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SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Crimes Amendment (Bail and Sentencing) Bill 2006

FRIDAY, 29 SEPTEMBER 2006

SYDNEY

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SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Friday, 29 September 2006

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Brandis, Kirk, Ludwig, Scullion and Trood

Participating members: Senators Allison, Barnett, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fierravanti-Wells, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Ian Macdonald, Mason, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja and Watson

Senators in attendance: Senators Crossin, Kirk, Payne and Trood

Terms of reference for the inquiry:

Crimes Amendment (Bail and Sentencing) Bill 2006.

WITNESSES

Committee met at 9.30 am

CHAIR (Senator Payne)—Welcome to this hearing of the Senate Legal and Constitutional Affairs Committee inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006. The inquiry was referred to the committee by the Senate on 14 September 2006 for report by 16 October 2006. The bill amends the sentencing and bail provisions in the Crimes Act 1914. It does so in accordance with decisions made by the Council of Australian Governments, COAG, on 14 July 2006 following the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities on 26 June 2006. The committee has received 11 submissions for this inquiry. All of the submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

[9.32 am]

CALMA, Mr Tom, Aboriginal and Torres Strait Islander Social Justice Commissioner, and Acting Race Discrimination Commissioner, Human Rights and Equal Opportunity Commission

HUNYOR, Mr Jonathon, Deputy Director, Legal Services, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. The Human Rights and Equal Opportunity Commission has lodged a submission with the committee, which we have numbered five. Do you need to make any amendments or alterations to that submission?

Mr Calma—No.

CHAIR—I ask you to make a short opening statement, at the conclusion of which we will go to questions from members of the committee.

Mr Calma—Thank you for the opportunity to appear on behalf of the Human Rights and Equal Opportunity Commission to give evidence to this inquiry. This bill should not be passed. The bill and the process surrounding its introduction are fundamentally flawed. The bill is said to be a response to family violence and abuse in Indigenous communities. Let me make our views clear. Family violence and abuse, and particularly child abuse and the abuse of women, should not be tolerated in any community. I have been calling for concrete action to be taken to prevent family violence and the abuse of children and women for a long time, but this bill offers no solution and may only create problems. The bill does not address family violence or child abuse in Indigenous communities in any meaningful way.

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 criminal laws. More importantly, the bill distracts from the real solutions to the problem of family violence in Indigenous communities—solutions that address poverty, overcrowding, substance abuse, low levels of education and unemployment. It also 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.

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. To automatically exclude it as irrelevant in the context of sentencing completely undermines its legitimacy. The bill is not based on or supported by any evidence or research. It 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 Australian Law Reform Commission. The bill turns all of these works on their heads. The bill also 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.

There are also problems with how the bill is going to work in practice. The terms 'customary law' and 'cultural practice' are not defined. 'Cultural practice' is a very broad term and the bill confirms that any form of such practice is covered. This potentially covers all aspects of what might be considered to be Australian practices and values. By way of example, we often hear that mateship is an important part of Australian culture. Would helping a mate be considered a cultural practice in Australia and therefore irrelevant in the sentencing for a Commonwealth offence? If these sorts of Australian values are not supposed to fall within the scope of the bill then we have to ask, 'Why not?' Is it because only the values and practices of minority cultures are being targeted by the bill? If this is what is really happening here then the proposed law is a form of racial discrimination and the bill should be rejected.

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.

The commission and I have stressed on many occasions that the right to enjoy culture may 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.

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. A court is not obliged to give significant weight to cultural factors in reaching an appropriate sentence; they may be outweighed by other factors, such as the need for general deterrence. In the event that the judge makes an error of sentencing, the sentence can be appealed. We urge the committee to recommend that the bill not be passed.

CHAIR—Thank you very much, Mr Calma. Mr Hunyor, did you wish to add anything at this stage?

Mr Hunyor—No, thank you.

Senator CROSSIN—Thank you for taking the trouble to provide a submission to this committee, Mr Calma. Some of the other submissions that we have received would suggest

that this bill is in conflict with the recommendations of the Royal Commission into Aboriginal Deaths in Custody. Do you have a view about that?

Mr Calma—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 commissioner'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.

Senator CROSSIN—Having read all the submissions and looked at some of the examples that have been cited in submissions as cases where customary law or practices may have been taken into consideration—and if the sentence was not great enough it has been appealed and the sentence has been extended—they all seem to be state and territory matters. Can you tell me where there might be a breach of Commonwealth law that this would apply to?

Mr Calma—It is difficult to really determine that as a case unless it is in relation to, say, the Social Security Act or maybe to counterterrorism. That is when we could be talking about cultural practices other than Indigenous cultural practices or customary law. I think it is important to recognise that, whilst the second reading speech did emphasise Indigenous and this is an address to Indigenous affairs, by putting this amendment into place it affects all Australians, not just Indigenous Australians.

Mr Hunyor—I have been trying to think of some examples of exactly that, in answer to your question. For example, you can imagine a mother who receives an overpayment of Centrelink benefits not making a declaration and hanging on to that money because Christmas is approaching and she wants to buy presents for the kids. Christmas is presumably a cultural practice. The fact that that is the basis on which that Commonwealth offence is committed would not be a factor that the court could take into account. So that is the sort of case where it may come in. Other cases would be a failure to declare income. In the example that we gave in our submission of helping out a mate, it might be a situation where someone does not declare income because they are trying to help out a mate financially. That would not be something that could be taken into account, if that is a cultural practice. Other examples would be customs offences, drug importation or failure to vote—those sorts of Commonwealth offences.

Senator CROSSIN—That is an interesting point. That is the thing that also struck me about the submissions. The emphasis in the second reading speech goes to Indigenous people. I am concerned that, apart from yourself, Mr Calma, there are not significant Indigenous groups in this country that have put in submissions. I assume that goes to the short period of time that this bill has been around for exposure. We are not hearing from FECCA, from multicultural groups or from any of the ethnic groups in this country. Is that a concern to you in your position at HREOC?

Mr Calma—It is a concern. I can see this from both the Aboriginal and Torres Strait Islander social justice perspective as well as the race discrimination perspective—my other hat. Yes, I am gravely concerned about the time frame. It is a major issue. I think we received our letter on the 19th, or the invite to prepare a submission. The closing date was the 25th. I did not get to see the letter until the 25th because of other commitments. In fact, the irony is that on Saturday the 23rd I addressed the inaugural Indigenous lawyers and barristers conference here in Sydney and mentioned the short window, thinking that the window was up until the 16th, which was the time that you had to submit your report. There was significant interest by the people there who wanted to make a submission. I tried to rectify that on the 25th, but whether people had the opportunity in that short window to be able to get a submission in, or to seek leave to appear, I cannot say; I cannot speak for them.

But I am sure that anybody who has looked at the second reading speech will think that it is an Indigenous issue to be addressed. I think it is totally unacceptable for the general population not to have an opportunity or be able to see that this is going to affect all people. And it is not just other ethnic peoples; it also affects Anglo-Celtic Australians, or those from an Anglo-Celtic background, particularly if we look at it from that issue. This is a problem with not defining what customary law or cultural practice is. As it has long been defined, it can include anything; it depends on the way that the courts will interpret it.

Senator CROSSIN—I want to ask about something which was brought to my attention this morning—that is, the glaringly opposing views between the explanatory memorandum and the response to key issues in the bill from the Attorney-General's Department, which I have been given this morning. It goes to cultural background and cultural practice. Can you perhaps clearly define for us what you might see as the difference between those two things?

Mr Calma—I could not hazard a guess as to what it might be. If we look at Indigenous culture, customary law, for example, varies across Australia. There is not a homogenous, single or monocultural customary law practised in Australia, and so it depends on where you are at. If you are in the Northern Territory, for example, in eastern Arnhem Land they have a number of skin groups. They have different moieties. It is similar in Central Australia. The number of skin groups varies quite considerably and the way that they practice varies very considerably. If you go out of the territory into other states you find that it varies. It is the interpretation. The way in which that culture is being practised is very varied. That is a major concern because, being undefined, it allows anything to be thrown into that melting pot. So, as far as cultural background goes, I could not guess what might be the case.

Senator CROSSIN—I will just point out that the explanatory memorandum describes the principal features of the proposed amendments. There are three dot points, one of which proposes to delete the reference to cultural background in section 16A of the Crimes Act for all Commonwealth offences. The response I have received this morning from the Indigenous Justice and Legal Assistance Division of the Attorney-General's Department says that cultural background should be a major consideration. They say the Australian government believes the law should apply equally to all Australians regardless of their cultural background. However, it goes on to say that even after the proposed amendments are enacted, subsection 16A(1) will still require a court to consider all the circumstances of the offence, which might include an offender's cultural background. It seems to me you cannot have it both ways.

Mr Calma—Senator, there are a number of concerns. The first is that it means that the sentencing process is going to be less transparent and clear if cultural background is to be wrapped up in the other factors. As you have seen, the explanatory memorandum says that 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 that this amendment removes an unnecessary emphasis on the cultural background.

We would say that it simply makes it clear and transparent what the court is doing. The concern is that, if cultural background is wrapped up in other things, it means that cultural factors may be seen to simply form part of the status quo. And so the culture of the Australian mainstream is seen to be somehow noncultural.

Senator CROSSIN—Or better.

Mr Calma—Yes, that is right. That is where our concern is—that the operation of the act then becomes discriminatory because it suggests that only certain people have culture and that other things are just the status quo. We think that is fundamentally wrong as an approach.

Senator TROOD—Thank you for coming, gentlemen. It is obviously common ground that we are all against family violence wherever it might occur and in whichever community it might occur. In your submission—it does not have a page number but it is point 12, second dot point—you say:

> The Bill distracts from the real solutions to the problem of family violence in Indigenous communities: solutions that address poverty, overcrowding, substance abuse, low levels of education and unemployment.

I can see the point you are making there—that there are other means by which one has to address these questions of violence in the community. But what do you say to the proposition that, as well as these other matters—these social engineering dimensions, if you will—there has to be a legislative commitment against violence in the community and that this particular piece of legislation seeks to give a legislative force to that proposition?

Mr Calma—The concern is that, in sentencing, it has long been a tenet of law that cultural background could be considered as one of the mitigating circumstances that the court can look at. We contend that 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.

What I argue is that the social engineering, as you described it, needs to take place. 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.

Mr Hunyor—Could I add to that answer? The commission has been consistent in the position it has taken—that considerations of customary law and cultural practice should not be taken into account where they are inconsistent with the human rights of individuals, of women and children, and internationally recognised human rights. And that was the position that we took in the submissions we made to the Northern Territory Supreme Court in the matter of the Queen v GJ, where our submission said that any consideration given to Aboriginal customary law in the sentencing process, in a case such as the present, should be carried out in a way consistent with human rights principles. And we said, particularly, cultural and collective rights must be balanced against the rights of individuals, including those of Indigenous women and children, and cannot prevail over the individual human rights to be free of violence and discrimination. If that is what this bill is trying to achieve, then it should say so. That is not what it says. If the intention is to ensure that the individual rights of women and children are paramount, then it could simply say so, and it does not. Interestingly, our application to seek leave to intervene in that case was rejected, largely on the basis that the court said, 'Thank you, but we do that already.' So that was already a part of the way that the court went about taking into account cultural practice. In that case they in fact increased the sentence.

Senator TROOD—I suppose the Commonwealth has to respond to the COAG agreement in relation to this particular matter. It is a state, territory and Commonwealth agreement. So, where that is relevant, the Commonwealth has to reflect that agreement in its statutes. I am not making a defence of it; that is just a passing observation. In the context of that, has there been any movement of which you are aware in relation to the state or territory legislation in relation to things like assault, murder and rape?

Mr Calma—I am not sure if there have been any amendments since the summit, but I draw your attention to the Northern Territory, where there is a process in place to address considerations of customary law and cultural practices in sentencing. Jonathon Hunyor can tell you the exact name of the legislation, but in essence that process says that if any party wants to introduce customary law or cultural practice as a mitigating consideration then they have to do that by way of oath, affidavit or statutory declaration so that all parties can consider it before it is considered by the court. That is, I think, an excellent safeguard to enable these considerations. We also have expressed concerns about the loose use of the term 'customary law' by some lawyers and I think it does need to be tested in the courts. I think we are coming from the same angle in trying to address these issues; it is just that the mechanism through which we do it is the concern for me.

Senator TROOD—You make a point about the lack of definition in relation to customary matters but, insofar as the matter is already in the Crimes Act, there is no definition already, is there?

Mr Hunyor—Of cultural background?

Senator TROOD—Yes.

Mr Hunyor—No, there is not.

Senator TROOD—That does not seem to me to advance your cause. It is not there at the moment. Putting it in again is not going to change the status quo in any way, is it? I presume you would prefer that there be some kind of definition there anyway, but there is not, is there?

Mr Calma—We are not arguing that there needs to be a definition. We are saying that if it is just left as it is then that allows the court to determine the definition, but ruling that it cannot specifically be considered does not allow any latitude to the courts to consider it.

Mr Hunyor—I guess 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.

Senator TROOD—You want us to reject the amendments. Can you help us by suggesting how an amendment might be introduced which would reflect the COAG agreement and which would be acceptable, in your mind?

Mr Calma—I think there are ways in which we could put in some straightforward language. The language could be that violence and abuse are breaches of human rights for women and children and not something that can be tolerated or condoned by any of the criminal codes of our country. This should be done simply by the provision of words along the following lines: 'Cultural background and/or customary law shall only be taken into consideration in sentencing matters consistent with universal human rights and fundamental freedoms. In particular, cultural background and/or customary law shall not be recognised as a matter that condones family violence or abuse, particularly against women and children.'

I think wordsmiths need to address those issues we have raised in the submission about the vagueness and broadness of the term 'cultural background', and also issues of what universal human rights and fundamental freedoms are. Nonetheless there could be a proactive approach— instead of dismissing it all or not allowing it to be considered, actually define it so that it can be considered. It has to be considered consistently with international human rights.

Senator KIRK—Thank you very much for your submission, gentlemen. Going to that issue that you were just discussing there, I read in your submission that to your knowledge there has been no consultation with Indigenous people in relation to this bill. Was there any consultation between yourselves and the Attorney-General's Department in the drafting of this legislation? Did they approach you and ask for your advice?

Mr Calma—I had one discussion with the Attorney-General and Minister Brough when it was first proposed. I would have to check on the date of that. My concern at that stage was really that I saw it as potentially being discriminatory if it was only for Indigenous people and that it could in fact—it had to be tested but it could—breach the Racial Discrimination Act.

Consequently, it is now rolled out to be for all cultural backgrounds and all customary law. I guess the point is that it has gone one step further now and talks about full abolition out of the current bill.

Senator KIRK—Is it normal practice for the Attorney-General's Department to run a draft past the commission to see what they think and whether there is going to be some impact on areas that are within your portfolio, so to speak?

Mr Calma—Not generally, I would have thought. We would see it when it becomes public and we would have the opportunity to comment on it. As I say, I did not see draft legislation, but we had a meeting where I expressed my concerns and suggested ways in which I thought we needed to extend more effort to addressing some of the primary reasons for why people are offending and start to put into place programs rather than to look at other legislative means to be able to address the issue.

Senator KIRK—Have you seen any movement in that direction—that is, the complementary putting of programs into place? Have you seen anything progress along those lines?

Mr Calma—No, I have not—and that was my concern which I have raised since the summit particularly. 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?

Senator KIRK—To your knowledge, were the National Indigenous Council consulted in relation to this bill?

Mr Calma—I could not say. You would have to check with them.

Senator KIRK—I would like to go back to the term 'cultural background' which we have been talking about. I understand that that has been omitted from the paragraph. I think this might have been what Senator Crossin was referring to. The explanatory memorandum seems to suggest that, even though the amendment seeks to remove reference to cultural background, all this is seeking to do is to remove unnecessary emphasis on cultural background and that there still can be reference to it. Is that how you read the legislation or do you think the explanatory memorandum is perhaps not representing that?

Mr Hunyor—It may be that that is in fact how it will operate. As I said, our concern is that it lumps the cultural background of everyone but minorities, the cultural background of the majority, into other things—the status quo and the assumptions that we make. The writer Patricia Williams refers to the majoritarian privilege of not noticing oneself, and that is the sort of concern that we have here: that these things become assumptions rather than things which we are clear about and which are transparent in the sentencing process.

Senator KIRK—Mr Calma made mention of the fact that when he was talking to the Attorney-General's Department he had concerns that this might be in breach of the Racial Discrimination Act. Do you still have concerns in that regard, or do you think this has been overcome by extending the operation across all cultures?

Mr Calma—It is yet to be determined, but it is hard to tell how the bill will work in practice because the drafting is vague, which I have already suggested. It is possible that it will have its greatest impact upon people who have a cultural practice that is different from the mainstream. The danger is 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, as Jonathon has indicated. If this is how the law works in practice, it will be inconsistent with the RDA. However, we cannot rely on the RDA to provide a remedy should that prove to be the case because this proposed legislation would be a later enactment than the RDA, and the High Court has indicated that a later enactment that is inconsistent with an earlier enactment of the same parliament will override or impliedly repeal the earlier enactment to the extent of the inconsistency. Hence, while the amendments would remain discriminatory in effect, they would be valid. The RDA would not be able to be utilised to obtain redress for the discrimination which is sanctioned by other, more relevant enactments of federal legislation and so then becomes invalid.

I would note, however, that if the states or territories followed suit and introduced similar legislation, it would be possible for the High Court to consider whether the impact of the law was discriminatory and whether it was in breach of the RDA, most notably section 10 of the RDA, which relates to the relationships between the states and the feds. This would be because the court would then be considering an inconsistency between the state and territory laws and the federal law, mainly the RDA. Constitutional issues would then be relevant, which could provide a remedy for this situation. It is a matter of concern that, if we are talking about equality in relation to the bill, it seems in this case to specifically target Indigenous people and therefore is not seen as equality before the law.

Senator KIRK—What you have said about the RDA and the fact that this law will take precedence is obviously right but, of course, the RDA is based on international law, isn't it—on Australia's international obligation?

Mr Calma—Yes.

Senator KIRK—That would suggest that Australia may well be in breach of its international obligations if—

Mr Calma—I am sure that the CERT committee would pick up on this as an inconsistency that needs to be addressed, but if the legislation goes through the ability to address it is not there.

Senator KIRK—That is true, yes—in real terms, in domestic law.

CHAIR—In the parliamentary secretary's second reading speech there was a reference to the creation of a National Indigenous Violence and Child Abuse Intelligence Task Force. Are you aware of any progress in the creation of that task force?

Mr Calma—No; that is the one I was referring to. I have not heard anything. I have expressed an interest to be party to it if the government so chooses, but I have yet to receive any feedback on that.

CHAIR—Other than this bill, to your knowledge, what follow-up or consequent action has come out of the June COAG consultations?

Mr Calma—To my knowledge, none.

CHAIR—The bill explicitly refers to the potential impact of granting bail. Clause 15AB(1)(a)(ii) says:

> (ii) any witness, or potential witness, in proceedings relating to the alleged offence, or offence ...

What experience or information does HREOC have about that being a significant issue in Australia?

Mr Hunyor—I will have to take that on notice; it is not something I have particularly considered in the context of this inquiry.

CHAIR—Certainly, you can take it on notice but, as Mr Calma mentioned, in terms of time frame the committee is operating under its usual constraints—in fact, slightly enhanced, I suspect. I would be interested in any information you can provide to the committee on that, because it is advanced as a significant reason for the introduction of the bill, which the committee acknowledges: we understand the concerns that the government raises in that regard, particularly if you look at the explanatory memorandum's wording of item 3.

Senator Crossin, I think, asked about the recommendations of the Royal Commission into Aboriginal Deaths in Custody, which were extensive, far reaching and have been implemented in a number of ways by different jurisdictions since the late eighties and early nineties, when the commission took place. There are very specific recommendations in relation to bail and—as you know, Mr Calma—imprisonment and similar issues. I would be interested in HREOC's specific analysis and response—and therefore I understand completely if you want to take that on notice—as to how the provisions of this bill interact with those very specific recommendations, particularly on bail and sentencing, of the royal commission.

It seems to me that one of the things that the Royal Commission into Aboriginal Deaths in Custody did was require sentencing authorities and governments generally to think a little more laterally and perhaps be a little more imaginative about how the law was applied and the tenor of provisions enacted in relation to these issues to deal with the question of Indigenous deaths in custody, and they did that quite well, broadly speaking. There are obviously ongoing issues—and you, Mr Calma, have been commenting on some of those yourself this week, in another context. But it seems to me that if there is a very significant problem with alleged offenders being bailed into communities where there is a capacity to intimidate witnesses then—thinking slightly outside the square or laterally—you could make provision within bail arrangements for a person to be relocated out of a community temporarily rather than being in a community where they might have an impact on a potential witness or something like that. So, rather than ending up with a provision which inevitably leads to incarceration for a period of time instead of the granting of bail, you could make alternative provisions. I will leave that on the table for your consideration in responding to that question.

Mr Hunyor—Thank you. We will take a look at that and get an answer to you, but can I indicate that bail courts always consider those sorts of matters when they are granting bail. 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 account by bail courts. I think it is probably part (b) of section 15AB(1), the section to which you referred, which says that they must not take into account 'any form of customary law or cultural practice' that is really what is being added by this. 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 you raised about people not being returned to remote communities where there may be concerns about violence towards witnesses or other members of the community—a point that has been very well made.

CHAIR—That is my understanding as well, Mr Hunyor, that that is the normal course of events. But clearly the Commonwealth, and COAG itself, has decided that this is a significant issue which needs addressing, and this is one route to do that. Whether it is the best or most appropriate route is another question. That is why I am interested in pursuing it.

Mr Calma—It might be a question that you might want to put to the A-G's representative because—

CHAIR—I well may, Mr Calma.

Mr Calma—there are a number of proposals around, which have been put by Indigenous people, to look at halfway homes or places outside of communities where you can refer people who are on bail and who at the same time can go through a treatment program to assist them. I think they are very good initiatives, particularly in relation to circle sentencing, which is one of our big concerns. The Koori courts, the Murri courts and the Nunga courts that exist around the country are showing that they are starting to address a number of issues in relation to reoffending. They are the sorts of customary practices that need to be considered more, and I think a greater effort needs to go into those programs in order to support them.

One of the big concerns we have in Indigenous affairs is that a lot of the initiatives are done on an annual basis, so there are breaks in continuity in trying to form a redress. Whilst the bureaucrats or the government might have reasons to change that, at the community level it is difficult to cope with all the changes and to know where the redress will be.

CHAIR—When you say that do you mean that there might be a pilot program that is funded for a year, for example, and then there is a break while people decide whether it is a good idea to continue, or that there may simply be annual funding and then someone brings up a new program and so on?

Mr Calma—Yes.

CHAIR—So the long-term view is lacking.

Mr Calma—Yes, always. The amount of administration required to apply for and retain funding on an annual basis leads to people being diverted from delivering programs because they are trying to justify their existence too often. I am not suggesting that that is not

important but there has to be a balance in the process, and that balance has to take into consideration the full engagement of Indigenous people.

CHAIR—Yes. There are good reasons why triennial funding has been introduced in other areas.

Mr Calma—Yes.

CHAIR—I understand the point that you make. That brings us to the end of the period of time we have available to speak to you, Mr Calma and Mr Hunyor. Thank you both very much for attending this morning and also for your submission. I do understand that the committee is required by the Senate to work under a difficult time frame so we appreciate your assistance with both making a very helpful submission and attending today.

Mr Calma—Thank you.

Mr Hunyor—In response to Senator Trood's question about a wording that might be appropriate, which Commissioner Calma provided, I will put that in writing and provide it in connection with the answers to Senator Payne's questions.

[10.18 am]

PARMETER, Mr Nicholas, Policy Lawyer, Law Council of Australia

WEBB, Ms Raelene, QC, Member, Advisory Committee on Indigenous Legal Issues, Law Council of Australia

CHAIR—Welcome. Thank you for your submission. The Law Council of Australia has lodged a submission with the committee which we have numbered 3. Do you need to make any amendments or alterations to your submission?

Ms Webb—No, there are none to be made.

CHAIR—I ask you to now make a brief opening statement and then we will go to questions from members of the committee.

Ms Webb—Before I do so, may I indicate that we have divided ourselves up. I am going to make a brief opening statement and then hand over to Mr Parmeter, who has done extensive research in this area, to assist you with your questions.

CHAIR—Thank you, Ms Webb.

Ms Webb—'One of the greatest strengths of our nation is our cultural diversity.' This is a 2003 statement from the Australian government's multicultural policy, to be found in the *Multicultural Australia: united in diversity* statement which updated the 1999 policy statement, and this set the 'New agenda for multicultural Australia: strategic directions for 2003-06'. Prime Minister Howard commended the renewed statement of Australia's multicultural policy and encouraged all Australians to join the government in ensuring that our 'diversity continues to be a unifying force for our nation'.

In 1994 the cultural background of an accused was inserted into the Crimes Act 1914 as a mandatory consideration in the courts' sentencing discretion with bipartisan support. As the then shadow Attorney-General, the Hon. Daryl Williams, stated in his speech on the second reading of the Crimes and Other Legislation Amendment Bill 1994, evidence before this committee—that is, the Senate Standing Committee on Legal and Constitutional Affairs—was overwhelmingly in support of including cultural background as a relevant matter in sentencing of federal offenders. The Hon. Peter Slipper, a member of the coalition, stated during his speech:

> It is important to realise we are one people in Australia. We are one nation and the laws binding all of us should be the same. However, given the diversity of the ethnic make-up of some parts of Australia now, it is obviously appropriate that cultural background should be included as one of those matters which courts take into account when sentencing a person after a person is found to have breached the law.

It is now 12 years after the insertion of cultural background into the Crimes Act with widespread support within the Australian community, and it is three years after the renewed statement of multicultural policy said then by the Prime Minister to be:

> … especially important given the tragic events of 11 September 2001 in the United States … and 12 October 2002 in Bali …

How does it then come about that in 2006 this committee is again considering an amendment to the Crimes Act which proposes to reverse the 1994 amendment and delete the reference to cultural background from mandatory factors to be considered when a court passes sentence on a person for committing a federal offence? The answer lies in part in significant misinformation about some individual cases, and the misconception that violence and child abuse in Aboriginal communities are going unpunished. It is not, as Richard Coates, Northern Territory Director of Public Prosecutions, makes clear in his paper on Indigenous sentencing and the Northern Territory's perspective—a paper that he gave in Brisbane in July 2006 at the International Society for the Reform of Criminal Law conference. The analysis of data provided by the Judicial Commission of New South Wales and other sources shows that sentencing for Indigenous offenders is not more lenient, and it is consistent across jurisdictions.

In this context, it is important to dispel the misconception that the much-publicised Northern Territory case, the Queen and GJ, was a case about rape. It was not. As both Chief Justice Martin, at first instance, and the Court of Criminal Appeal were at pains to point out, the accused was not charged with rape. The act with which GJ was charged, and for which he was sentenced, was an act of consensual sexual intercourse with a minor. The fact that the sentence in the Queen and GJ was increased on appeal illustrates the point that is made in the Law Council of Australia's submission that where mistakes in sentencing are made at trial those mistakes have invariably been rectified on appeal, and that is the purpose of the appeal process in our system of law.

The Law Council of Australia acknowledges and commends the bravery of Dr Nanette Rogers in bringing to the forefront the issues of violence and child abuse in Indigenous communities. It is unfortunate, however, that the public debate which has ensued has focused on the wrong issues. As the Law Council of Australia's submission to the Council of Australian Governments in July 2006 has demonstrated, none of the shocking factual cases involving child abuse referred to by Dr Rogers have had any customary law element. The record needs to be put straight, and some balance needs to put back into the debate. The Law Council of Australia commends to this committee the paper of the Northern Territory Director of Public Prosecutions that I have already referred to.

The essential point is that it is not just defenders of accused persons but prosecutors also who would not welcome the amendments under consideration. If we turn to the proposed amendments, the Law Council of Australia understands that the driving force behind the amendments is the agreement reached at the Council of Australian Governments in July 2006 with states and territories which says:

> ... 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.

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. Given that the

intention is that all states and territories will enact similar amendments, the Law Council of Australia submission addresses the potentially far-reaching impact of the amendments if adopted by other states and territories. However, even focusing just on the bill relating to Commonwealth offences, it is clear that the bill 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. The essential point to be made is that citizens of Australia come from a multitude of cultural backgrounds. While this diversity was said by the Prime Minister in his 2003 statement on multicultural Australia to be a unifying force, in the present amendments in 2006 it is apparently to be disregarded.

The jurisprudence on sentencing, in the context of a multicultural society, is well developed in Australia and the principles are well understood. In 1982, in the High Court case of Neal v the Queen (1982) 149 CLR 305 at 326, Justice Brennan emphasised:

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts that exist only by reason of the offender's membership of an ethnic or other group.

So much is essential to the even administration of criminal justice. In 1995, the High Court stated in Masciantonio and the Queen (1995) 183 CLR 53:

> ... the gravity of the conduct said to constitute provocation must be assessed by reference to the relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of the person's age, sex, ethnicity, physical features, personal attributes, personal relationships and past history.

Justice McHugh commented in that case:

> If it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would answer that that must be the natural consequence of true equality before the law in a multicultural society when the criterion of criminal liability is made to depend upon objective standards of personhood.

Thus to say that all Australians should be treated equally before the law is not to remove consideration of cultural factors but to recognise and give cognisance to the individuality of each person, recognising that each person's culture is an integral part of their individuality. It follows that removing a consideration of cultural factors in sentencing is not to treat people equally before the law. In fact, it may well result in discrimination against Indigenous Australians and Australians of multicultural descent.

There are two other important aspect of the Law Council's submission to be highlighted. They are that judicial discretion in sentencing should be preserved and also that the amendments will undermine positive steps already taken to alleviate the very issues of concern. An example of that is the establishment of the Aboriginal courts that Mr Calma was referring to. The broader submission is that, rather than looking at amendment to the criminal law to address the issues of concern—violence and child abuse—the government should be looking to a wider package to address the underlying issues. Justice Fitzgerald, a former president of the Queensland Court of Appeal, in a case called Daniel [1998] 1 Qd R 499, articulated the dilemmas facing judges and the limitations of the law. His conclusion was:

The criminal law is a hopelessly blunt instrument of social policy, and its implementation by the courts is a totally inadequate substitute for improved education, health, housing and employment for Aboriginal communities. Irrespective of race, the criminal justice system increasingly merely punishes those who are the product of deficient or failed social policies ... While courts cannot entirely yield to the pessimistic belief that adequate punishment frequently does not act as a deterrent to violent offences, it is unrealistic to think that imprisonment is a wholly satisfactory response to behaviour based on anger, resentment, powerlessness and frustration related to deprivation and oppression, whatever the race of the offender.

CHAIR—Thank you. Mr Parmeter, do you wish to add anything now?

Mr Parmeter—No.

Senator TROOD—Thank you both for appearing this morning. Ms Webb, you put a lot of emphasis on this 1994 change. Can you provide us with any information about the impact that that particular amendment has had on the way in which the courts have operated in this area that might give us some idea about how significant this particular phrase has been in sentencing et cetera?

Ms Webb—I will pass that to Mr Parmeter who has done quite a lot of research in this area.

Mr Parmeter—I will say from the outset that customary background evidence was accepted by courts well before the amendment under consideration was inserted into the act. Since that time, I think it has had an impact on the manner in which the court approaches offenders in their specific circumstances. There are numerous cases in which it has been used. But, predominantly, it has been used in the sense of providing a background against which a particular offence occurred to distinguish between, say, somebody who committed a murder by mugging someone in a Sydney street and somebody who killed someone in a violent altercation over some sort of cultural issue. There are points in those cases and circumstances which need to be distinguished from one another, and courts need to be able to do that.

Senator TROOD—Have there been any cases of which you are aware where the concern which is being addressed in the COAG statement is material—that is to say, that this particular provision which is argued to be a cause of leniency in some cases has in fact been used in that way?

Mr Parmeter—A landmark case in the High Court was Masciantonio v the Queen, which Raelene quoted a passage from in her opening statement. That case involved an Italian man who, as a result of his cultural background, reacted in a certain way to offensive behaviour by his son-in-law. The court drew a distinction between the reaction that man had in those circumstances and the reaction that an ordinary person of Anglo-Celtic background would have in the same circumstances. In the context of Indigenous issues, the behaviour of the man in question in the Queen v GJ—which is the case that you are aware of—involved the promised bride to the Aboriginal elder. In that case it is commonly not understood that the only context in which the cultural background of the offender was taken into account was regarding his taking the girl after she had apparently gone to stay with another boy around her own age. That was seen to him—because she had been promised to him under his traditional laws—to be highly offensive. That was the only context in which it was taken into account.

The remainder of the case and some of the more alarming aspects of that case were considered as part of the broader circumstances of the individual concerned.

Senator TROOD—You allude to Justice Brennan's remarks in Neal as relating to these matters normally being taken into account. You take refuge in that, or at least seek comfort from it, as I understand your proposition. Why might not we see it in both ways—that if this were removed from the legislation then those principles would similarly apply? I am struck by the force of that passage, as you are, and I can see what His Honour was getting at, but it seems to me you can work that both ways.

Ms Webb—The problem is with removing any consideration of the cultural practice of customary law. Cultural background is something that the courts may take into account. But the very material facts that the court does take into account in sentencing are in fact the cultural practices and the customary law. Cultural background gives rise to cultural practices. They are the material facts that Justice Brennan is referring to—the facts of what was done, what practices were engaged in. They are the ones that the court says are to be taken into account. They are the ones that are being removed and cannot be taken into account under the amendment. That is the difficulty with it.

Senator TROOD—Obviously you have serious concerns about the direction of the legislation, but can you help us in relation to how we might implement the COAG agreement in ways which would allow the Commonwealth to be responsive to the concerns which were reflected in the agreement? I know you have got a suggestion here on page 9—the second dot point alludes to it—but perhaps you could explain this a little more fully for the benefit of the committee.

Mr Parmeter—What we are submitting is that, in terms of fulfilling the spirit of what COAG agreed at its meeting on 14 July, there does not appear to be any necessity to prevent courts from considering these aspects of an offender's background. These aspects go to part of the totality of the court's consideration of the offender's conduct. In terms of protecting the community and protecting women and children—particularly protecting women and children in remote Aboriginal communities—it would be a sufficient statement in the legislation simply to say that the court must take into account the interests of the community. As Jonathon pointed out in the previous submissions, the court already does take those issues into account. On customary law, for example, the commissioner has basically indicated, in a range of previous speeches—and there is a great deal of court precedent to suggest this—that customary law will never justify violent or abusive behaviour. So I suppose we ask why these amendments are necessary in the context of those facts.

Senator TROOD—Perhaps this is not what you intended by this observation but it occurs to me that one solution would be to leave the reference to cultural background in 16A(2), which allows some discretion for the court—it allows the court to take account of that specific question if it chooses to do so, if it is relevant—but not necessarily go the further distance, as section 16A(2)(a), I think, does. Would that be of assistance in the matter?

Mr Parmeter—To clarify what I was trying to convey in that submission: we accept that an amendment to the act to require the court to take into account and give primacy to the interests of the community, the victim and any potential witnesses would be a sufficient

statement of principle for the court to follow. The effect would be that that would be a paramount consideration for the court, but it would allow the court to continue to consider a range of matters and a range of options for sentencing and bail. Senator Payne, you alluded earlier to there being options available such as allowing an offender to be released into the custody of somebody outside the community and things like that. There are also things like the Aboriginal court constructs, which, first of all, have a very strong impact on the offender and—as I understand it, having had the processes explained to me in the past—require the offender to face up to their conduct and understand exactly what the impact of that conduct was on the community in question. The constructs also allow the Aboriginal elders to be involved in the process to indicate that this is a community issue. This is not a black-letter law issue. Thirdly, they vest more authority in those elders to bind their community together, if you like. Those are the observations that I have made from having had the Aboriginal courts explained to me.

Ms Webb—I will add to that. I think that the amendment would be stronger if 16A(2)(a) were removed and 16A(2)(b) remained. That would be stronger in being able to provide protection for women and children, because there are customary and cultural factors that can be used to assist with that protection. I think this is one of the points that Nick was making in relation to the way communities might deal with it themselves.

Senator TROOD—That has occurred to me. This is not necessarily an overall negative; in fact, cultural values, practices, backgrounds et cetera might all be positive elements—

Ms Webb—They can indeed work for the positive.

Senator TROOD—of trying to deal with this particular problem. They are not necessarily problems, as the legislation tends to almost assume.

Ms Webb—That is entirely correct. For example, if you were to take into consideration that the release of young men on bail might enable them to go through traditional law that might be happening at the time, that might be a very strong positive aspect as to why they should be given bail. But, if you have this amendment, you could not take that into account. These young men would not be able to do that and have that particular community involvement that would assist in their education.

Mr Parmeter—I will add to that by referring to a case that I have outlined in the COAG submission called the Queen v Gondarra, which was an unreported decision in the Northern Territory but is a significant example of what we are talking about. The man concerned was convicted of arson after burning down his own house, and afterwards he was essentially allowed to complete a chamber of law, which was a significant aspect of his rehabilitation. Those are the sorts of sentencing options which will be cut off by this legislation.

Senator TROOD—Do we know whether or not he has repeated the offence or anything like it?

Mr Parmeter—My understanding is that he has not, but I can certainly make inquiries about that and let you know.

CHAIR—That was an unreported case from last year, wasn't it?

Mr Parmeter—Yes, it was.

Senator CROSSIN—Thank you very much for your time and for making a submission today. It is much appreciated. I am trying to put the changes to this act in context. I appreciate your background of the 2003 statement. If we have a look at all the media and the statements from the current Minister for Families, Community Services and Indigenous Affairs, which I believe are probably driving these changes, we see they are to target family and domestic violence in Aboriginal communities. Yet this bill changes federal criminal legislation, the majority of which would probably breach the Social Security Act. I am having difficulty trying to get a grip of how we believe changing an act which will predominantly target social security breaches will address the chronic levels of family violence we have in all communities—not just Indigenous communities, I have to say.

Mr Parmeter—I agree with you to the extent that the amendments under consideration will only have limited reach in terms of family violence. Certainly the majority of federal offences are under the Social Security Act. As I have indicated in my submission, the majority of those who have been incarcerated following breach of a federal offence are in fact non-Australians. What we are addressing, though, is the broader impact that these amendments will have once passed when the federal government seeks to invoke bilateral agreements to encourage states to implement similar reforms. I think uniformity of the legislation is a reasonably common theme, particularly where this is concerned, following a statement at the Council of Australian Governments by all Australian governments that they will seek to ensure that their laws reflect the principles espoused in the communique that came out following that meeting. So I think that the broader impact is being anticipated in our submission.

Senator CROSSIN—I am not entirely sure that all governments have said that. We should probably get a full copy of the communique—I should have brought it with me. The explanatory memorandum quotes one sentence from that communique as opposed to the many paragraphs in which this is in context. My understanding is the Northern Territory government have said on record that they intend to make no changes, because they believe the system is working. This is reflected in the numerous examples from the submissions we got from the social justice commissioner today and from you. They believe that there is due consideration and flexibility already in the system in the Northern Territory. As I get around the Northern Territory, I find that, for example, an increase in domestic violence seems to occur at week 6 or 7 after the birth of a baby when Indigenous women get their baby bonus payment. But I do not see any complementary changes to the Social Security Act to pay that on a fortnightly basis as opposed to a lump sum. Have you any comment about the very narrow targeting of these changes as opposed to looking at all Commonwealth legislation to see if there is not a cause and effect there, if you understand what I am trying to say?

Mr Parmeter—I do see the point that you are making, and I think it is a good one. The point is that there is a much broader problem to be addressed. This legislation, and the targeted effect of the legislation, is going to have a limited impact. It will have a broader impact in terms of affecting all Commonwealth legislation on matters which can be considered in the sentencing process for any Commonwealth offence, but in terms of the impact of these particular amendments they do not appear to address the underlying root causes of some of the problems we are seeing in Aboriginal communities.

Ms Webb—Can I just add to what Nick has said in response to what you have said, Senator Crossin. What is not being addressed and what you have identified is: what is the root cause of these violent episodes and what is happening in communities. That then would give a lead to how you go about dealing with it. And if, indeed, this violence is escalating at a time that is related to payments then one would consider that that would be something to look at. But from a point of view of trying to deal with the very serious issues, the way that that would need to be done—and I would say should be done—is to work with the community, find out what the problems are in the community and work with them to say, 'How do we go about solving it; how can we help you?' Once the community itself has an ownership of the problem, there will be a very real chance of getting a way of dealing with it. It will not happen overnight, but it is a matter of finding out what is causing the problem, not putting a bandaid there. In fact it is not even a bandaid in this case, because it is not going to go to those particular issues at all. So I think that point is an excellent one: find out what is causing the problem.

Senator CROSSIN—Yes. To my mind, if we are going to be serious about tackling Indigenous violence then there is a whole range of federal legislation I would be changing, and this would not be at the top of the list, I have to say. There is particularly the anecdotal evidence that I hear from communities about the impact of sections of the Social Security Act. Anyway, there is a whole range of examples given in these submissions of Indigenous cases, but you also say on page 3 of your submission that this indicates that the bill if enacted will have a greater impact upon non-Australians. I have written here, 'Other ethnic groups'. Do we have examples of groups in our community other than Indigenous people whom this bill will impact upon? You have given one example of the person with an Italian background; do you have others?

Mr Parmeter—I am afraid I do not have case examples to hand, Senator, but the comment derives from the fact that, while the bill is clearly directed at addressing Indigenous violence, it is also clear that it is going to impact upon people of all cultural backgrounds. I do not think the circumstances in which that arises have been properly anticipated or properly considered by the legislature when they have sought to draft the amendments. In that particular statement that I made, I think I was referring to the fact that only 43 per cent of offenders convicted of Commonwealth offences are Australian citizens. The next largest group is Indonesians, and the list goes on. If you refer to the Australian Law Reform Commission's report on sentencing of federal offenders, which I suspect the ALRC will be able to speak to when you speak with them, you see that they do outline the various cultures and nationalities that are affected by federal legislation.

Senator CROSSIN—A number of the submissions referred to the Fernando principles. I do not have a law background; I do not know if that is of benefit or a hindrance when I sit on this committee. Perhaps I have a different approach to my colleagues on this committee. What is it about those principles in relation to these changes? Would they be breached? Are they compromised? Are they abandoned? Are they enhanced?

CHAIR—Can I say, also, Senator, the New South Wales Aboriginal Legal Service has put a comprehensive set of information about the Fernando principles in their submission as well.

Senator CROSSIN—Yes, I have seen it in a few of them.

Mr Parmeter—In response to that, Senator, I believe it is very likely that the Fernando principles would be affected by the amendments being made in this legislation if those similar amendments were adopted in New South Wales. The Fernando principles refer, largely, to the Aboriginality of the offender, which carries with it a whole range of considerations. It is certain that the cultural background and the customary practices observed by that offender would be considered as part of the overall picture of the offender created by the court.

Senator KIRK—Thank you very much for your submission. Listening to all of this, I think that you made some very good points but I cannot help but think about something that Senator Crossin raised. In a sense this Commonwealth law is going to have a relatively limited application and the problems that you are alluding to are those which will exist if and when the states and territories implement complementary legislation. Is that fair to say?

Mr Parmeter—I do not think that it is necessarily as simple as that. 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 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.

Again, I make the point that we have made in our submissions in the context of the broader implications of the bill if states and territories adopt similar laws. If 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.

Senator KIRK—Is one of the issues currently the fact that if a court, even at the Commonwealth level, is taking into account cultural factors when making an assessment as to whether or not bail should be granted or in sentencing, quite often these concerns are not explicitly provided for, in the sense that when reasons are given for bail determination or sentencing the court does not expressly state, 'And we took into account the following'? Is one of the issues, too, the fact that currently there are, in a sense, hidden considerations, whereas this legislation seeks to remove them entirely? What I am getting at is that you are unlikely to read a decision which says 'And we took into account the following.' It is just seen as a material or relevant matter.

Mr Parmeter—As you correctly pointed out, 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—for instance, in the example which was raised earlier where a juvenile offender might be required to attend initiation rites. That is one strong example, and there are others.

Senator KIRK—Isn't one of the problems, too, that even if this legislation were to be passed it would be difficult to assess its impact in the sense that if courts are no longer required or permitted to have cultural background and other factors then how do we really make an assessment as to how the legislation is impacting, if you see what I mean?

Mr Parmeter—I agree with that observation. I think it will be very difficult to work out the impact unless individual communities are consulted. Obviously the time frames allowed for committees such as this to consider this legislation are nowhere near sufficient to allow them to go and visit individual communities, which is a pity.

Senator KIRK—It is. I agree with that.

CHAIR—We have come to 11 o'clock, so that brings us to the end of this particular aspect of the discussion. Ms Webb and Mr Parmeter, I thank you both for appearing on behalf of the Law Council. I thank you also for your very detailed submission and the assistance that you have given the committee with its understanding of the issues in the bill this morning. If there any of issues which arise out of our further discussions we may be in contact with you. I do know it was a very sharp turnaround in terms of time frame, so we appreciate your assistance.

Mr Parmeter—Thank you for the opportunity to comment. Senator Trood, I would like to see if I can locate the cases and I will see if I can get them sent to the committee.

[11.02 am]

GIBSON, Ms Althea, Legal Officer, Australian Law Reform Commission

SANTOW, Mr Edward John, Legal Officer, Australian Law Reform Commission

WEISBROT, Professor David, President, Australian Law Reform Commission

CHAIR—I welcome our witnesses from the Australian Law Reform Commission. The ALRC has lodged a submission with the committee which we have numbered '1'. Do you need to make any amendments alterations to that submission?

Prof. Weisbrot—No.

CHAIR—Professor, you know the drill. I will ask you to make an opening statement and then we will go to questions.

Prof. Weisbrot—Thank you for giving us this opportunity to appear before the committee. I apologise that we do not have with us Professor Brian Opeskin, who just left the commission a few days ago.

CHAIR—And the country?

Prof. Weisbrot—No, he has not quite left the country yet, although you may be able to prevent that. He was in charge of the sentencing inquiry and I am sure he would have had useful things to say but we will do our best in his absence. We feel fairly strongly about the proposed amendments. They run contrary to the recommendations in four ALRC reports over about 20 years, including some recent ones. In terms of the first proposal, the removal of the term 'cultural background' from paragraph 16A(2)(m), we do not favour that, but as it is a non-exclusive list we perhaps could have lived with that. No doubt the courts, in their discretion, would have taken cultural background into account in any event in coming up with an appropriate sentence for an individual offender.

We have stronger feelings about the affirmative ruling out of customary law and cultural practices by the second relevant provision in the bill, and feel that that will hamstring the courts to some extent in trying to fashion an appropriate sentence for individual offenders. We also think it is an unduly blunt instrument and that there would be better ways of achieving the same effect—if it was in fact necessary to achieve that effect at all. The courts will, in any event, always give weight to the submissions that are made in that respect. We know that some of the submissions that are made that advert to customary law and practice are false and dishonest ones and they are usually pretty quickly dismissed by the courts. We have seen that in a range of cases involving Aboriginal customs as well as assertions of other customs. In fact it is probably not a very sensible tactic because it would be very difficult on the one hand to assert remorse and contrition and on the other hand to try to explain away fairly terrible behaviour by way of cultural practice. So the courts will decide when it is relevant and also give it the appropriate weight.

Secondly, if there was a need to deal with a particular issue of domestic violence and assertions of customary practice in that area, in taking account of customary law and cultural practice we would have much preferred to have seen included something like 'the courts also

shall have regard to Australia's human rights obligations'. There are a number of jurisdictions in our region that recognise customary law on a regular basis—for example, Papua New Guinea, Solomon Islands, Vanuatu. They have that countervailing factor explicitly in their legislation. Indeed, in Papua New Guinea it is in schedule 2 of their constitution. What they are saying is that custom is an obvious influence on some offenders but nevertheless they cannot use that as an excuse where they are manifestly breaching the human rights of the victim—so there is something a bit more targeted there. On notice, I can provide the committee with some examples. I am sorry, I did not bring them with me but I can email those.

CHAIR—Thank you.

Prof. Weisbrot—As I said, the wording goes well beyond domestic violence, and it provides an unduly blunt instrument. I have thought of a few cases just while sitting here that I thought should be raised. For example, an Indigenous person who engaged in traditional hunting or fishing that breached an environmental act or regulation may not be excused. Many of those offences are strict liability; nevertheless, it would be useful for the court to know that they were acting in accordance with traditional practice. In the social security area the ambiguity of some traditional relationships could put someone on the wrong side of our very complicated social security laws. That person may have had a genuine belief, for example, that a person they consider a relation and a dependent should have been covered by social security laws and, in fact, they technically were not. Similarly, we would not ordinarily see the infliction of traditional punishment as an excuse, but it would be a relevant motivating factor in an assault. The fact that the person was acting under colour of traditional authority, traditional obligation, would be something that you would want to take into account.

Another example outside the Indigenous area, or perhaps including that as well as more broadly, might be some of the offences that involve associating with others—for example, under the list of offences by terrorist organisations and some others where a person felt under a traditional obligation, a family obligation, to associate with certain persons, they might be in breach of the law. Nevertheless a court might want to take that into account as a motivating factor for the person engaging in that association contrary to the law.

CHAIR—Thank you. Your submission indicates that the government is considering the *Same crime, same time* report. Is that still the case?

Prof. Weisbrot—That is right.

CHAIR—Did the Commonwealth make a submission to the inquiry?

Prof. Weisbrot—Yes, it made a number of submissions during the course of the inquiry.

CHAIR—Did it in any way refer to the need to introduce legislation such as this in relation to federal offences?

Prof. Weisbrot—Not that I recall, but we can check that.

CHAIR—Thank you. The committee would be interested to know that, as well as the time frame of when the Commonwealth made its submission. I know you tabled your report in June. How long had the inquiry been under way?

Prof. Weisbrot—Two years. We got the terms of reference on 12 July 2004, so it is almost exactly two years.

CHAIR—I was struck—I am not sure that 'irony' is the right word; I have been seeking the right word—that from paragraphs 22 to 25 you talk about the history of cultural background and ALRC's previous recommendations in relation to that, which to some degree resulted in the 1994 amendments to include cultural background. It struck me as interesting that that arose out of a report on multiculturalism. Both from the second reading speech and the explanatory memorandum, this has a much more specific focus on Indigenous matters. It seems to me to be an interesting shift in the contemplation of the legal provisions.

Prof. Weisbrot—I am not sure whether the multiculturalism report added another dimension or another layer to it or whether it was simply that the time was right finally to implement the original recommendation. But I think the combination of those two certainly led in the 1994 legislation to that specific amendment being introduced.

Senator CROSSIN—On page 2 of your submission you refer to the *Same crime, same time* inquiry that you did. Is it correct that one of the recommendations you made was that legislation should in fact endorse the practice of considering traditional law and customs?

Prof. Weisbrot—Yes. That is right.

Senator CROSSIN—So this change to the Crimes Act would be quite contrary to one of your recommendations?

Prof. Weisbrot—That is right.

Senator CROSSIN—What led you to that recommendation?

Prof. Weisbrot—It is part of the existing law. It was simply a reconsideration of that area. We studied sentencing law generally. We looked at recrafting the list of factors and simplifying them. It is a non-exhaustive list, but we were concerned about having a very lengthy list in that judges might get tripped up by later not adverting to every single factor and then a court of appeal might say, 'Aha, you missed XYZ factor right down the end.' So we tried to recraft that in slightly more categorical forms. Nevertheless, on that reconsideration we felt strongly that cultural background and Aboriginal and Torres Strait Islander customs should be among the specifically enumerated factors.

Senator CROSSIN—And that cultural background should be considered by a court when sentencing a federal offender.

Prof. Weisbrot—Yes. Again, the weight given to it in any given matter would be a different matter, but where relevant it should be something that the court should be able to have regard to.

Senator CROSSIN—Would you say that the changes to the Crimes Act in fact are contrary to the recommendations of the Royal Commission into Aboriginal Deaths in Custody?

Prof. Weisbrot—That is right.

Senator CROSSIN—In what way would you believe that they are contrary?

Prof. Weisbrot—They 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.

Senator CROSSIN—You raised a situation before in relation to Indigenous people breaching the Social Security Act. You would have heard me ask Ms Webb questions about whether this is a very narrow focus. You might be interested to know that, in my experience, I have not known of any Indigenous people being charged with a breach of the Social Security Act. In fact, when Centrelink officers have been put in a remote community—and there are only four of them at this stage—$1.3 million was generated in that community in the previous year, because Indigenous people are not connected under the Social Security Act. In fact, where a Centrelink office has been put in, it has been found that, for a change, Indigenous people are actually getting the right social security benefits they are entitled to, because someone has finally gone to a bit of trouble to connect people correctly. That leads me to where I was before, and that is that I do not see any direct evidence—and no-one has convinced me; certainly the Commonwealth government have not convinced me and theirs is the only submission we have that wants these laws passed—that this will in any way diminish domestic violence or abuse in Indigenous communities, because it is such a very targeted change to the Crimes Act.

Prof. Weisbrot—I would agree. I do not see it as a good instrument for doing that. There would be many more effective strategies, prior to the commission of any offence, involving education, alcohol counselling, other kinds of counselling, social security supports and all of the obvious crime prevention strategies, which I think should be heavily pursued. Of course, they are not precluded by this. At the other end, using sentencing policy would rarely be very effective in the circumstances in preventing that kind of abuse. It may isolate an offender for a longer period of time but the person presumably will still be back in the community in time. Again, where the person is alleging that he or she is operating under colour of custom, in most of those circumstances you have to assume that that is simply not going to be factually true. So I do not think it is going to have too much effect there. But the ambit of the amendment is not limited to domestic violence cases and my concern is that it will leak out into other circumstances in which the court should be taking customary law into account. I gave some examples of that; I am sure there are others.

Senator CROSSIN—The amendments contained in this bill are actually based, I believe, on misconception. I am still trying to ascertain whether there has actually been any case at all in which cultural background or customary law has actually been used by a court. Has there been?

Prof. Weisbrot—Yes. Do you mean in domestic violence circumstances or more generally?

Senator CROSSIN—In diminishing somebody's sentence or bail provisions.

Prof. Weisbrot—It does happen. There have been cases historically. I think it is a fairly regular feature in the Northern Territory courts. This is more from my academic research that

I have done over time than the ALRC report, but my impression has been more that the courts tend to 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. I think there are cases in which that has come up. Certainly in terms of the traditional punishments, there are a number of reported cases from both directions. There have been cases where a person is given a lighter sentence than might otherwise be the case because the court recognises they are going to suffer double punishment—that they are going to have some traditional punishments inflicted as well as having a jail term—and so that is balanced. On the other side, the inflictors of that punishment are not immune from the criminal law. There are cases where a person has been involved in a spearing or something like that and the fact that they are operating under colour of custom has been taken into account, again not in excusing the offence but in reducing the moral culpability and therefore the sentence involved.

Senator CROSSIN—The examples you give, though, relate mainly to laws that are under the jurisdiction of the states and territories.

Prof. Weisbrot—That is right.

Senator CROSSIN—So again I am failing to see a link between what the federal government is trying to achieve here and the changes to this legislation.

Prof. Weisbrot—There would be very little if any domestic violence within the ambit of federal law. It would be overwhelmingly within that of state and territory law. If it is part of a COAG process and, in defence of the Commonwealth at least in terms of the idea, it is quite often the case that the ALRC recommends the Commonwealth do something as a matter of principle hoping that the states and territories will follow that good principle. In this particular case, we do not like it but it would be hard for me to argue that the Commonwealth should not adopt a principle even though it may not have effect in many cases. But in the recent report on sentencing we do go through that. The Australian Institute of Criminology analysed many thousands of Commonwealth criminal cases for us and so we do have the pattern of Commonwealth criminal law there. You are right: it is a limited area. It is not the standard kind of crime that most people think about, which is within the ambit of the states and territories. It is a much more limited area.

Senator CROSSIN—My final question is: can you give us examples of where this might impact on other minority groups in our community, particularly on people from an ethnic background as opposed to Indigenous people?

Prof. Weisbrot—There have also been a number of false claims in that area. In one notorious series of rape cases there was an allegation that it comported with Muslim or Pakistani custom, and the courts were very quickly dismissive of that. I do not think anyone could make a genuine assertion that Muslim culture actually endorses the sorts of things that happened. On another side, one of the examples I gave was about people's familial structures, their feeling about family obligation and their need to associate with people who might put them in danger of breaching certain sorts of consorting laws at the state level or terrorist organisation laws at the federal level. That might be one example. There are not many, and the ones that have been raised in the literature are mostly ones that have been rejected—for

example, fathers from strict cultures, and I will just put it that way, using violence or false imprisonment against kids to keep them from being involved in the broader culture. As a defence it never works; as a factor in explaining behaviour and fashioning an appropriate sentence, it sometimes is relevant in understanding the motivation. So it is relevant for a court to know whether the person, on the one hand, was involved in just a drunken rage or, on the other hand, assaulted somebody because they were operating under colour of custom and tradition and felt a strong obligation to intervene, even if it turned out that they contravened the criminal law. We would not excuse that behaviour, but we would say in fashioning a sentence that we understand the motivation and will take that into account, among a range of other factors.

Senator TROOD—Is this discriminatory legislation in the commission's view?

Prof. Weisbrot—Insofar as it singles out a particular group as having their custom and culture excluded in a particular provision, we thought it was unwise to do it that way. It could be argued that that is discriminatory.

Senator TROOD—The Attorney-General's Department argues that it is not. Are you not convinced or impressed by that assertion?

Prof. Weisbrot—No. Again, there are a large range of factors that are put before a court. The classic joke in criminal law is the person who throws themselves on the mercy of the court as being an orphan when they have just been convicted of killing their mother and father. There are a lot of try-ons in the courts in that way. People raise the fact that they have dependent children who they support, even if they have committed terrible crimes. People try to raise a whole range of things. I think this is an overreaction to some particular cases. I understand that the particular triggering cases were ones in which Aboriginal custom was not accepted by the courts anyway. I am concerned about taking a particular sentencing factor that we have recognised historically as being relevant for courts—again, weight and other factors being balanced against those—but singling out that one as being a matter that is not fit for the court to hear. We do have concerns about that.

Senator TROOD—I understand that proposition, but that applies to any minority group. As you have pointed out, it is in relation to custom. My particular anxiety is whether or not this piece of legislation, in your view, is discriminating against a particular minority group in the community.

Prof. Weisbrot—It does single out in particular customary law and culture, and I think the customary law part could only refer to Aboriginal and Torres Strait Islander people.

Senator TROOD—So that is your interpretation?

Prof. Weisbrot—That is my concern. It is not my dominant concern; my principal concern is the effectiveness of it and whether it is sensible policy.

Senator TROOD—I understand that. This was just a particular point that I wanted to clarify. I probably come to the same conclusion. Certainly, if I read the second reading speech there would seem to be no doubt about the direction in which the legislation is moving, but we are concerned of course with the legislation as it is proposed to be enacted. That is the

question that ought to be before us—whether or not the legislation as it is proposed to be enacted is discriminatory, and you have made yourself clear on that.

I want to clarify something else with you. The National Law Council put to us the proposition that, were these reforms to be introduced, they would prevent a court taking advantage of customary practice and law and the way in which that particular custom might be helpful in sentencing somebody. In other words there are elements of customary law which might serve to mitigate sentences, but there might be elements of customary law which might actually reinforce the importance of the punishment or the way in which the court responds to an offence. Is that your view as well?

Prof. Weisbrot—That is true, and it is certainly the experience in the region. There have been arguments from time to time that the adherence to customary law is a soft option. In fact, the experience in the village courts in Papua New Guinea and in the superior courts where custom is recognised is that it is often an aggravating factor that the court can point to—the fact that the person not only committed an offence, but also, in cultural terms, that it was regarded as a more serious offence than the Western law had provided. It can cut both ways.

Senator TROOD—Would the effect of these amendments mean that the more serious imposition under customary law would be precluded from the court being a matter of consideration?

Prof. Weisbrot—It would seem to be. It is interesting that the exact wording of it talks about:

… a reason for excusing, justifying, authorising, requiring or rendering less serious … the criminal behaviour to which the offence relates

Arguably, you could raise custom as an aggravating factor, and it does not seem to be precluded by those words. That would be a perverse result to allow custom to be used only as an aggravating factor and not as a mitigating factor.

Senator TROOD—You have alluded to the importance of the common law in taking account of some of these matters. I gather you are asserting, rightly I think, the virtue of the common law in that respect. Would that not now be possible? Are you concerned about the fact that these amendments would leave us in a situation where the well established principles of common law that might be applied in these circumstances would no longer be able to be applied?

Prof. Weisbrot—That is my concern. In my opening remarks, I mentioned we would not favour the first change, which is omitting cultural background as one of the sentencing factors, but perhaps because we assume that it would be read in anyway under common law principles of sentencing it would not upset us that greatly. I still think the change should not be made, but a basic common law approach to sentencing will not preclude a court from using that material in relevant circumstances.

I am more concerned about the latter change, the second change, which seeks to affirmatively preclude courts from receiving evidence on that. Given the sensitivity in this area because of the overrepresentation of Aboriginal people in the prison population and so on, it is particularly retrograde. But I would be concerned as well with the specific removal of other kinds of sentencing factors—for example, a person's youth, old age, infirmity or the

effects on their family: the sorts of things the courts regularly take into account. It is a very delicate balance to fashion an appropriate sentence when you have to also take into account the severity of the actual crime and whether the person pleaded guilty or not and the effect on victims. All of those things have to be taken into account.

I would be concerned about specifically excluding one or more factors on that basis, particularly coming out of an individual case. I am sure we can point to individual cases in which an elderly person seemed to have got light treatment by community standards or a young person got light treatment. But we still need to have those factors in there as ones that we recognise generally as bearing on a person's moral culpability, on their prospects for rehabilitation, on the disproportionate impact of certain sorts of sentences.

We have been talking mostly here about severity, but another reason that you might want to take this into account would be the type of sentence. It may be that cultural practice would shift a court's judgement on going to jail or not. It might shift the balance a bit more towards a non-custodial option like community service or something else. I think that issue should not be minimised either.

Senator KIRK—Thank you very much for your submission. I notice at paragraph 45 that you say:

45. The ALRC acknowledges that there are real concerns about the way in which the 'cultural' factor is sometimes applied.

Then you say:

... ways to alleviate these concerns including continuing judicial education and improved methods to inform the court of appropriate traditional laws and customs.

I understand that you address that in report No. 103, which is the most recent one.

Prof. Weisbrot—That is right.

Senator KIRK—You say that you do not consider:

... a limitation of judicial discretion is the appropriate way to meet the concerns.

Could you just outline for us in a bit more detail what you see as the best way to alleviate these concerns—namely, through judicial education and other improved methods of informing the courts of traditional culture.

Prof. Weisbrot—There were a number of factors that went into our recommendations on judicial education. Some of those related to the 'federalness' of our report—that is, that sentencing is almost always done by state and territory courts and they are not always familiar with the particularities or peculiarities of federal legislation. So part of the run of educational recommendations was to try to get sentencers more familiar with the specifics of federal sentencing law where they were sitting in a federal jurisdiction, which may only happen occasionally. Greater specialisation may be another way of achieving that, so a certain magistrate might be designated as the one who does the federal cases.

There were also issues about training in cultural sensitivity and ascertaining customary law in sentencing generally. We were also very impressed by some of the sentencing databases that exist in the states and territories—for example, the JIRS, the Judicial Information Research System, in New South Wales which is operated by the Judicial Commission. That

provides a wealth of information to sentencers. They can tap into the computer the range of factors that they are considering and then get back some similar cases so that they are really comparing like with like. That helps promote consistency and intelligent sentencing there. Nothing of that sort exists at the federal level so we recommended that something be done in that area.

Senator KIRK—So what you are saying is that at the federal level you would like to see moves in that direction so that there can be some comparison as to what factors are taken into account in similar sentencing type situations rather than seeking to limit the factors that can be taken into account?

Prof. Weisbrot—Yes, I think so. We did not see any evidence that judges were doing a poor job of sentencing in individual cases; we did notice disparities across states and territories, and it was quite marked although it was often dismissed as anecdotal evidence. When we actually had the thousands of cases analysed—and we do reproduce a table about this in the report—there were distinctly different sentencing patterns between the various states. If you were going to commit a crime in Albury-Wodonga, you would be much better off doing it in Wodonga for example because the sentences are much lower in Victoria than they are in New South Wales for similar crimes and having regard to the range of factors. So we want to try to standardise that. There is no compelling logic for there to be that disparity. So that was one area that we certainly wanted to try to improve.

Senator KIRK—Does that happen at the federal level as well? When these state courts are exercising federal jurisdiction do you see that disparity? Is that what you meant?

Prof. Weisbrot—Yes, that is what we were looking at. We did not look at general crime; we looked at federal sentencing. So we took the same federal crimes across the various jurisdictions and looked at the outcomes.

Senator KIRK—So in the exercise of federal jurisdiction there is quite a lot of regard given then to cultural factors and concerns?

Prof. Weisbrot—I don't think we have particular data on that, because there are not that many cases. One of the recommendations as well was that we need some sort of specific office—I think an Office for the Management of Federal Offenders was what we came up with in the end—because there are a lot of federal offenders. There are not all that many in the prisons—I think about 680 at the moment—but there are a lot of federal offenders. Because they wash through the state and territory systems, it took us a long time to get the raw material and then have it analysed. That had not been done previously. We thought that the federal system was growing—there were more federal crimes and greater ambit of coverage—so we needed to have a much clearer sense of what was happening in the federal system. The key to good management is having the basic information to be able to decide whether there is a problem and what you need to do about it.

Senator KIRK—In the federal context—because that is what we are looking at here today—do you think the scope, or the application, of this legislation will be significant? We have been trying to get our heads around the sorts of laws or crimes to which this legislation may have an application. It seems like it is a fairly limited range of offences. Is that fair to say?

Prof. Weisbrot—I think that within its own logic it will not be effective at all because, again, there is little or no domestic violence that is prosecuted under federal law. If the aim is to try to do something about inappropriately lenient sentences in domestic violence cases, I think it will not have any effect. It is possible that it will have some effect in a range of other cases. I cannot think of any positive effects it may have by removing relevant information from a court.

Senator CROSSIN—I think Ms Webb said that you would be able to provide us with evidence about which minority groups in the community would be most likely to breach federal legislation under the Crimes Act. I think she said these were Indonesians, and then—

Prof. Weisbrot—We only have the data in relation to the prison population so, again, that is only the tip of the iceberg. We do not have data in relation to the great bulk of crime, where people get a non-custodial option or they are in and out very quickly. Figure A1.13 has country of birth or nationality of Australian prisoners. Seventy-four per cent are from Australia, but then there is a small smattering, it is really just—

Senator CROSSIN—The 74 per cent would include Indigenous?

Prof. Weisbrot—They would, yes. We did not do it by ethnicity; we had no basis for studying that. We did it only by country of birth or nationality. We did not have specific figures on ethnicity, only on country of birth. Once you get past the 74 per cent, you are talking about one per cent, two per cent, three per cent or four per cent from other areas. One area was a little unusual. When we started this inquiry, we assumed we would not be dealing with young offenders at all in federal jurisdiction. Then it turned out that a lot of the Indonesian fishermen were kids—'fisher kids' I guess you have to call them—and so we did delve much more deeply into the area of young people and sentencing than we suspected we would in federal jurisdiction.

Senator CROSSIN—In the communiqué from COAG of 14 July, the application of customary law goes to this:

> COAG agreed that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse.

I am assuming that that is the one sentence out of three upon which the federal government has now acted. My interpretation of that is that a person cannot use customary law or cultural practice as a defence. I am wondering if that is the way you might interpret it and therefore what the link is between sentencing and bail change.

Prof. Weisbrot—In the lexicon of criminal law, justification and excuse are two different kinds of defence. I think it is an unhelpful debate historically in criminal law whether certain defences fit into one or another. They are generally the defences used to excuse behaviour entirely, so you would be not guilty by reason of customary culture. By and large that has not been accepted in Australian law or in most Western countries. In terms of sentencing, could you just read the last few words of that?

Senator CROSSIN—It is just here. I interpret it to mean that a person cannot use customary law as a defence. I am wondering then—

Prof. Weisbrot—Certainly the first words refer to whether a person would be guilty or not, which would be 'excuses, justifies, authorises, requires', and that is uncontroversial. In respect of 'lessens the seriousness of the violence or sexual abuse', if that is referring to sentencing factors, I guess that is what the government is seeking to address in this legislation. Whether you are asking me whether it—

Senator CROSSIN—It says that the Commonwealth does not have jurisdiction over matters to do with family violence and abuse. That is a state and territory jurisdiction.

Prof. Weisbrot—That is right, unless you get into some abstruse areas. There are provisions that have come into the law in recent times that relate to war crimes, sexual servitude and so on. I think those are not the kinds of crimes that are being talked about in this—and some of those offences are now part of federal criminal law—but the 'ordinary' crimes of domestic violence or sexual violence, which would normally be state or territory law.

CHAIR—As there are no further questions, thank you very much, Professor Weisbrot, Ms Gibson and Mr Santow, for your helpful submission and the information you have given to the committee today and for appearing before the committee today.

Proceedings suspended from 11.41 am to 11.50 am

BRAZIL, Mr Raymond, Research Officer, Aboriginal Legal Service (New South Wales/ACT)

McKENZIE, Mr John, Chief Legal Officer, Aboriginal Legal Service (New South Wales/ACT)

MOORE, Mr Gerry, Zone Manager, Aboriginal Legal Service (New South Wales/ACT)

CHAIR—Welcome. The Aboriginal Legal Service has lodged a submission with the committee which we have numbered 10. Do you need to make any amendments or alterations to the submission?

Mr McKenzie—No.

CHAIR—Thank you very much. I invite you to make an opening statement and then we will go to questions from members of the committee.

Mr Moore—First of all, I would like to acknowledge the traditional owners and the traditional custodians of this land which are the Cadigal people from the Eora nation, and pay my respects to the people whose land we are now meeting on.

Mr McKenzie—To talk briefly to our paper, in short we certainly agree and support the provisions in relation to bail as they relate to victims and potential witnesses. We think that is a proper and appropriate step to take. I do note, of course, as I think was addressed in the previous parties' appearance before this committee, that the Commonwealth Crimes Act does not cover many of the offences that may in fact be relevant in that regard out in the remote communities. As we have put into our written submission, 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.

We see that as a very real impact on our clientele base, that 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.

The second part of our concern is in relation to the removal of the cultural background criteria as a mandatory consideration by the sentencing justice or magistrate. We accept that this does not mean that the courts will be prohibited from taking that into account. What we are concerned about is: firstly, that it will send a very real symbolic message to the judiciary that cultural background is not to be given the importance that it formerly was; and, secondly,

that in the absence of that mandatory reference those members of the judiciary who in their own thoughts do not regard these types of considerations as applicable or just in such sentencing matters will feel far more free to adopt that, with the knowledge that any court of appeal sitting over and above them on their judgements will not have a legislative base to be able to pick them up on for not having covered that particular criteria.

So we accept that it is not outlawing the cultural background consideration but we think that it is very much a backward step that will only affect those members of the judiciary who do not in their own consciences feel a cultural background is relevant. No-one can make them come to any decision, but what this proposed bill will do is give them encouragement and some protection from appellate courts in not even addressing those particular cultural backgrounds. That is what I wanted to say. Gerry wants to give a practical example or two of what we are concerned about with the Commonwealth cases. That is on Centrelink fraud.

Mr Moore—I will give an example of what we are concerned about. Say a funeral occurs in a certain area where you have a large congregation of Aboriginal people who would probably not just go there for the funeral but stay there for some considerable time. It is not uncommon, for instance, to head out to Dubbo or another country town and stay there for anything up to six weeks or maybe six months, depending on the family and how strong the support they need is. If somebody is going to be prosecuted for some Centrelink fraud, there is a fear about the cultural aspect of staying there, looking after your family, especially where your extended family is away from their supports. We are really concerned that there could be implications where all these considerations are not taken into account if a magistrate or judge is sentencing somebody for supposedly committing fraud.

Mr McKenzie—The other aspect to our concern about the prohibition on customary law and cultural practice is that in New South Wales we have operating quite successfully, in only a limited number of spots, a process that we call circle sentencing, which is very much a restorative justice measure and which is absolutely based in cultural practice of the local area. We are very concerned that the impact of this bill would, we think, probably mean that any Commonwealth offences would no longer be able to be dealt with through the circle sentencing path. I think Gerry can probably give a little bit of insight into that as one of the Aboriginal senior people from Nowra, which has been one of the earlier pilot areas of this whole scheme.

Mr Moore—We have a circle sentence situation, like the ones John has mentioned in other areas. The whole premise is that it is based on cultural respect. What if we get a situation where those respect structures are set aside, where you do not even have to send someone to a circle sentencing court? It has taken us a long time to build to the point where not only have they been piloted but they are running successfully in other areas. There is a big concern that they will just be set aside and will not even be used because the cultural aspect of a circle sentencing court is that it is built on respect and built on culture. If I am coming before it as a defendant, it means that I am more than likely going to be taking notice of the elders who are sitting on the circle court.

This could take away the whole cultural aspects of sitting in a circle, being dealt with by your elders. I gave an example a short while ago to John. If I am defending somebody as a solicitor in court, I am going to be telling the magistrate exactly what I think he needs to hear

in order to get my client the best possible outcome. In a circle sentencing situation, that is not the case because, as the person whom the circle is about, I can sit down and start telling porky pies about what I am doing or not doing, and the elders actually pull you up and say: 'That is BS. You can't say that because I know you were doing X or Y.'

So it is that whole cultural aspect that has been strengthened with the circle sentencing that we have got real fears of. If you have a federal bill that will eventually seep through to the states and then a magistrate or a judge is no longer compelled to take into consideration the things we are talking about. That could totally erode the circle sentencing that we have built up over a short while and that we are having such great success with.

CHAIR—Mr Brazil, do you have anything to add?

Mr Brazil—Only to restate that the Aboriginal Legal Service is not proposing that customary law or cultural practice be taken into account by way of defence in the sense of disallowing a finding of guilty, but that the court be allowed—and directed, perhaps—to consider the circumstances of a person in finding an appropriate sentence for him. As Mr McKenzie was saying, by removing that and by not allowing the court to take into account cultural practice or customary law, it is really not allowing the court to take into account the circumstances relating to the individual before the court. The cultural practice is uppermost in our minds.

CHAIR—Thank you very much. You have just been talking about circle sentencing, and on page 6 of your submission you refer to that broadly as well. The paragraph that I am interested in says:

> We argue that the recognition of cultural difference and the ability to take into account cultural practices are fundamental matters in the successful operation of such courts.

That is fine. It goes on:

> To deprive a sentencing court of the power to consider cultural matters including customary law and cultural practice would be to deny these Aboriginal Sentencing Courts an important component of what makes them work so well in the interest of justice and in the interest of Aboriginal communities.

So it is your proposition that the amendment to section 16A by the addition of 16A(2A) which says:

> However, the court must not take into account under subsection (1) or (2) 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—

will have a direct impact on the capacity of an Aboriginal sentencing court, in whatever form it comes—circle sentencing, community courts, Murri courts, Koori courts and so on—to operate properly.

Mr McKenzie—Yes, on any Commonwealth offence. That is exactly what we believe, and it is on the basis that the whole process is established upon and gets its strength from the mutual respect flowing from the offender to the people in the circle and in the other direction from the community and elders' representatives on the circle back to the offender. If that circle as a forum is prohibited from taking into account any cultural practice that may be very relevant to the offender's misdeeds then that whole basis of trust and respect starts to fall

away and erode, and it could well disappear. We believe that there is a very real threat here if this bill were to become law. As we say, the most common prosecution of our clients in this state under federal law is for Centrelink fraud; that will be the first matter that will no longer be able to be referred to circle sentencing.

CHAIR—I am perhaps not as familiar with circle sentencing in New South Wales as I might be; it is a long time since I left anything to do with the New South Wales jurisdiction and court system. How, officially, in the structure does that fit into the sentencing process?

Mr McKenzie—It has a legislative base; it is recognised by New South Wales law that it has a particular role to play in the criminal justice system. A magistrate in a courthouse to which a matter would ordinarily go is involved in the decision as to which particular offences and offenders get referred to the circle sentencing. So there is a filtration system, firstly, through the general criminal justice system. 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.

CHAIR—And to take the situation further, this, as we all know, applies to offences committed under federal law, but the plan of the Commonwealth, it would seem to me, is to encourage the states and territories to amend their laws in the same way, which would mean that you would have direct amendments in law—if they were to take that up—in the New South Wales system.

Mr McKenzie—Yes. And were that to happen in the New South Wales Crimes Act amendment then we do not think circle sentencing could 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. I have referred to that in our submission in setting out those principles that His Honour Justice Wood set down in the Fernando case; they will no longer be able to be taken into account.

CHAIR—I wanted to thank you for your exposition of the Fernando case in your submission; it has been helpful to the committee. I am reasonably confident the Commonwealth, though, will say to me that, even after the proposed amendments are enacted, subsection 16(A)(1) will still require a court to consider all the circumstances of the offence, which might include an offender's cultural background, and therefore it will not be a problem. That is what they will say to me; what do you say to that?

Mr McKenzie—As I mentioned before, that is true—the statement as it is. It 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. What we deal with day by day in the criminal courts is a very intricate balance of a mosaic between legislative law and judge-made law. It is a combination, as those two intersect, that actually produces the law that is implemented on a day-to-day basis in our courts.

In this situation, 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. That is what we are concerned about.

CHAIR—Would it be your contention that in relation to the advances that have been made in these circumstances, particularly in relation to the effectiveness of sentencing courts and so on, amending the law in this way would be a retrograde step?

Mr McKenzie—Yes.

CHAIR—Thank you very much and, again, thank you for your submission. It was very helpful.

Senator KIRK—Chair, you have touched on the issue I was going to ask about; I do not know that I can take it very much further. But I want to clarify whether it is the case that with, say, a federal offence the matter would go in the first instance to a state magistrate, who determines the guilt or innocence of the person, and then the matter goes to the sentencing court. Is that correct?

Mr McKenzie—No, it is not quite like that. It certainly goes to the state magistrate, dealing in his or her federal capacity—that is what this legislation is all about. But whether or not that matter gets sent to circle sentencing is a separate decision. The question as to whether it comes up at all in front of the mainstream criminal court is decided at an earlier stage, before its first day in the ordinary court.

Senator KIRK—I see. So the question as to whether or not it is going to go to a circle sentencing court is made at the outset—before the substantive issue is even determined?

Mr Moore—Because you cannot have indictable offences. Obviously, they have to be set within a certain range of offences that go before the circle. The court administration process is that they have somebody who works in the court and with the community elders who sit as the circle panel. Somebody might be sent to that panel to be assessed. If they are assessed as coming from that area and are showing that they could get some benefit out of the circle then they would be referred to the magistrate. The whole process would then be set in train that they would go through the circle. The circle will not just sit once; it could sit several times.

Mr McKenzie—I should stress, for everyone's understanding, that only offenders who are entering pleas of guilty are even eligible to go to the circle sentencing. So it is a sentencing court only.

Senator KIRK—I am just wondering, if this were to come into effect, what impact it might have on the actual substantive decision that is being made by the state Magistrates Court acting in its federal capacity. Given that this applies only to sentencing, would there still be an opportunity to take into account customary law, almost as a basis for—maybe not a defence but—

Mr McKenzie—Not the way the bill is worded. The real catch for us is that phrase 'or lessen the seriousness of the offence'. That is what pleas and mitigation on a plea of guilty are

all about. It means that a lawyer would be successfully objected to by his or her prosecutory colleague for even mouthing the words. Even wider than that, by saying this is not quite as serious as if this were the case, we will be prevented from even being able to say that.

Senator KIRK—Would this have ramifications as to the number of pleas of guilty that are made in the first instance?

Mr McKenzie—That may well be a practical outcome of it. Obviously our advice to clients is that you have got absolutely nothing to gain by pleading guilty.

Senator KIRK—So plead not guilty and go through the process, which will lengthen the time it is going to take and increase the number of resources that will have to go into it.

Mr McKenzie—And the resources of the court and all the criminal justice agencies involved.

Senator KIRK—So it could have really quite a counterproductive effect.

Mr McKenzie—Yes. I do not want to exaggerate it; I am mindful at this stage that it will only apply to a very small number of offences that affect our Aboriginal clients.

Senator KIRK—But if it goes to the states—

CHAIR—But that is not the plan, Mr McKenzie.

Mr McKenzie—I know that is not the plan. I can only address the bill that is before—

CHAIR—I understand that, although we can use the COAG communique as a pointer.

Senator KIRK—Although even in the case of federal jurisdiction, as you have said, why would a person plead guilty now? Why would they not just plead not guilty and then lengthen the whole process and increase the resources that would have to go into it?

Mr McKenzie—There is one thing that strikes me about this whole situation, referring to the communique, as you did. As I understand it, the communique was to specifically relate to offences involving sexual violence and domestic violence, and yet this bill makes no distinction about that.

CHAIR—I would just observe: because there is no relevant jurisdiction.

Senator TROOD—Mr McKenzie, in light of the evidence you have given, can I just clarify a remark you made at the start of your submission in relation to 15AB. You made a general observation about that being acceptable, but I presume you are saying 15AB(1)(b) is not acceptable. That is the part that refers to the court not taking into consideration customary law et cetera. I assume that is what you are saying—that you are not offended by (1)(a) but that (1)(b) is a matter of concern, as presumably are the contents of 16A(2). Is that right?

Mr McKenzie—That is correct. Thank you for that. I did not properly explain.

Senator TROOD—With regard to the inclusion in 1994 of the 'customary background' phrase, how might that have had or not had an impact on the way in which this legislation may have worked? Is there much case law or evidence that this has been a significant inclusion?

Mr McKenzie—I can only talk from ALS experience and practice. I have been in and around the provision of Aboriginal legal services for 25 years now, and that marked a very

real beacon, if you like, for all the members of the judiciary to make sure they took that into account. That does not mean they had to mitigate a sentence on the basis of it; they had to address their minds to it. That is all we are asking. We are asking for the ordinary operations of the courts to be directed to at least address this as a set of principles. Through our day-to-day experience, we have experienced a much greater preparedness of the judiciary since 1994 and the commensurate state legislative sentencing amendments that came in around the same time. We have found almost without exception that the judiciary is far more receptive to at least listening and allowing the courts' time to be taken up with presenting evidence on the cultural background of our clients being sentenced in particular to criminal offences.

We of course still come across some members of the judiciary who think that is all a load of whatever and should not be considered. Now, we are not saying that we can control them; all that we ask is that they address their minds to the present direction in a certain principled way and that it be adhered to. If they do not do that, that at least gives us a point of appeal to an appellate court, where we can say: 'Here is a clear diversion from this justice's responsibility under this act. They haven't done this, they haven't done it in good faith; therefore, it gives us a point of law to bring an appeal to you as the appellate court and ask you to overturn the sentence and perhaps put in a more lenient one.' We see that that is where the effect will be.

Senator TROOD—I can see the force of that argument, but is that not also a difficulty, in the sense that the legislation would seem to be addressing a concern that the courts have now gone too far in the other direction, that we need to rebalance the consequences of 1994 and the changes that took place in both the Commonwealth and the state and territory legislation at that time? What is your answer to that proposition?

Mr McKenzie—My answer is: that is exactly why we have the appellate structure within the courts. If the prosecuting authorities in whatever state or territory feel that it is too lenient a sentence, they still have open to them the option which has always been open to them—the appellate structure through which they can launch an appeal against the inadequacy of a sentence. I think the lie is put to the government's position when one looks at the statistics on the scarcity of Crown appeals on inadequate sentencing; one sees that that is not a view held by the government agency which is entrusted with making sure that the sentencing and consideration has not gone too far, as you said in your remarks, Senator.

I do not think this is the right way to go about fixing that imbalance. It seems to me the way to fix it is for the agency of the government, the Commonwealth DPP in this case, to be courageous and take appeals all the way to the High Court if necessary, if it can get a point of law to do it. That is where you can set the tariffs, if you like—which are the terms criminal lawyers talk in—of what sentence is appropriate for what range of offences. The legislative tool is a much blunter tool, and it does not allow for the idiosyncrasies and particularisation of the circumstances of not only the offence but also the offender. That is why we believe it is best left to the courts set up in the appellate system to right that imbalance, rather than a tool like this which we fear is going to have a lot of unintended, collateral-damage consequences.

Senator TROOD—And you are obviously concerned because this is the first piece of legislation, as I understand it, in relation to the COAG decision that will be replicated through

the states and territories. Have you had any indications yet of the direction in which the states and territories might move with regard to that?

Mr McKenzie—Only in that they are signatories to the communiques. We have had no communication other than that. But they signed up to the communiques.

Senator TROOD—It is a matter that Senator Payne obviously raised. I suppose the question is: you made a compelling point about the importance of these changes in New South Wales; have there been any intimations from the New South Wales Attorney-General about these?

Mr McKenzie—They are considering them, yes, but they have not given us an indication as to whether or not they will follow the Commonwealth lead. But, certainly, we know that they are considering them.

Senator TROOD—One final question: do you regard this legislation as being discriminatory?

Mr McKenzie—Yes.

Senator TROOD—You do?

Mr McKenzie—Absolutely.

Senator TROOD—On what basis?

Mr McKenzie—On the basis that removing an all-important consideration of one's cultural background is in effect discriminating against people who are not from the majority mainstream cultural background. It is forcing such people to be judged on the same basis as people who are members of the mainstream cultural background of Australia, whether you class that as Anglo-Saxon or something else. People who do not fit into that cultural background are effectively having their own cultural background locked out of the whole process.

Senator TROOD—So, even if there were not references in the second reading speech and to some extent in the bill, that could, on one view, take you in the direction of saying, 'This piece of legislation relates to Indigenous Australians,' the removal of the reference to cultural issues is in itself discriminatory?

Mr McKenzie—Absolutely. That is our contention, yes.

Senator TROOD—Thank you.

Senator CROSSIN—Mr McKenzie, in your conclusions you actually say that you support the provisions in the bill that relate to victims and witnesses, especially those in remote communities.

Mr McKenzie—Yes.

Senator CROSSIN—Is this in relation to having consideration as to whether a person comes from remote community when it comes to bail provisions?

Mr McKenzie—That is correct, yes. We think that is quite proper because we are very concerned for the victims of family violence and, even more importantly, child sexual abuse. We think that that is a very balanced and appropriate measure.

Senator CROSSIN—But you have problems with the prohibition of customary law and cultural practice from the bail and sentencing provisions.

Mr McKenzie—Yes.

Senator CROSSIN— I take it there have been a number of cases that use the Fernando principles. That was almost a watershed or a benchmark, was it, in setting parameters for the use of this?

Mr McKenzie—Yes.

Senator CROSSIN—Do you believe the changes to the federal legislation will move or walk away from those principles?

Mr McKenzie—In relation to all federal offences, yes; if it flows through to the state legislation, totally.

CHAIR—I have one other question which relates to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. Your submission makes reference to that, both in the context of R v Fernando and more generally. Can you make any further comments on how these amendments sit with the recommendations?

Mr McKenzie—Certainly. To begin with, the overall thrust of the recommendations of the royal commission was to minimise Aboriginal imprisonment. 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.

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 need 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.

CHAIR—I have taken the opportunity recently to reacquaint myself with some of the recommendations of the royal commission, not just relating to bail, sentencing and imprisonment generally, but also more broadly. It seems to me that the essence of the royal commission and its recommendations and considerations was really about the need for the authorities, very broadly speaking, to take into account the differences existing within the Australian community because of customary practices and cultural background—specifically in relation to Indigenous people—to avoid something as fundamental as Indigenous deaths in custody. Is that a reasonable summation, in your view?

Mr McKenzie—Yes, indeed. That is why the general thrust of this is that is going against that.

CHAIR—Mr Brazil, Mr McKenzie and Mr Moore, I thank you again for your submission and for your appearance here today. It has been very helpful to the committee.

[12.25 pm]

BOERSIG, Mr John, Assistant Secretary, Indigenous Law and Justice Branch, Attorney-General's Department

WILLIAMS, Ms Kimberley, Acting Director, Criminal Law Reform and Policy Section, Criminal Law Branch, Attorney-General's Department

CHAIR—We are grateful for the comments the department gave to us yesterday, which we have numbered as submission No. 11. Do you wish to make any amendments or alterations to that?

Mr Boersig—No, we do not.

CHAIR—I remind witnesses that the Senate has resolved that an officer of a department of the Commonwealth, or of a state, shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. The resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. Mr Boersig, do you wish to make an opening statement?

Mr Boersig—No, I do not.

CHAIR—I would like to acknowledge the committee's gratitude for your presence here during the proceedings this morning. We always feel that it helps the committee to have the officers present during the hearing. It gives you an opportunity to hear the issues that are raised and to have some capacity to appreciate issues the committee might be pursuing. We are grateful for that. Thank you for your time. I will start with a few questions. First of all, you will know that most of the witnesses from whom we have heard today have raised issues concerning criminal law procedures affecting primarily Indigenous people. Firstly, in drafting the bill, what consultation did the department undertake specifically with Indigenous representative groups and, secondly, with ethnic community groups?

Mr Boersig—In relation to Indigenous groups, there was no direct consultation by the department, except to say that we raised the issues with the Aboriginal legal services. 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.

CHAIR—Does that mean that the removal of the phrase 'cultural background' in paragraph 16A(2)(m) was not regarded as relevant by the department in terms of its impact on ethnic communities in Australia?

Mr Boersig—I think the overall impact of 'cultural background' was seen as applying to all Australians and that was consistent with the position that the government is taking in relation to this type of legislation—for example, in relation to terrorism.

CHAIR—It occurs to me, though, that, in relation to terrorism, when the committee has pursued questions of consultation there has occasionally been some degree of consultation and in fact the very specific Muslim Community Reference Group, which has been established, is a part of that process. None of this was run by any of those groups, was it?

Mr Boersig—No, it was not.

CHAIR—I assume the bill was introduced in the Senate for the purposes of referring it to this committee for consideration. Was it introduced in the Senate or in the House?

Ms Williams—The Senate.

CHAIR—Why was it not introduced by the Attorney in the House?

Mr Boersig—I cannot answer that question at this stage. It related to a parliamentary business issue, I am advised.

CHAIR—So many things do. The parliamentary secretary's second reading speech refers to the National Indigenous Violence and Child Abuse Intelligence Task Force. Can you update the committee on progress on that?

Mr Boersig—As far as I am aware that is being progressed on a multilateral basis between the various police forces and the Commonwealth. At this stage, as I understand it, there is still discussion in relation to that. We do not have the carriage of that matter.

CHAIR—In relation to the COAG communique and other matters of implementation, the COAG communique refers to a request to:

... the Standing Committee of Attorneys-General (SCAG) 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 and to recommend any changes required.

I note from the COAG communique that the next COAG meeting is not due until early next year. Has there been any progress on that aspect of the communique at all?

Mr Boersig—I understand that there have been officers' meetings and there are probably papers being prepared from each of the jurisdictions.

CHAIR—Not withstanding that COAG agreed to make that consultation through the SCAG process and then to come back to the COAG meeting next year, the Commonwealth has decided to move ahead first?

Mr Boersig—That is correct.

CHAIR—How then will the Commonwealth's amendments address matters of family and community violence and sexual abuse specifically?

Mr Boersig—The overall context in which these amendments are placed relates to the issues that arose in the summit. In relation to that, there are a number of initiatives. I have mentioned one already but, in particular, in our portfolio we are looking at community legal education and traditional education. Those are the issues that we are progressing and we are doing that on a bilateral basis with the states.

CHAIR—I understand that and I commend those initiatives—I think they are very important—but how will these specific amendments and their application to matters of federal law address family and community violence and sexual abuse?

Mr Boersig—The position that the Commonwealth is taking here is one of leadership and modelling. This is the direction we suggest that other states and territories should be taking in relation to that legislation.

CHAIR—That is an interesting observation. I do not see that aspect mentioned in the second reading speech. It refers overwhelmingly to abuse, violence and other criminal offences. Okay, I understand the point that you make. In the absence of our colleague Senator Ludwig somebody needs to ask what mischief it is that we are trying to cure, so let me take that mantle inadequately myself.

Senator CROSSIN—He would be flattered to know you thought of him.

CHAIR—You would be surprised to know how often I need to think of him! The Law Council submission, which you may or may not have seen, Mr Boersig, refers on page 2 to a number of statistical aspects of the application of cultural background or customary law in the legal system. The submission says:

- there has been no reported case in which cultural background or customary law has been used by an Australian court to determine the guilt or innocence of an offender ...

It indicates:

- cultural background has been considered by a court in only a limited number of cases, and only where it is relevant to the circumstances in which the offence was committed.

Is it possible to advise the committee the number of cases where cultural background has been considered or alternatively whether there are any cases where cultural background or customary law have been used to determine guilt or innocence in matters of federal jurisdiction?

Mr Boersig—I am not aware of any case that determines guilt or innocence. In relation to mitigation, I understand that some issues of mitigation are brought in courts, particularly in the Northern Territory for example, and that those issues are raised in the context particularly around tribal law.

CHAIR—Would it be possible on notice to determine whether you can find any specific examples to provide to the committee? To go back to Senator Ludwig's turn of phrase, the mischief that we are trying to cure is not really a mischief. It goes back to the point you made earlier, I assume, about the Commonwealth taking the lead.

Mr Boersig—It does.

CHAIR—You will have heard the evidence of the Aboriginal Legal Service New South Wales and the ACT which was just presented to us. You might not have had the benefit of receiving their submission because, like everybody, they were constrained by time and we have only just received it. I am very interested in the observations they made in relation to these amendments and the impact they may have on the capacity for initiatives such as community courts, circle sentencing and Murri courts to work effectively when cultural background is not allowed to be taken into account. For your benefit that reference is on page

6 of their submission, at the back. They raised quite serious concerns in the view of most of the members of the committee. What would your comments be on those matters?

Mr Boersig—In relation to sentencing provisions generally, it is the case that a number of factors are balanced at any particular time. Sentences are an amalgam of considerations whether they are done at a circle sentencing court, a Koori court, a Nunga court, a Murri court or indeed at normal court proceedings. You are balancing a raft of factors—in fact, I could not list the number of factors that are considered. There are major principles being considered and, whether it is parity, retribution, punishment, deterrence, restoration or repair, all those factors are operating at point of sentence.

At various times governments legislate to control or restrict those. The Commonwealth legislation is a good example of that, where you are putting a layer over the top of what was generally common-law practice. You are giving some direction and guidance, and that is the context in which the kinds of amendments that we see here are done. It is not the first time that this type of approach has been taken. In fact it is a usual course, and you can see that in bail provisions as well around Australia. Certainly you see it in any kind of codification of sentencing procedures.

In the operation of an alternative, diversionary or sentencing court such as a circle court I should say that a magistrate is present, as I am sure the committee will be aware. This is not a group of Indigenous people meeting by themselves. The court comprises a magistrate, a police prosecutor, a lawyer and members of the community. What is happening there is that a balance is being taken in relation to a whole range of evidence and information that is often not available at the time of sentence in a normal Magistrates Court, for example. That is partly to do with the time constraints. A short plea of guilty in a Magistrates Court might take three minutes. In a circle sentencing court it might take three hours to exercise the same kinds of issues.

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, and that is why all these participants are involved. 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.

CHAIR—Mr McKenzie put forward some well-articulated arguments about practice and procedure, I suppose, just as a professional who works in the system in New South Wales talked about pleas and mitigation in relation to a guilty plea and so on. An experienced practitioner like Mr McKenzie thinks this will have a very significant effect on how that system works. I acknowledge that he was talking most particularly about whether it flows on through the New South Wales jurisdiction. Do you contend that his concerns are without foundation?

Mr Boersig—I would say that there can be an impact on that process. But, as I indicated a short while ago, there are a number of factors operating at any one time which are being balanced by any court proceeding. One of the intents behind this is the needs associated with

victims and balancing some of those needs. It is the case that there is more emphasis being given here on those needs than would otherwise be there in the current form.

CHAIR—I think the committee will have to weigh the evidence in that regard. It will not surprise you at all, Mr Boersig, that my final questions relate to the Royal Commission into Aboriginal Deaths in Custody. I see that the second reading speech and the explanatory memorandum contain references to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. They say that the recommendations were considered during the formulation of the bill. Can you tell us which specific recommendations of the royal commission were considered during the formulation of the bill?

Mr Boersig—The recommendations of the royal commission are numerous. I think there are 339 in fact. They are all-encompassing. There are different chapters ranging from policing through to court structures, dealing with youth and special issues. There is emphasis on the importance of families and family relationships, particularly in Indigenous communities. All those issues influenced the approach taken to the way that we looked at this legislation. As I indicated, there is a balanced approach being taken in relation to the needs of victims and communities. As you indicated earlier, the thrust of the royal commission—which I would not disagree with—was major concerns in relation to incarceration.

There are also recommendations in that report for effectively a holistic response to these issues, and 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. I have not got them in front of me so I cannot quote them verbatim, but certainly 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.

CHAIR—There are also recommendations relating to sentencing and remote communities, both of which are specific aspects of this bill. How were they dealt with in the consideration and the preparation of the bill?

Mr Boersig—The impact this legislation might have on alternative sentencing was considered—and the impact that this has on the sentencing process was considered.

CHAIR—Can you provide the committee on notice with more information about the developments in legal education, judicial education and so on?

Mr Boersig—Yes. I can indicate that they are proceeding bilaterally and we are putting proposals forward. The gist of the proposals relate to judicial education through the National Judicial College. They relate to a 'train the trainer' package, a package of information, which is appropriate in relation to human rights and individual rights, how that information might be conveyed and the process for implementing that on the ground through culturally appropriate service providers. But the essence of that is about attitudinal change with a longitudinal process taken. If you want to bring about attitudinal change, it is going to take some time. Having a lecture in a remote community about your rights may be valuable—and certainly

having leadership in that area is valuable—but it needs to be followed up with small group work and one-to-one work within a community. That is the context of it.

CHAIR—Thank you for that brief outline. I have to say that this is not a matter of your responsibilities specifically, Mr Boersig, but in the discussion today of matters flowing from the COAG meeting in June and the summit in July—I might have those in reverse order—it seems to me that the explanation of being progressed bilaterally does not produce a great deal. We have had the Social Justice Commissioner and Acting Race Discrimination Commissioner here this morning and the only thing that Tom Calma has heard since those meetings in June and July is this legislation.

Senator CROSSIN—I am going to go back over quite a great deal of that evidence, Mr Boersig. My understanding—and correct me if I am wrong—is that A-Gs has presented no submission to this inquiry.

Mr Boersig—That is correct.

CHAIR—Except for the one received last night.

Senator CROSSIN—Yes, but the one received last night was on request from a query from Senator Ludwig, so it is actually in response to one of the committee members—is that correct?

Mr Boersig—That is correct.

Senator CROSSIN—And there is no opening statement in relation to a position about this legislation from A-Gs?

Mr Boersig—No, I have not made an opening statement.

Senator CROSSIN—Have any discussions occurred with OIPC?

Mr Boersig—In relation to?

Senator CROSSIN—The impact of this bill, the introduction of this bill, the ramifications of this bill or the work they may well be doing to go across some of the COAG discussions.

Mr Boersig—Yes.

Senator CROSSIN—What has occurred?

Mr Boersig—There have been ongoing discussions from before the summit right through to the current period. We are involved with them in bilateral discussions.

Senator CROSSIN—What communication has been made with OIPC in relation to this particular piece of legislation?

Mr Boersig—The legislation has been discussed across portfolio. As I have indicated, we are involved in preparation for bilateral discussions because the legislation is integral to that process.

Senator CROSSIN—Have OIPC seen this legislation?

Mr Boersig—Yes, they would have seen this legislation.

Senator CROSSIN—Have you asked OIPC to provide you with comments on this legislation?

Mr Boersig—Yes, we have discussed this legislation with them.

Senator CROSSIN—Can this committee request OIPC to provide us with their comments or their views about this legislation?

CHAIR—We can write to OIPC, certainly.

Senator CROSSIN—Have you had any discussions with Minister Cobb's office in relation to other ethnic groups in this community?

Mr Boersig—No, I have not.

Senator CROSSIN—So this legislation has really centred around the impact on Indigenous people in this country, as opposed to the broad reference of cultural background—is that correct?

Mr Boersig—My involvement in the new process has centred around the impact on the Indigenous community.

Senator CROSSIN—Why has it not gone further—such as to ethnic groups, for example?

Mr Boersig—The legislation has gone through quickly. It has been prepared on that basis, and it has been seen as a model. It is seen as consistent with the approach the government has taken in relation to the kinds of legislation and protections that should be offered to all Australians.

Senator CROSSIN—There is an expectation that the Senate will deal with legislation that will impact on people in our community other than Indigenous people and yet the lead agency responsible for this has not notified or had discussions with multicultural groups in our community about this, and I find that most disturbing. What disturbs me even more, I suppose, is that, because of the short time frame for this legislation, we have not had a chance to communicate with those groups or for them to communicate with us on their views about it. Has this legislation been discussed with the National Indigenous Council?

Mr Boersig—Not to my knowledge—not this legislation. The general issues have been before the National Indigenous Council.

Senator CROSSIN—When you say 'the general issues', are we talking about issues in relation to family violence and sexual abuse or are we talking about amending the Criminal Code of the Commonwealth Parliament?

Mr Boersig—Family violence and sexual abuse.

Senator CROSSIN—I will get to that in a minute. The COAG communique asks SCAG to report to the next COAG meeting on the extent to which bail provisions and enforcement take particular account of the impact on victims and so forth and recommend changes. Is the Commonwealth now walking away from the SCAG process? Why would you want to introduce legislation that would pre-empt the work that has been asked of it by COAG?

Mr Boersig—In that sense, nothing stops the Commonwealth pursuing legislative options now in relation to showing leadership and modelling to the states in the approach the Commonwealth is saying should be taken to these issues.

Senator CROSSIN—It pre-empts it, though, doesn't it? It says 'and to recommend any changes required'. You are not actually going to recommend changes required; you are going to front up to the next meeting to say, 'We've already done this.'

Mr Boersig—The processes are bilateral. In the process of bilateral discussion we are already doing that. We are saying: 'Here are some suggestions. Here is the way in which you might amend your legislation to better reflect, for example, the protection of victims.'

Senator CROSSIN—The Australian Law Reform Commission this morning said to us that sometimes they do recommend you take action and amend legislation as a form of leadership. In this particular instance, they do not recommend that. They are not suggesting that this is any form of leadership at all. In fact, they do not support the majority of this legislation. On what basis do you come to a view that this provides leadership?

Mr Boersig—That it models the type of legislation that could and should be imposed. It is consistent with discussions with each of the states.

Senator CROSSIN—I might take you to task about this, consistent with our discussions. One of the things that I have been trying to come to grips with is exactly where the link is between the changes to this legislation and family and domestic violence. The majority of this legislation, as far as I can see, will impact on people who breach the Social Security Act or perhaps a terrorism act. Can you tell me any Commonwealth act that this would apply to that would specifically relate to a crime to do with domestic or sexual violence?

Mr Boersig—I am not able to indicate any particular matter of that nature.

Senator CROSSIN—It is a state and territory responsibility, isn't it?

Mr Boersig—Yes.

Senator CROSSIN—Then how does this provide leadership in dealing with family violence and sexual abuse in Indigenous communities?

Mr Boersig—The tenor of the principles were those that were agreed at COAG. It 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 jurisdictions approaches very similar issues. One of the positions that we are able to adopt is the strength of harmonising those kinds of issues.

CHAIR—That goes exactly to the point that the ALRC make in their report *Same crime, same time*, which says that the entire system for sentencing federal offenders should be significantly overhauled to achieve consistency, fairness and clarity. Why make this amendment now, before the government has even responded to that report?

Senator CROSSIN—Good point.

Mr Boersig—The point of this is that it reflects and has come out of the very real concern about family violence and sexual abuse within Indigenous communities. It is consistent with the approach arising out of the summit, which is to take effective, clear and definitive action as quickly as possible, and to provide leadership in relation to those types of issues. It is certainly consistent with that process.

CHAIR—Mr Boersig, I feel that we are grasping at straws. You keep giving us the rhetoric that somehow this is linked to and will be connected with and will cure or address the COAG discussion about family and domestic violence. But the amendment to this crimes bill will actually have no direct impact on that, because no Commonwealth legislation crosses that action, does it?

Mr Boersig—In relation to Indigenous issues it would be remote.

Senator CROSSIN—No—in relation to family and domestic violence.

Mr Boersig—It would be remote, yes.

Senator CROSSIN—COAG agreed—and I asked this of previous witnesses—that no customary law or cultural practice excuses, justifies, authorises or requires. Is that not a statement that says it cannot be used as a defence?

Mr Boersig—I think the statement, which also adds that it lessens the serious level—

Senator CROSSIN—I am not asking about that; I am asking about the first couple of words.

Mr Boersig—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.

Senator CROSSIN—I have not got onto those last words yet. I want to concentrate on the first couple of words. Isn't it true that it could be interpreted to mean that a person cannot use that as a defence, and isn't it a fact that there are no cases where a person has used that as a defence?

Mr Boersig—I am not aware of any cases where it has been used as a defence at all. The words can be interpreted in both ways—both as clearly saying, 'This is not a defence in a plea of not guilty,' and as, 'You can't excuse or justify your behaviour or say it is authorised by something.'

Senator CROSSIN—I get across communities, and I was in Maningrida only last week. I went there specifically because of the national attention that has been given recently to the case at Maningrida. The community are very clear about the fact that they do not believe Indigenous people should use it as an excuse either. They are very clear about the fact that Indigenous people should face the full brunt of the law, and we cannot seem to get from people any cases where a person's Aboriginality has been used as an excuse. If there are not overwhelming cases to prove the contrary to that, what is the justification for the changes that are before us today?

Mr Boersig—I think it is clearly that, if you are looking for a principled or high moral ground position, then you have a statement being made that puts the position beyond doubt.

Senator CROSSIN—In the information you gave us that I received this morning, you say at the fourth dot point under No. 1, 'Cultural background should be a mandatory consideration':

However, even after the proposed amendments are enacted, subsection 16A(1) will still require a court to consider 'all the circumstances' of the offence, which might include an offender's cultural background.

But the explanatory memorandum simply says:

... delete the reference to 'cultural background' in section 16A ...

If it is actually deleted, what is the leverage for a court then to consider cultural background? It seems to me that you cannot have your cake and eat it too.

Mr Boersig—The history of that is, as I indicated before, that the common law includes a myriad of factors of matters that were taken into account. The Commonwealth crimes legislation listed some of those when it was codified. Section 16A(2) says 'in addition to any other matters' and then it lists all these matters. We are proposing to exclude 16A(2)(m), which is the one about background. It still would not stop the courts from considering any other matter they saw as relevant, so they could consider cultural background if they saw it as relevant at that time, and there are a number of circumstances where you would.

Senator CROSSIN—If they can do that, why delete it? I do not have a legal background, so I suspect I am coming at it from a different angle to everyone else in this room. You are saying, 'We're going to delete it from here, but we are going to use this general principle here.' Why delete it if you can still use it in some other subliminal way?

Mr Boersig—I think the point being made here is, again, that it is a position stating clearly that the law is applicable and everyone should have the same protection and be treated equally. That is the essence of it.

Senator CROSSIN—But that will not be the case, will it, because you are saying, 'However, this doesn't preclude courts from looking at an offender's cultural background.' So people are not treated equally, are they?

Mr Boersig—But it is certainly saying that it is not a mandatory consideration any more. It is saying that, if it is relevant to a court then the court will take that up and consider it, subject to the second proviso in 16A(2)(a).

Senator CROSSIN—What specific recommendations of the Royal Commission into Aboriginal Deaths in Custody were considered while you drafted this bill?

Mr Boersig—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.

Senator CROSSIN—So you are saying that it is the general tenet of the recommendations as opposed to recommendations 2, 10 and 22, for example.

Mr Boersig—In terms of the major thrust that this imposes, we have considered the issues that relate to sentencing and alternative sentencing. Other issues are clearly on the table.

Senator CROSSIN—Why is it then that some of the submissions before us today believe that, in fact, the bill does not reflect those recommendations?

Mr Boersig—My understanding is that it is a question of emphasis. As I have indicated, there is a balance being struck here between an emphasis being placed on the needs of a community—for example, a remote community—and on the rights or the consequences that may flow onto particular Indigenous persons in those circumstances.

Senator CROSSIN—So it is a broad interpretation of the recommendations or a broad consideration of them?

Mr Boersig—The recommendations will lend themselves to both the broad and the particular. The major role in relation to the recommendations is thrust down into the operation of state and territory legislations—for example, in relation to probation and parole, in the structure of courts, and in relation to the police and so forth. The issues in relation to reporting to the Aboriginal Legal Service are the same.

Senator CROSSIN—The Aboriginal Legal Service of New South Wales said to us that they believed that it may result in Aboriginal people spending more time in jail, further adding to the already overwhelmingly disproportionate number of Aboriginal people in custody, which would be contrary to the Royal Commission into Aboriginal Deaths in Custody. What is your view of that?

Mr Boersig—The Royal Commission into Aboriginal Deaths in Custody emphasised the high incarceration rate and the plight of Indigenous people, and that is clear. How is that addressed? It is already done in a myriad of ways. There are a number of provisions, in terms of coronial recommendations that have yet to be fully implemented or, as we have seen, perhaps, on Palm Island recently—I will leave it at that.

Senator CROSSIN—I suggest to you that this is not talking about recommendations that are yet to be put in place; this is talking about recommendations of that royal commission that will be exacerbated with the changes that are being proposed now. If the general tenet of the royal commission was that we should reduce the number of Aboriginal people in custody, there is a suggestion that these laws will be contrary to that, that they will in fact see Aboriginal people spend more time in custody, and more people will spend more time in custody.

Mr Boersig—The royal commission recommendations are still within the context of the operation of our legal system and all its current parameters. They do not say that there should be open slather and people should walk out the door. It is the management of all those criminal justice issues, as they are currently done now through sentencing and like procedures. Even in relation to alternative structures, there need to be parameters under which they operate. They must operate within Australian law. The royal commission does not say anything else—

Senator CROSSIN—Maybe my question is not clear enough to you; that is not what I am asking you. What I am asking you is this: the New South Wales Aboriginal Legal Service are

suggesting that the impact of this legislation will see more Aboriginal people in custody or spending more time in custody, which goes against the recommendations of the royal commission.

Mr Boersig—It is possible that more people will be in custody. Whether that will happen will depend on a whole range of factors that may yet come into play.

Senator CROSSIN—In response to Senator Payne's question, you also mentioned that you had consulted or written to Aboriginal legal services. Which ones?

Mr Boersig—We have spoken with all the Aboriginal legal services.

Senator CROSSIN—Have you spoken to them or written to them?

Mr Boersig—We have spoken to them. They were at a meeting just recently. There was a meeting in Adelaide where the issue was raised, in June and more recently.

Senator CROSSIN—Can you provide me with a list of the people from the Aboriginal legal services who were at that meeting?

Mr Boersig—All the principal lawyers were there.

Senator CROSSIN—From every Aboriginal legal service right around the country?

Mr Boersig—That is right.

Senator CROSSIN—Did you give them a briefing on this bill?

Mr Boersig—No, not on this bill. I spoke to them of the summit and the issues that arose there in relation to customary law.

Senator CROSSIN—So Aboriginal legal services has not been spoken to or written to specifically about the legislation before us?

Mr Boersig—That is correct; we have a note about that.

Senator CROSSIN—You have talked about sentencing and said that, in drafting this bill, processing and alternatives were considered. How and in what way was that done?

Mr Boersig—We looked at the nature of restorative justice and alternative sentencing and at the kinds of forums operating currently around Australia. As I have indicated, there is a vast range of forums, which range from Northern Territory community courts through to things like the Koori court in Victoria. There is also family group conferencing or conferencing in relation to juveniles as well as the circle of sentencing approach.

Senator TROOD—I must say that, in understanding the legislative framework being put in place here, like Senator Crossin and Senator Payne, I am struggling with a couple of points that I think are probably fairly material to the direction of the bill and about which I want to ask you a couple of questions. The first relates to customary practice and law et cetera. As I understand your position—and I am helped in part by the answers to Senator Ludwig's questions—you have removed the reference to cultural background, but your view is that the court can still take cultural background into account.

Mr Boersig—In certain circumstances, subject to section subsection 16A(2).

Senator TROOD—That is my difficulty. Section 16A(2) seems to make it very clear that law and practice shall not be taken into account. How do we get around the apparent contradiction that seems to exist between these two?

Mr Boersig—You need to look at the latter part of that sentence, which relates to excusing criminal behaviour or making criminal behaviour less serious. If the information that is sought to be conveyed as relating to it is an excuse of some kind or a justification based upon a belief or a claim of a customary law practice, it would be excluded; there would be no weight. But it may be based around the circumstances of the offender. I will give an example of that. Where someone pleads guilty to spearing someone in the leg and they are charged with, say, serious assault, their excuse that this was done on the basis of customary law would not be considered. If, on the other hand, they were a defendant who was to go back out into the community and be speared because that was what might happen to them, that factor—that is, that they would be speared—could be taken into account by the court.

Senator CROSSIN—Isn't that the current situation?

Mr Boersig—Largely.

CHAIR—It cannot possibly pertain to a federal offence anyway.

Senator CROSSIN—I am just talking out loud: my understanding is that that is the current situation.

Mr Boersig—I am not saying that it would apply to any federal offence they can currently think of. That is the distinction that is being made here. Cultural factors or other factors, such as the environment to which they would be returning—that is, they would be returning to a tribal environment—could be considered.

Senator TROOD—If it were to be put before the court that a person might go out and be speared, the court could take that into account.

Mr Boersig—They may or may not take it into account, as is shown by the case law.

Senator TROOD—I presume the force of that remark is not that one would encourage spearing as a solution to the problem.

Mr Boersig—That is right. I am just saying that that does come up. We have put that as an example of where customary or tribal law may be taken into account by a sentencing judge if that were going to happen.

Senator TROOD—I must say it is perverse to my mind that you would remove references to cultural background in section 16A when in fact you intend it to remain as an element within the defence. As much as you explain it, I cannot understand why that makes any sense at all. However, let us move on. In relation to the remarks of Senator Ludwig, the department's view is that this legislation is not discriminatory—is that correct?

Mr Boersig—That is correct.

Senator TROOD—You have heard this morning almost all of the witnesses say that they regard it as discriminatory. Could you perhaps help me in squaring that particular circle?

Mr Boersig—If the legislation indicated with regard to customary law that it only applied to Aboriginal people then it would be discriminatory. In its application it does not do that; it applies to all Australians.

Senator TROOD—Are there many Lebanese, Germans, Vietnamese or Venezuelans, for example, living in remote communities around the country?

Mr Boersig—I could not answer that. In Lightning Ridge there probably are.

CHAIR—Based on your experience, that is quite true; in Lightning Ridge there may well be—and the odd person in Coober Pedy perhaps.

Mr Boersig—Yes.

Senator TROOD—Would they be in remote communities in the general meaning of remote communities?

Mr Boersig—There would be people of that background throughout Australia.

Senator TROOD—Yes, but we have heard lots of evidence containing the view that this is discriminatory—if not specifically or directly then in the way in which the bill will operate. But 15AB(2), which makes a very specific reference to people in a very specific set of circumstances, surely could apply only to Indigenous Australians?

Mr Boersig—It would apply to any customary law or cultural practice of whatever kind, however defined, in those areas.

CHAIR—15AB(2)?

Senator TROOD—15AB(2) says:

If a person referred to in subparagraph (1)(a)(i) or (ii) is living in, or otherwise located in, a remote community—

Then it proceeds.

Mr Boersig—Yes, we would be concerned about persons in a remote community, but that would not simply be Indigenous people; it would be non-Indigenous people as well.

Senator TROOD—I can see one argument about that, but I must say there are not terribly many Venezuelans that I know of who might be in remote communities.

Senator KIRK—I think Senator Trood left off at the point of discrimination. Was that right, Senator Trood?

Senator TROOD—Yes.

Senator KIRK—I might continue along those lines but perhaps in a different direction to where he was going to take it. Was any consideration given as to whether or not this legislation was consistent with the Racial Discrimination Act?

Mr Boersig—Yes.

Senator KIRK—And what did you find?

Mr Boersig—Our view was that it is consistent.

Senator KIRK—Can you explain that to me?

Mr Boersig—The operation is not discriminatory in relation to a particular group in Australia.

Senator KIRK—Why is that? It looks at customary law and cultural practices, which, generally speaking, would only apply to the Indigenous community. Is that the case?

Mr Boersig—There are customary law and cultural practices in many ethnic communities.

Senator KIRK—But the practical intent of the bill—and not only that but also perhaps its actual application—seems to be that it primarily apply only to Indigenous communities.

Mr Boersig—The bill applies across the board to all Australians.

Senator KIRK—Then perhaps you can tell me what consideration the department gave to the broader impact of the bill—that is, beyond its application to Indigenous communities. To what extent did you consider how it will apply to, for example, Australians of Indonesian descent?

Mr Boersig—The bill was drafted so that it would apply across the board. That was its intent. The operation of any legislation should pick up the issues that are being defined within its terms, and that will pick up some of the issues that we have discussed today and others in relation to, for example, Indonesian people, if that is appropriate.

Senator KIRK—As Senator Trood said, a lot of people here today have said that in their view this legislation is discriminatory, but you say you think it is not. I guess you would also reject any suggestion that there is indirect discrimination here.

Mr Boersig—The bill is drafted so it applies to all Australians.

Senator KIRK—I am trying to think who set out the argument quite articulately; I cannot recall. The cultural practices of Australians of Anglo-Saxon descent, like most of us here, are considered to be the norm and therefore they are not taken into account in these matters. However, the cultural practices of people of other descent, whether it be Aboriginal, Indonesian or what have you, are regarded differently because they are not considered the norm. In that sense, can you see that, by saying that certain cultural practices are not to be taken into account, you really are singling out a particular group in the community, which is essentially the minority, leaving out those of us whose cultural practices are regarded as the norm, and therefore there is a form of indirect discrimination going on?

Mr Boersig—I would not necessarily agree at all, and I have certainly read the material which indicated that. The cultural practices within Anglo-Celtic communities, if they were raised as an excuse, justification or authorisation for an offence or to lessen the seriousness of an offence, would not be considered by the court. That would be the application of this. So if there were some Anglo-Celtic or Anglo-Irish—

Senator KIRK—What would be an example of that?

Mr Boersig—Perhaps the Cronulla riots—using 'mateship' as a justification for assault might be a matter that would come under that category.

Senator KIRK—It is a pretty scary aspect of our culture, if that is the case.

Mr Boersig—It is, and you would be concerned if it were taken into account to lessen the penalty that they received.

Senator KIRK—I am happy for the call to go back to Senator Trood at this point, Chair, if that is what you wish to do.

CHAIR—Thank you, Senator Kirk. I think Senator Trood has dealt with the issues he wished to raise. I am still not comfortable, Mr Boersig, with our discussion about the impact of this legislation on things like circle sentencing and so on and the potential for a deleterious impact on the advances that have already been made in that area. After hearing from the voice of experience, the witnesses from the Aboriginal Legal Service here in New South Wales—from Mr McKenzie and, in particular, Mr Moore, who is from a part of New South Wales where circle sentencing has become quite highly utilised—their concerns seem to me to have foundation. I would have to check the *Hansard*, but I think you acknowledged there might be some impact, and it seems to me that that is a bad thing if this legislation, and what may flow from it, has a negative impact on the advances that have been made in this regard.

Mr Boersig—The context in which, again, any sentencing procedure is structured is a balancing of a whole range of needs—the needs of the community and the victim as well as those of the accused. In that context, there will be a balancing in any process. The operation of the legislation will not stop alternative sentencing, such as circle sentencing, from operating. For example, an explanation based on cultural law can still be given about an offence, and therefore there is an opportunity for the victim or the community to comprehend what happened if the accused said they did it for that reason, but there can be no mitigation of a sentence on that basis. And it is the magistrate who imposes the sentence, ultimately, even in circle sentencing.

CHAIR—I understand that. But isn't Mr McKenzie correct when he says: 'What's going to happen now is that the prosecution are just going to jump on any mention of those issues relying on a subsection like 16A(2A) to say, "No, I'm sorry, we can't go here. It's not on. They've said ... They've changed the law"'? It is not a subtle implement you are using here, if I might say so.

Mr Boersig—I think the example that Mr Moore gave was the fraud in West Dubbo. Is that one of the issues you are referring to?

CHAIR—No, I am not specifically referring to that at all. I am referring to the very practical approach that these advances in the law have taken to deal with matters relating to Indigenous sentencing and criminal law operations.

Mr Boersig—The way an alternative sentencing forum—say, a juvenile conference—might operate would not necessarily rely on the Indigenous background. You could still have a conference that relates to the concerns and needs of those involved; they could still progress. The only issue that impacts here is whether there should be mitigation based on the claim by the person that their actions were justified or authorised by customary law. The kind of sentence that can be imposed, the restorative or reparative work that can be done, is still there and evident, but you cannot have a lesser sentence because of it.

CHAIR—The point that they make—and, I think, quite reasonably—is that we are in a competitive environment here: we are in an adversarial legal system. And if the prosecution can grasp at a sentence that says, 'The court must not take into account any form of customary law or cultural practice,' the rest of the sentence is going to become completely irrelevant, in

practice. That is a big peg on which to hang your hat if you are trying to gain a successful prosecution. And the bluntness of this approach in both 15AB and 16A(2A) is very impactful.

Mr Boersig—With greatest respect, the processes in which the prosecutor may well raise those issues should be ones in which balanced argument is presented by the other side. Circle sentencing, for example, as I said, still has the lawyer there and the police officer and the magistrate involved, and it is a determination for the court. If the court errs, there is an appeal process.

Senator TROOD—But you cannot get there, can you? You cannot get to that process unless you pass through the criminal justice system in the first place.

Mr Boersig—That is right, but this is occurring within the criminal justice process. The circle sentence is a referral by a magistrate, for example, to the circle, which is composed of elders and members of the community and sometimes the victim and the victim's family, and a police officer may be involved. The prosecutor and the magistrate set aside time—court time, in fact—to hear the case. So it is not outside the process at all.

Senator TROOD—I can see that view but one of the things concerning me is that one of the values in the progress that we have made since 1994, and the changes that have occurred in relation to the state and territory legislation as well, would seem to be that, in part, the Indigenous communities around the country are taking some responsibility for the behaviour of their members and, to the extent to which criminal justice is incorporated in that taking of responsibility, that is a good thing. And so, in some cases, clearly, we have a situation where there is a kind of sharing of the consequences. A magistrate in the criminal justice system might say, 'There is an argument being put to me about the cultural dimension of this. I will impose a sentence, as I am required to do, but I know there will be, as well, a circle, which will impose an additional sentence.'

The consequence of this legislation could be that the criminal justice system will impose a sentence of some kind, and the offender will then find her or himself being punished a second time, to a point which reflects an Aboriginal or an Indigenous community's view of the seriousness of the offence. Is there not a danger that a sentence might be imposed which is perhaps—on even a view of the criminal justice system—beyond what might be reasonable for the circumstances?

Mr Boersig—This is not a question of double jeopardy. The circle sentence occurs and is within the context of the proceedings of the criminal justice system. That is the sentence that is imposed. 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.'

The example that we give is the one where the person is a defendant and the prosecutor and the court knows that they may go out and be speared. That may be a matter that could be considered by the court in terms of tempering the sentence for what they have done. There are

various cases that fall one side or the other in relation to the actual decision that was made. What this legislation is directed at are the other circumstances where it is the defendant who is claiming less culpability or reduced seriousness because of the claim that customary law justified their action. That is to be excluded.

Senator TROOD—I think I am with Senator Payne in holding the view that there are not going to be terribly many judges around the place who are going to allow that issue to be raised because they have a very clear direction from the legislation as to the extent to which that is a matter that is relevant to any sentencing considerations.

CHAIR—The way the bill is drafted it says that the court must not take into account any form of customary law or cultural practice as a reason for rendering less serious the criminal behaviour to which the offence relates in relation to both bail and sentencing. Can it take those things into account to heighten the sentence?

Mr Boersig—There is nothing to stop that happening.

CHAIR—That is hugely reassuring! Can you tell me what the definition of cultural practice is?

Mr Boersig—I think that, in the same way as was discussed earlier in relation to cultural background, there is not one clear definition of what cultural practice will be. Anthropologists might define it one way and lawyers another, depending on the context.

CHAIR—So the courts will be able to say, 'In the context of this, we don't think this amounts to cultural practice.'

Mr Boersig—They may be able to do that. It is not prescribed.

CHAIR—Has that given any certainty?

Mr Boersig—The legislation without that type of definition gives a broad possibility of interpretation that would only be remedied ultimately on appeal.

CHAIR—I want to come back to the question I asked before. I was stunned by your response, which is perhaps why I responded more glibly than usual. So a court could take into account customary law or cultural practice to increase a penalty or to regard something as more serious?

Mr Boersig—Yes, there is nothing stopping that.

CHAIR—Why would this not be drafted in the neutral then so that it did not go either way, it just should not be taken into account?

Mr Boersig—Again, the context is one of principle about protection of victims and the emphasis being placed on those types of needs.

CHAIR—So it is appropriate in the Commonwealth's view to leave it open to the courts that additionally onerous penalties could be imposed because of someone's cultural background or cultural practices or customary law?

Mr Boersig—If they indicate that they claim their customary law or cultural practice authorises or justifies the activity, that is true.

CHAIR—That is concerning.

Senator CROSSIN—In relation to Commonwealth legislation, though?

Mr Boersig—Yes.

CHAIR—But if it is taken up nationally, which is the intention, I will be interested to see how that progresses. I do not have any further questions to ask at this point, but there may be matters the committee wishes to pursue on notice.

Mr Boersig—Certainly.

CHAIR—You will know the Senate, and therefore the government, has given us a very strict time frame. We need to report by 16 October, as I recall. So if we have any matters which we need to pursue on notice, I would be grateful for the department's assistance.

Mr Boersig—I think there are two already.

CHAIR—Yes.

Mr Boersig—And we might try to clarify that before we leave.

CHAIR—Thank you very much. I again thank you both for your time today, and particularly for being here during the processes of the morning. I do appreciate that, and I would like to place it on record as a committee chair when the department is good enough to do that. I thank all of the witnesses who have given evidence to the committee today.

Committee adjourned at 1.30 pm