racial Discrimination,¹⁰ to which Australia is party:

2.1(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws or regulations *which have the effect of* creating or perpetuating racial discrimination wherever it exists” (emphasis added)

2.2 States Parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, *special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms...* (emphasis added)

¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination (1966), 660 UNTS 195, [1975] ATS 40; entered into force generally on 4 January 1969 and for Australia on 30 October 1975.

23. As stated by the Pontifical Commission on Justice and Peace in a 1988 statement, *The Church and Racism* (at #23):

Equality does not mean uniformity. It is important to recognise the diversity and complementarity of one another's cultural riches and moral qualities. Equality of treatment therefore implies a certain recognition of differences which minorities themselves demand in order to develop according to their own specific characteristics, in respect for others and for the common good of society and the world community.

24. The Bill's *Explanatory Memorandum* states that it will still be possible for courts to consider "cultural background" where this is considered relevant, subject to the restriction which is discussed below in paragraphs 29 to 45 (and see also paragraph 26 below). Under current law, if "cultural background" is not considered "relevant" by the court it will not be considered. So nothing is gained by omitting "cultural background" – but something is lost: there may be cases where a relevant issue related to cultural background is not considered because courts consider only those factors which are explicitly listed under s.16A(2). Some judges and magistrates may be less likely even to think of cultural background in the absence of an explicit statutory prompt; and others may decide to accord cultural background a lesser, even negligible, status because of Parliament's decision to remove it from the statutory list of factors.

(3) *Impracticality arising from retention of mandatory consideration of certain related factors*

25. Catholic Social Services Australia does not believe that "the character, antecedents ... [and] means...of the person" can in all circumstances be appropriately assessed without reference to "cultural background". However, the explicit removal of "cultural background" from s.16A(2)(m) assumes the contrary.

(4) *Impracticality and injustice arising from prohibition of consideration of other related factors*

26. This aspect of the Bill (Item 4) is interlinked with another aspect of the Bill (Item 5) which explicitly prohibits sentencing courts from considering "any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or rendering less serious the criminal behaviour to which the offence relates" (see paragraphs 29-45 below). It is not clear how this prohibition would be applied by courts. However, there is a risk that judicial efforts to abide by this explicit prohibition would result in the deliberate disregard of cultural factors which courts would otherwise have regarded as an indispensable element of the sentencing equation.

(5) *Application to all Federal offences*

27. The July 2006 COAG Communiqué referred only to "family and community violence and sexual abuse". However, the Bill appears to remove "cultural background" from mandatory consideration in sentencing for *any* federal offence – i.e. for a far wider range of offences than those with which COAG was concerned.

C Recommendation 2

28. Catholic Social Services Australia recommends that the Senate Committee on Legal and Constitutional Affairs recommend against the adoption of Item 4 of the Bill.

IV Prohibition of consideration in sentencing of customary law or cultural practices

A What the Bill does

29. The Bill's *Explanatory Memorandum* describes Item 5 of the Bill as follows:

This item enacts the Council of Australian Governments decision, made on 14 July 2006, that no "customary law or cultural practice" can provide a "reason for excusing, justifying, authorising, requiring or rendering less serious the criminal behaviour to which the offence relates." This item expressly prohibits a court from accepting a "customary law or cultural practice" as an excuse or justification when sentencing a person for having committed a federal offence.

30. Item 5 of the Bill would add, after the list of issues which a sentencing court *must* consider, a new provision listing what the court must *not* consider. That provision is as follows:

However, the court must not take into account...any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or rendering less serious the criminal behaviour to which the offence relates.

31. This might be interpreted in either of two ways:

Variant (a): Prohibiting *any* consideration by the sentencing court of cultural practices and/or customary law

Variant (b): Prohibiting *inappropriate* consideration by the sentencing court of cultural practices and/or customary law

32. Judging from the Second Reading Speech and the Bill's *Explanatory Memorandum*, Catholic Social Services Australia assesses that the most likely interpretation of Item 5 would be Variant (a). This submission proceeds on the assumption that, in practice, some courts at least would apply the prohibition in the sense described in Variant (a).

B Catholic Social Services Australia's concerns

(1) Overview

33. By prohibiting any consideration of cultural practices or customary law, the Bill, if made law, 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.

(2) Definitional issues

34. What is encompassed by the terms "customary law" and "cultural practice"? How do these terms differ from and/or overlap with "cultural background"? This last question is especially significant because the Bill's *Explanatory Memorandum* affirms that "cultural background" could still be considered by sentencing courts – but only to the extent such consideration would not breach the prohibition set out in Item 5 of the Bill.

(3) *Justice concerns*

35. Catholic Social Services Australia endorses the following comments of Mr John North, former President of the Law Council of Australia:

The Courts have always taken into account any matter relating to the circumstances of an offender, whether it be cultural, religious or socio-economic. Courts should not be prevented from taking account of relevant matters affecting their sentencing decisions...

Customary laws have been recognised by the courts for decades as potentially relevant to the sentencing process in a variety of different matters. However, domestic violence and abuse of children have never been recognised by the courts, or Aboriginal communities, as being justified by customary law.

Limiting the discretion of the courts to consider customary law will not lead to equality – it will result in further disadvantage for one of the world's most disadvantaged minority groups.¹¹

36. If inappropriate use were made of cultural practices or customary law in a particular case, the appeals system provides the appropriate channel for rectification.

(4) *Apparent lack of confidence in judgement of sentencing authorities*

37. The Bill departs from a reliance on judicial officers to weigh up a complex range of factors to determine appropriate sentences. Do the sponsors of this Bill believe that judicial consideration of, say, the sentence's impact on of a convicted offender's family has the effect of "excusing, justifying, authorising, requiring or rendering less serious" any criminal behaviour? Presumably not, as the sentence's impact on an offender's family is not addressed in the Bill and remains, if relevant and known, a mandatory consideration under s.16A(2)(p). If judges and magistrates can be trusted not to over-estimate the significance of the sentence's impact on the offender's family, why can't they be trusted to accord appropriate but not undue weight to cultural practices and customary law?

(5) *Impractical nature of prohibition, in view of mandatory consideration of related factors*

38. The omission of "cultural background" from s. 16A(2)(m) would still leave courts bound to take account, to the extent relevant and known, of "the character, antecedents ... [and] means...of the person". Catholic Social Services Australia does not believe that these factors can in all circumstances be appropriately assessed without reference to any "cultural practice" or "customary law". By forcing courts to purport to achieve this feat in every case, the Bill if made law would cause injustice by preventing consideration of the full range of factors necessary to ensure fair sentencing outcomes in particular cases.

(6) *Impact of prohibition on discretionary consideration of "cultural background"*

39. As noted above (paragraphs 26 and 24), the prohibition in Item 5 of the Bill is interwoven with Item 4's removal of "cultural background" from factors requiring mandatory consideration if relevant. As noted, is not clear how a court could close its eyes to cultural practices and customary law during the process of exercising its discretion to take account of "cultural background". Catholic Social Services Australia is concerned that judicial deference to the Item 5

¹¹ *Calls to Scrap Customary Law Misconceived*, Media Release by Law Council of Australia, 23 May 2006.

statutory prohibition would unduly discourage courts from paying appropriate heed to “cultural background”, especially as it would no longer be mandatory for courts to consider this where relevant and known. By forcing judges and magistrates consciously to disregard cultural practices and customary law, the Bill if made law would make it impossible to fairly and fully assess and take account of relevant “cultural background” issues should courts wish to exercise their discretion to do so.

(7) *Inadequate differentiation of customary law and customary practices*

40. Although these terms are not defined in the legislation, it seems sweeping to treat customary law and customary practices as a single category.

(8) *Possible effect on lived experience of cultural practices*

41. Catholic Social Services Australia is concerned that an unintended and undesirable consequence of the proposed legislation could be an intangible but negative “chilling” effect on the maintenance of cultural practices – because a degree of legal recognition has been withdrawn.

(9) *Apparent influence of misconceptions of Aboriginal customary law*

42. Item 5 of the Bill should be considered in the context of the following comments in a 2000 NSW Law Reform Commission report which recommended recognition of Aboriginal customary law in sentencing:¹²

3.112 Any proposal to recognise Aboriginal customary law in sentencing must carry with it a caution to distinguish legitimate and authentic customary law from false assumptions and misconceptions. Specifically, there is a danger that the judiciary, and others involved in the sentencing process, will accept the claim or myth that sexual and domestic violence against women is sanctioned by Aboriginal culture, or, at least, not regarded as seriously as it is in non-Aboriginal culture. This premise must be categorically repudiated.

3.113 In a number of cases, Aboriginal custom at least, if not customary law, has been relied on to legitimise domestic and sexual violence against Aboriginal women, or to minimise the seriousness of the offence or the suffering of the victims...

3.114 Fortunately, most judges have dismissed this distortion of Aboriginal culture:

Ill treatment of women and assaults upon women will not be tolerated by the law and I know of no Aboriginal custom which would refute that as a philosophy.¹⁶⁰

43. Catholic Social Services Australia is concerned that the motivations underlying the Bill, however well-intentioned, may be grounded in the very misconceptions of Aboriginal customary law against which the NSW Law Reform Commission warned. In particular, there appears to be an operating assumption that judges and magistrates may take account of Aboriginal customary law in such a way as to “excuse” or lessen the seriousness of offences involving violence against women. Even apart from grave doubts about whether this assumption accurately reflects

¹² NSW Law Reform Commission, *Sentencing: Aboriginal offenders*, Report 96 (2000). The internal footnote (160) is as follows: “160. *R v Long* (NT, Supreme Court, No 6 of 1989, Asche CJ, 8 February 1989, unreported) at 19. See also *R v Tilmouth* (NT, Supreme Court, No 45 of 1989, Kearney J, 18 July 1990, unreported).”

Aboriginal customary law, as noted above the appeals process is the most effective means of redressing any individual inappropriate sentencing decision.

(10) *Application to very wide range of Federal offences*

44. The July 2006 COAG Communiqué referred only to “family and community violence and sexual abuse”. However, the Bill’s Item 5 prohibition would apparently apply to any federal offence involving “criminal behaviour”. “Criminal behaviour” is not exhaustively defined in the Bill, but is stated to include conduct which is (and any fault element relating to) “a physical element of the offence in question”. So Item 5 of the Bill relates to a much wider range of offences than those mentioned in the COAG Communiqué. However, the *Explanatory Memorandum* states that Item 5 “enacts” the July 2006 COAG decision.

C Recommendation 3

45. Catholic Social Services Australia recommends that the Senate Committee on Legal and Constitutional Affairs recommend against the adoption of Item 5 of the Bill.

V Urgent need for action to address underlying causes of violence in Indigenous communities

46. Catholic Social Services Australia does not believe that changing sentencing rules is 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. We endorse the following remarks by Professor Larissa Behrendt (Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning at the University of Technology, Sydney):

...when a member of the judiciary is looking at a case where violence has been committed against Aboriginal women or children, they’re really looking at the symptoms of the problems of violence within Aboriginal communities. And the real way to start to make a difference to those levels of violence and those levels of sexual abuse is not so much through the judiciary, because they’re really at the end of the process – they’re undertaking damage control – it’s to get into the issues that actually compound to create the circumstances of cyclical poverty, of despondency, of despair, of substance abuse, and therefore violence and other antisocial behaviour, including sexual abuse in those communities.¹³

Recommendation 4

47. Catholic Social Services Australia recommends that the Senate Legal and Constitutional Affairs Committee stress in its report the urgent need for action to address the underlying causes of violence in Indigenous communities – especially poverty, social exclusion and inadequate support for families in crisis.

¹³ ABC Radio National transcript: *Law Report*, “Abuse in Aboriginal Communities”, 30 May 2006.

VI Conclusion and Recommendations 1-4

48. Catholic Social Services Australia appreciates the opportunity to contribute to the Committee's Inquiry into the Bill.

49. Catholic Social Services Australia recommends that the Senate Legal and Constitutional Affairs Committee:

1. Recommend that:
 - (a) The Bill not be adopted in its present form; and that
 - (b) To enable appropriate consideration, consultation, scrutiny and debate, the Senate should again refer the Bill to the Committee on Legal and Constitutional Affairs – this time with a referral-to-report deadline of at least six months.
2. Recommend against the adoption of Item 4 of the Bill.
3. Recommend against the adoption of Item 5 of the Bill.
4. Stress in its report the urgent need for action to address the underlying causes of violence in Indigenous communities – especially poverty, social exclusion and inadequate support for families in crisis.

Some extracts from Catholic Social Teaching relevant to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crime Amendment (Bail And Sentencing) Bill 2006

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Indigenous Australians

Pope John Paul II, *Address to Aborigines and Torres Strait Islanders*, Blatherskite Park, Alice Springs (November 2006):

For thousands of years this culture of yours was free to grow without interference by people from other places... You had a great respect for the need which people have for law, as a guide to living fairly with each other. So you created a legal system – very strict it is true – but closely adapted to the country in which you lived your lives. It made your society orderly. It was one of the reasons why you survived in this land. You marked the growth of your young men and women with ceremonies of discipline that taught them responsibility as they came to maturity.

Pope Paul VI in an address to Australian Indigenous people (1970):

We know that you have a life style proper to your own ethnic genius or culture – a culture which the Church respects and which she does not in any way ask you to renounce... Society itself is enriched by the presence of different cultural and ethnic elements. For us you and the values you represent are precious. We deeply respect your dignity and reiterate our deep affection for you.

Australian Catholic Bishops Conference, *The Heart of Our Country: Dignity and justice for our Indigenous sisters and brothers – Reflections on Pope John Paul II’s 1986 Address to Aborigines and Torres Strait Islanders*, Social Justice Sunday Statement, 24 September 2006:

The message to give the original Australians a special place in our efforts at building a truly multicultural society was reiterated by Pope John Paul II in 2001 in his message to the Church in Oceania after the Synod in Rome. He wrote:

it is the Church’s task to help indigenous cultures preserve their identity and maintain their traditions.

He made special mention in this context of the ‘Australian Aborigines whose culture struggles to survive’ ...

John Paul II called [in 1986] for the ‘just and proper settlement that still lies unachieved’ in relation to the removal of children. He called specifically for ‘just and mutually recognised agreements with regard to these human problems, even though their causes lie in the past’.

These 'human problems' continue to manifest themselves in social and economic disadvantage and community dysfunction that can be captured in statistics related to health, employment and incarceration. These statistics read like those from a Third World country. In 2001, the Indigenous population comprised 2.2 per cent of the total Australian population, yet they unemployment rate for Indigenous people was at least three times higher than the rate for non-Indigenous Australians. The statistics related to the health of Indigenous Australians are appalling: lower life expectancy, higher infant mortality, higher hospitalisation for preventable diseases, lower infant birth weights, alarming rates of death from diabetes and kidney disease. How can it be that in this land of plenty, the average life expectancy of Aboriginal and Torres Strait Islander people is 17 years less than for non-Indigenous Australians?

Behind the statistics are real human beings whose disadvantage in this area could be prevented with political will and relatively moderate resources applied in the right places...

In a nation that enjoys a vibrant economy, where governments boast of their careful financial management, the question remains: why have we not been able to eliminate these dire circumstances from the everyday experience of many Indigenous people"

As John Paul II commented 20 years ago:

What has been done cannot be undone. But what can now be done to remedy the deeds of yesterday must not be put off till tomorrow.

It would seem that the remedies are well within our economic reach. The message delivered in Alice Springs continues to challenge us to positive, decisive action today.

Discrimination and racism

Guadium et Seps, Pastoral Constitution on the Church in the Modern World, Second Vatican Council, 1965 (at #29):

But any kind of social or cultural discrimination in basic personal rights on the grounds of sex, race, colour, social conditions, language or religion, must be curbed and eradicated as incompatible with God's design.

Pontifical Commission on Justice and Peace, *The Church and Racism*, 1988:

Some mention must also be made of ethnocentricity. This is a very widespread attitude whereby a people has a natural tendency to defend its identity by denigrating that of others to the point that, at least symbolically, it refuses to recognise their full human quality. This behavior undoubtedly responds to an instinctive need to protect the values, beliefs and customs of one's own community which seem threatened by those of other communities. However, it is easy to see to what extremes such a feeling can lead if it is not purified and relativised through a reciprocal openness, thanks to objective information and mutual exchanges. The rejection of differences can lead to that form of cultural annihilation which sociologists have called "ethnocide" and which does not tolerate the presence of others except to the extent that they allow themselves to be assimilated into the dominant culture. (#12)

Equality does not mean uniformity. It is important to recognise the diversity and complementarity of one another's cultural riches and moral qualities. Equality of treatment therefore implies a certain recognition of differences which minorities themselves demand in order to develop according to their own specific characteristics, in respect for others and for the common good of society and the world community. (#23)

Doctrine and examples by themselves are not sufficient. The victims of racism, wherever they may be, must be defended. Acts of discrimination among persons and peoples for racist or other reasons – religious or ideological – and which lead to contempt and to the phenomena of exclusion, must be denounced and brought to light without hesitation and strongly rejected in order to promote equitable behavior, legislative dispositions and social structures. (#26)

Racism will disappear from legal texts only when it dies in people's hearts. However, there must also be direct action in the legislative field. Wherever discriminatory laws still exist, the citizens who are aware of the perversity of this ideology must assume their responsibilities so that, through democratic processes, legislation will be put in harmony with the moral law. Within a given State, the law must be equal for all citizens without distinction. A dominant group, whether numerically in the majority or minority, can never do as it likes with the basic rights of other groups. It is important for ethnic, linguistic or religious minorities who live within the borders of the same State, to enjoy recognition of the same inalienable rights as other citizens, including the right to live together according to their specific cultural and religious characteristics. Their choice to be integrated into the surrounding culture must be a free one. (#29)

“Option for the poor”

U.S. Catholic Bishops, *Economic Justice for All* (1986) (at #88):

The primary purpose of this special commitment to the poor is to enable them to become active participants in the life of society. It is to enable all persons to share in and contribute to the common good. The "option for the poor," therefore, is not an adversarial slogan that pits one group or class against another. Rather it states that the deprivation and powerlessness of the poor wounds the whole community. The extent of their suffering is a measure of how far we are from being a true community of persons. These wounds will be healed only by greater solidarity with the poor and among the poor themselves.

Human dignity

Guadium et Sepis, Pastoral Constitution on the Church in the Modern World, Second Vatican Council, 1965 (at #26):

there is a growing awareness of the sublime dignity of human persons, who stand above all things and whose rights and duties are universal and inviolable. They ought, therefore, to have ready access to all that is necessary for living a genuinely human life: for example, food, clothing, housing, the right freely to choose their state of life and set up a family, the right to education, work, to their good name, to respect, to proper knowledge, the right to act according to the dictates of conscience and to safeguard their privacy, and rightful freedom, including freedom of religion.