Submission to the Commonwealth Government:

AUSTRALIA'S COMPLIANCE WITH THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION

January 2008

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SUMMARY

Australia's obligations under Articles 5(a) and 5(e)(iv) of the UN Convention on the Elimination of Racial Discrimination (CERD) have been compromised by measures under three Commonwealth statutes which do not constitute "special measures" under the CERD Convention. Those statutes are:

- *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*;
- *Crimes Amendment (Bail and Sentencing) Act 2006*; and
- *Northern Territory National Emergency Response Act 2007*.

Measures under these three statutes have brought about:

(a) The application on the basis of race of welfare "quarantining";

(b) The associated removal of social security appeal rights;

(c) An approach to sentencing for Commonwealth and Northern Territory offences which produces racial discrimination; and

(d) An unwarranted exclusion of the operation of the *Racial Discrimination Act 1975 (Cth)* from significant Commonwealth legislation having a racially discriminatory effect.

We recommend that the Commonwealth Government:

(1) Acknowledge that Australia cannot meet its obligations under Articles 5 and 2 of the CERD Convention while our statute books retain provisions for the following measures, which are not "special measures" under the CERD Convention:

  (a) The application on the basis of race of welfare "quarantining";

  (b) The associated removal of social security appeal rights;

  (c) An approach to sentencing for Commonwealth and Northern Territory offences which produces racial discrimination; and

  (d) The exclusion of the operation of the *Racial Discrimination Act* (Cth) from significant Commonwealth legislation having a racially discriminatory effect.

(2) Take urgent remedial action to rectify such non-compliance with the CERD Convention. This must involve broad consultation – to ensure adequate community input, appropriate "informed consent", and a smooth transition to the new arrangements.

(3) Especially in light of relevant comments in past Australian reports to the CERD Committee, report frankly in Australia's combined 15th, 16th and 17th reports on:

  (a) Recognition of such Australian non-compliance;

  (b) Remedial action undertaken by mid-2008 and

  (c) Timetable for future remedial action.

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ABOUT CATHOLIC SOCIAL SERVICES AUSTRALIA

Representing 64 member organisations, Catholic Social Services Australia is the Catholic Church's peak national body for social services. It advises the Australian Catholic Bishops Conference on social policy issues as well as supporting the delivery of a wide range of social service programs.

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

Catholic Social Services Australia promotes a fairer, more inclusive society that gives preference to helping people most in need. It is committed to an Australian society that reflects and supports the dignity, equality and participation of all people. To this end, Catholic Social Services Australia works with Catholic organisations, governments, other churches and all people of goodwill to develop social welfare policies and other strategic responses that work towards the economic, social and spiritual well-being of the Australian community.

Our 64 members employ over 6,500 people and provide 500 different services to over a million people each year from sites in metropolitan, regional and rural Australia. Services provided by our members encompass aged care, community care, disability services, drug and alcohol services, employment and vocational programs (including Job Network, Disability Open Employment and Personal Support Program), family relationship services, housing, mental health, residential care and youth programs.

I INTRODUCTION

1. Catholic Social Services Australia appreciates the opportunity to make this submission about Australia's non-compliance with provisions of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination ("the CERD Convention").

2. We would be happy to discuss at greater length any of the issues raised in this submission.

II SCOPE OF THIS SUBMISSION

3. Catholic Social Services Australia is lodging this submission in response to the invitation on the Department of Foreign Affairs and Trade website "to submit written views on Australia's compliance with Articles 2-7 of the CERD Convention" for consideration in the Government's preparation of Australia's 15th, 16th and 17th CERD reports, which are to be lodged by October 2008.

4. This submission is largely limited to three issues, all related to Articles 5 and 2 of the CERD Convention. *Article 2* of the CERD Convention contains central obligations to pursue a policy of eliminating racial discrimination and "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions". Relevant provisions of Article 5 of the CERD Convention are as follows (emphasis added):

> *Article 5*
>
> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee **the right of everyone, without distinction as to race**, colour, or national or ethnic origin, to **equality before the law, notably in the enjoyment of the following rights**:
>
> (a) The right to ***equal treatment before the tribunals*** and all other organs administering justice; …[and]
>
> (e) Economic, social and cultural rights, in particular: …
>
> (iv) The right to public health, medical care, ***social security and social services***

5. **Part III** of this submission makes some preliminary comments about Australia's reporting under the CERD Convention.

6. **Part IV** of this submission addresses the first two of our three issues, which arise from the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* ("the Welfare Payment Amendment Act"):

- "*Quarantining*" (or "income management") of social security and other payments across entire Indigenous communities – raising issues under Article 5(e)(iv) of the CERD Convention; and
- The associated removal of the right to external *appeal* to the Social Security Appeals Tribunal – raising issues under Article 5(a) and Article 5(e)(iv) of the CERD Convention.

7. **Parts V and VI** of this submission addresses the third of our three issues: measures amending Commonwealth and Northern Territory *sentencing* legislation which raise issues under

Article 5 of the CERD Convention. These amending measures were enacted by two Commonwealth statutes: the *Crimes Amendment (Bail and Sentencing) Act 2006* ("the Crimes Amendment Act") in relation to Commonwealth offences; and the *Northern Territory Emergency Response Act 2007* ("the Northern Territory Response Act") in relation to Northern Territory offences.

8. **Part VII** of this submission sets out our recommendations.

9. Except in its recommendations, this submission does not directly address the exclusion of the operation of the Racial Discrimination Act 1975 from the "Northern Territory package" of legislation passed by the Commonwealth Parliament in August 2007. However, that exclusion underlies some of the specific issues we do address in relation to welfare quarantining and sentencing especially. In our view, the exclusion should be revoked.

10. This submission draws heavily on earlier expressions of Catholic Social Services Australia's concerns, especially:

- Our August 2007 *Submission to the Inquiry* by the Senate Legal and Constitutional Affairs Committee *into the Provisions of the Northern Territory Emergency Response Bill 2007 and Associated Bills*:[1]
    - Which is attached (without its own attachments, available upon request) as **Annex A** to this submission; and
- Our September 2006 *Submission* to the Senate Legal and Constitutional Affairs Committee's *Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006*:[2]
    - Which is attached as **Annex C** to this submission.

11. This submission also calls attention to previous input from a range of expert commentators.

III PRELIMINARY REMARKS

12. We welcome the fact that Australia is moving towards meeting its reporting obligations under the CERD Convention.

13. We note that the report to be submitted by the Australian Government in 2008 to the UN Committee on the Elimination of Racial Discrimination ("the CERD Committee") will cover an unusually long period (from mid-2002 to mid-2008).

14. In view of the many developments over the relevant period, we trust that the report will provide full and frank assessments, even in areas of difficulty.

[1] Catholic Social Services Australia, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Provisions of the Northern Territory Emergency Response Bill 2007 and Associated Bills*, 9 August 2007, attached to this submission as **Annex A** (also available at www.catholicsocialservices.org.au).
[2] Catholic Social Services Australia, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006*, 27 September 2006, attached to this submission as **Annex C** (also available at www.catholicsocialservices.org.au).

IV SOCIAL SECURITY "QUARANTINING", APPEAL RIGHTS AND CERD ARTICLES 5(a) AND 5(e)(iv)

15. Aspects of the Welfare Payment Amendment Act breach Australia's obligations under the CERD Convention in at least two areas, without constituting "special measures" within the meaning of CERD Article 1(4) or Article 2(2).

16. Those aspects are:

- The introduction of mandatory "quarantining" of income support and other Government payments in its application to entire Indigenous communities (with other persons subject to quarantining only if certain conditions are present in individual cases):
    - Compromising the guarantee under CERD Article 5(e)(iv) of "the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: … (e) … (iv) The right to … social security and social services"; and
- The related removal of the right to external appeal to the Social Security Appeals Tribunal:
    - Compromising the guarantee under CERD Article 5 (a) and Article 5(e)(iv) of "the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice; [and] (e) … (iv) The right to … social security and social services".

17. When relevant measures were foreshadowed in mid-2007, the Australian Catholic Bishops and Catholic Social Services Australia objected to the introduction of racial discrimination into Australia's welfare payment system. A statement by Australia's Catholic Bishops Conference is attached to this submission as **Annex B**.[3]

18. Catholic Social Services Australia's concerns were also raised in our submission to the Senate inquiry into the "package" of legislation which included the Welfare Reform Amendment Act.[4] As noted above, that submission is at **Annex A** of this submission. Please refer to pages 4-8 of **Annex A** for our arguments – including (at paragraphs 19-23) our reasons for determining that the measures in question do not constitute "special measures".

19. The concerns of Catholic Social Services Australia were recently reiterated in our *2008-09 Pre-Budget Submission* of January 2008, which made the following recommendation and points:[5]

Recommendation 34	The Government should act quickly to remove legislative provisions which permit the application to entire Indigenous communities of a scheme for the quarantining ("income management") of income support payments.

[3] Australian Catholic Bishops Conference, *A Statement from the Catholic Bishops of Australia on dignity and justice for Indigenous Australians*, 5 July 2007, attached to this submission as **Annex B**.
[4] See note 1 above.
[5] Catholic Social Services Australia, *Submission to the Commonwealth Government: 2008-09 Pre-Budget Submission*, January 2008 (available at www.catholicsocialservices.org.au) at pp. 15-16.

We welcome the Government's commitment to redressing the appalling disadvantage affecting many Indigenous Australians.[6]

We remain concerned about aspects of the previous Government's "Northern Territory intervention", particularly the lack of adequate consultation with Indigenous leaders and Indigenous communities, and the introduction of racial discrimination into the Australian social security system by the application to entire Indigenous communities of a scheme for "income management" of income support payments. Our reasons are detailed in our submission to the Senate Inquiry into the relevant legislative provisions, which is attached as Attachment C to this Pre-Budget Submission.[7]

We are aware of the Government's intention to wait until mid-year before assessing the impact of the "intervention" and associated legislation. However, we urge the Government to make an exception in this one instance by acting quickly to remove this racially discriminatory aspect of the legislation.

20. The application of social security "quarantining" to entire Indigenous communities requires immediate re-examination from the perspective of non-compliance with the CERD Convention.

21. Progress will require genuine consultation with Indigenous people. This need is underscored by CERD Committee General Recommendation XXIII, which calls on states party to the CERD Convention to:[8]

> [E]nsure that members of Indigenous groups have equal rights in respect of effective participation… and that **no decisions directly relating to their rights and interests are taken without their informed consent**

and is further underscored by the following recommendation made by the the CERD Committee in 2005 (in the context of the abolition of the Aboriginal and Torres Strait Islander Commission):[9]

> The **Committee recommends that [Australia] take decisions directly relating to the rights and interests of indigenous peoples with their informed consent,** as stated in its general recommendation XXIII. The Committee recommends that [Australia] reconsider the withdrawal of existing guarantees for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision- and policy-making relating to their rights and interests.

22. It is incumbent on the Commonwealth Government to report on the welfare quarantining issue in its forthcoming report to the CERD Committee, not least because of the following statement in a previous Australian report to that Committee:[10]

> 498. **The Australian social security system**, incorporating a range of income support payments, **is universal in application and does not discriminate** against people of a different race. A person's **eligibility for payment** of…any…income support payment…is **dependent upon** meeting a number of stipulated **criteria that are devoid of any reference to racial origin**.

[6] See e.g. Australian Labor Party, *New Directions: An equal start in life for Indigenous children*, May 2007.
[7] [See **Annex C**.]
[8] CERD Committee, *General Recommendation XXIII - on Indigenous Peoples*, at para 3 (emphasis added).
[9] Committee on the Elimination of Racial Discrimination, 66th session, *Consideration of Reports submitted by States Parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination – Australia*, CERD/C/AUS/CO/14, 14 April 2005, p.3 at para 11 (emphasis added).
[10] Combined *10th,11th and 12th Reports of Australia to the UN Committee on the Elimination of Racial Discrimination*, 20 July 1999 (CERD/C/335/Add.2, 14 December 1999), p. 91 at para 498 (emphasis added).

V SENTENCING FOR COMMONWEALTH OFFENCES AND CERD ARTICLE 5(a)

23. Recent changes to Commonwealth sentencing legislation enacted by the *Crimes Amendment Act 2006* cast doubt on Australia's commitment to its CERD Article 5(a) obligation to guarantee "the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice".

24. Catholic Social Services Australia expressed concerns about the *Crimes Amendment Act 2006* in our submission to the relevant 2006 Senate Committee Inquiry. As noted above, that submission is at **Annex C** to this submission. Please refer to **Annex C** for our arguments and for more detail on the context of the legislation.

25. We reiterated our concerns in the 2007 submission which is at **Annex A** (see pages 9-11 of **Annex A**).

26. While our 2006 submission did not explicitly cite the CERD Convention, we were and remain concerned about the discriminatory implications of the amendments to sentencing law. Offenders from the dominant "cultural background" will have their "cultural background" taken into account as a matter of course, so why should the same not apply (where relevant) for all other offenders? Where it does not, discrimination exists.

27. Other submissions to the 2006 Senate Committee Inquiry raised the discrimination issue, as did the Committee's report. Concerns raised in others' submissions are summarised in the following extract from the Committee's report, under the heading "Is the Bill discriminatory?":[11]

> 3.38 Many submissions and witnesses argued that the Bill is discriminatory.
>
> 3.39 For example, the Law Council argued strongly that the Bill will have a discriminatory impact on Indigenous Australians and Australians of multicultural descent. As Ms Raelene Webb QC told the committee:
>
> > ... even focusing just on the bill relating to Commonwealth offences, it is clear that [it] will impact not just on Indigenous offenders but also on offenders from different cultural backgrounds. Only offenders from the dominant Anglo-Saxon Australian culture will not be impacted by the amendments or will perhaps be impacted to a lesser extent.[38]
>
> 3.40 In the context of the Bill's application to Federal offences only, the Law Council made the pertinent observation that the majority of those who have been incarcerated in Australian prisons following commission of a Federal offence are non-Australian citizens (Australian citizens comprise only 43 per cent of such prisoners). The Law Council concluded that this indicates that in practice the Bill 'will have a greater impact upon non-Australians; it also gives rise to the concern that the Bill will have effect on people and circumstances that have not been properly considered in the rush to implement' the Bill.[39]
>
> 3.41 The Law Council argued that the Bill may breach the provisions of the *Racial Discrimination Act 1975* (RDA) since it 'will require courts to treat Indigenous offenders or offenders of particular ethnic origin as if they did not belong to a particular Indigenous or ethnic group'. Further, the RDA 'embodies a

[11] Senate Standing Committee on Legal and Constitutional Affairs, *Report: Crimes Amendment (Bail and Sentencing) Bill 2006*, October 2006 at paragraphs 3.38-3.45 (footnotes omitted).

concept of discrimination which seeks to ensure substantive rather than merely formal equality before the law';[40] this is something that, arguably, the Bill does not achieve.[41]

3.42 The Social Justice Commissioner articulated HREOC's [the Human Rights and Equal Opportunity Commissioner's] views about the possible discriminatory effect of the Bill in a similar vein:

> The argument that this bill provides equity before the law is misconceived and premised on a false assumption that only some people—other people—have culture. All Australians, regardless of their ethnic background, have cultural values and may engage in cultural practices which may be relevant to sentencing for a criminal offence. It does not offend equality before the law for such matters to be taken into account in all cases where they are relevant. On the contrary, such an approach provides equality before law.[42]

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

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

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

28. The submission of the Attorney-General's Department included the following claim:[12]

> The legislation does not discriminate as it applies to all Australians.

29. As indicated in the majority report of the Senate Committee Inquiry, this comment shows a failure to grasp the distinction between formal and substantive equality – and the Crimes Amendment Act does not provide substantive equality (emphasis added):[13]

> 3.97 … The committee notes the Department's assertion that the Bill is not discriminatory – that the Bill may be drafted in a way that accords with principles of formal equality but, clearly, in practice it is likely to apply only to certain categories of offenders. **It does not therefore provide substantive equality to Indigenous offenders or offenders with a multicultural background**.

30. A similar point was made in the dissenting report in that Inquiry:[14]

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[12] *Letter and attachment: Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006* from Mr James Popple, Attorney-General's Department to Ms Jackie Morris, Acting Committee Secretary of Senate Standing Committee on Legal and Constitutional Affairs, 28 September 2006 (available as *Submission 11* at http://www.aph.gov.au/Senate/committee/legcon_ctte/crimes_bail_sentencing/submissions/sublist.htm).

[13] Senate Standing Committee on Legal and Constitutional Affairs, *Report: Crimes Amendment (Bail and Sentencing) Bill 2006*, October 2006 at paragraph 3.97 (emphasis added). The CERD Committee's clear view that the CERD Convention prohibits indirect discrimination on the basis of race – as expressed in its General Recommendation XIV – has been stressed by the ACT Human Rights Commission (see **Annex A** at p.7).

[14] See note 11 above at paragraph 1.6 of the Dissenting Report by the Australian Labor Party.

> 1.6 Labor Senators are of the view that the Bill will lead to increased racial discrimination against Indigenous Australians and those with a multicultural background. The Bill will inevitably impact most upon these persons since, clearly, its practical application will only be to offenders from certain cultural backgrounds. Labor Senators disagree with the Department's claim that the Bill is not discriminatory.

31. Notwithstanding the significant concerns expressed on this and other matters – in the majority and dissenting Committee reports as well as in submissions – the legislation was passed by the Commonwealth Parliament with only one minor change (which helpfully ensured that a customary law or cultural practice could not be regarded as aggravating an offence).

32. The issue requires urgent rectification because of the problematic provisions already in place in the Commonwealth and the Northern Territory jurisdictions.[15] An added reason for urgency is the current process of decision-making by other Australian jurisdictions as to whether or not to follow the problematic Commonwealth example.

33. This legislation is at odds with previous Australian reporting to the CERD Committee in relation to sentencing – which noted in 2003, for example, both a circle-sentencing pilot at Nowra Local Court and South Australian efforts to "explore sentencing options for Aboriginal people".[16]

34. The next Australian report to the CERD Committee should report on this important area, especially because the 1992 Australian Law Reform Commission's recommendations (which led to statutory recognition of cultural background in sentencing where relevant) were reported upon in Australia's 9th report to the CERD Committee in 1993.[17]

VI SENTENCING FOR NORTHERN TERRITORY OFFENCES AND CERD ARTICLE 5(a)

35. Similar issues arise under the *Northern Territory Response Act 2007* as under the *Crimes Amendment Act 2006*.

36. Here we draw on the submission of the Law Council of Australia to the Senate Committee Inquiry into the Northern Territory "National Emergency Response" package of legislation in August 2007:[18]

> 59. Part 6 of the *NER [National Emergency Response] Bill* incorporates provisions banning the consideration of the cultural background or customary laws of an offender in mitigation (or aggravation) in sentencing. The provisions effectively mirror the provisions of the *Crime Amendment (Bail and Sentencing) Act 2006,* ….

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[15] On the Northern Territory, see Part VI below.

[16] Combined *13th and 14th Reports of Australia to the UN Committee on the Elimination of Racial Discrimination*, 28 November 2003 (CERD/C/428/Add.2, 1 April 2004) at p. 27 (para 145) and p. 28 (para 148) respectively.

[17] *9th Report of Australia to the UN Committee on the Elimination of Racial Discrimination*, 14 September 1993 (CERD/C/223/Add.1, 23 September 1993), p. 30 at paragraphs 137-138.

[18] Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs: Northern Territory National Emergency Response Legislation*, 9 August 2007.

61. The Law Council submits that the provisions of the *Crimes Amendment (Bail and Sentencing) Bill 2006* continue to be discriminatory in their application and permit, or require, substantive discrimination against Aboriginal people or people with a multicultural background.

62. As the provisions in Part 6 of the NER are effectively identical to the operative provisions of the *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth), the Law Council reiterates its submissions to that previous inquiry and considers that the impact of Part 6, if implemented in the Northern Territory, will be significantly worse given the disproportionate numbers of Aboriginal people charged under State and Territory criminal laws. In this regard, the Law Council refers again to its previous submissions (attached), which contain examples of several cases in which the cultural background of the offender was a relevant, but not decisive, consideration.

63. Again, the Law Council submits that the proposed prohibition on taking into consideration any form of customary law or cultural practice in the context of bail applications and in determining criminal sentences cannot be justified as a 'special measure'. As argued in the Law Council's earlier submissions on this issue, Part 6, if implemented, will (among other things):

- require courts to treat Aboriginal and Torres Strait Islanders, and those of different ethnic origins, as if they did not belong to a specific cultural group;
- result in more Aboriginal people being incarcerated, for longer periods and with fewer options for rehabilitation within their communities; and
- undermine the positive achievements of Aboriginal courts, which have relied on flexible sentencing and bail options and community involvement to strengthen compliance with the law, Aboriginal communality and leadership and, ultimately, reduce rates of imprisonment and recidivism

37. Like the Law Council, Catholic Social Services Australia has concerns about the sentencing provisions of the *Northern Territory Response Act 2007* which are similar to our concerns about the *Crimes Amendment Act 2006*. As stressed by the Law Council, the latter statute will have an even more discriminatory effect in relation to Indigenous Australians.

38. We therefore recommend urgent reconsideration of the sentencing provisions of the *Northern Territory Response Act 2007*, from the perspective of non-compliance with the CERD Convention. We also urge coverage of this issue in Australia's next report to the CERD Committee.

VII RECOMMENDATIONS

39. We recommend that the Commonwealth Government:

(1) Acknowledge that Australia cannot meet its obligations under Articles 5 and 2 of the CERD Convention while our statute books retain provisions for the following measures, which are not "special measures" under the CERD Convention:

(a) The application on the basis of race of welfare "quarantining";

(b) The associated removal of social security appeal rights;

(c) An approach to sentencing for Commonwealth and Northern Territory offences which produces racial discrimination; and

(d) The exclusion of the operation of the *Racial Discrimination Act* (Cth) from significant Commonwealth legislation having a racially discriminatory effect.

(2) Take urgent remedial action to rectify such non-compliance with the CERD Convention. This must involve broad consultation – to ensure adequate community input, appropriate "informed consent", and a smooth transition to the new arrangements.

(3) Especially in light of relevant comments in past Australian reports to the CERD Committee, report frankly in Australia's combined 15th, 16th and 17th reports on:

(a) Recognition of such Australian non-compliance;

(b) Remedial action undertaken by mid-2008 and

(c) Timetable for future remedial action.

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Catholic Social Services Australia

Submission to Senate Legal and Constitutional Affairs Committee

INQUIRY INTO THE PROVISIONS OF THE NORTHERN TERRITORY EMERGENCY RESPONSE BILL 2007 AND ASSOCIATED BILLS

9 August 2007

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SUMMARY

There has been insufficient time to consider and comment on the detail of the five Bills which make up this package of legislation.

This submission directly addresses just four of the plethora of significant issues raised by those Bills:

- The evident need for more extensive **consultation**, and for genuine Parliamentary scrutiny, if the outcomes are to be either workable or beneficial.
- Our objection to the introduction of **racial discrimination** into our welfare payment system.
- Intrinsic problems with the "**quarantining**" of welfare payments – problems which require examination and resolution before the legislated introduction of any such scheme.
- Reiteration of our previously-expressed concerns that the proposed **sentencing** provisions will discriminate against Indigenous people and other cultural minorities while not helping to redress child abuse.

Our **sole recommendation** is that the **Committee recommend the further referral of the Bills to committee, for a period of at least two months**. This would allow the beginnings of consultation on the far-reaching implications of these hastily conceived Bills – and on how they might be improved.

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1. INTRODUCTION

1.A About Catholic Social Services Australia

1. Representing 63 member organisations, Catholic Social Services Australia is the Catholic Church's peak national body for social services. It advises the Australian Catholic Bishops Conference on social policy issues as well as supporting the delivery of a wide range of social service programs. For 50 years, Catholic Social Services Australia has assisted and promoted better social policy for the most disadvantaged people in Australian society. This continues a much longer tradition of such engagement by the Catholic Church in Australia.

2. Catholic Social Services Australia has the mission of promoting a fairer, more inclusive society that gives preference to helping people most in need. It is committed to an Australian society that reflects and supports the dignity, equality and participation of all people. To this end, Catholic Social Services Australia works with Catholic organisations, governments, other churches and all people of goodwill to develop social welfare policies and other strategic responses that work towards the economic, social and spiritual well-being of the Australian community. Our 63 members employ over 6,500 people and provide 500 different services to over a million people each year.

1.B Scope of this submission

3. This submission is relatively narrow in scope. There has been insufficient time (just 48 hours) to consider and comment on the detail of the five Bills making up this package of legislation.

4. This submission directly addresses just four issues:

- Consultation.
- Racial discrimination in relation to welfare payment systems.
- The "quarantining" of welfare payments.
- Bail and sentencing provisions.

5. The issues are dealt with at slightly more length in attachments, some of which also touch on other aspects of the Bills which are not addressed in this submission. In particular, we refer the Committee to our media release of 7 August 2007 (**Attachment A**) and to the statement issued by Catholic Bishops on 5 July 2007 (**Attachment B**).

2. CONSULTATION

6. The five Bills in question introduce radical changes and would deeply affect a wide range of matters. For example, they would affect land rights[1] and the inalienability of welfare payments, as well as introducing racial discrimination into our welfare system.

[1] See e.g. Jon Altman, *"National Emergency" and Land Rights Reform: Separating Fact from Fiction – An assessment of the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act 1976*, Briefing paper for Oxfam Australin 7 August 2007.

7. The publication, introduction and passage of Bills of this nature and magnitude in a single Parliamentary sitting fortnight would be a travesty of process. It would signal to the Australian (and international) community an unjustifiable disregard for consultation and debate – even on such fundamental matters as the effective application of different laws for people of different ethnicity.

8. Apart from the principles underlying the need for additional consultation, experience suggests that legislation which is drafted and passed in undue haste will prove unworkable in practice as errors and unintended consequences emerge. This is particularly the case with complex legislation making major changes to pre-existing approaches and systems.

9. There is no indication that "emergency" assistance measures would be unduly delayed by such a review, as initiatives have already commenced and could continue ahead of the introduction of this legislation.

10. We therefore urge the Senate Legal and Constitutional Affairs Committee to do everything in its power to urge the deferral of consideration of these Bills by the Senate until after more extensive scrutiny, of a period allowing at least one month for the provision of submissions by the public. This would allow the beginnings of consultation on the far-reaching implications of these hastily conceived Bills – and on how they might be improved.

Recommendation

> Catholic Social Services Australia recommends that the Committee recommend the further referral of the Bills to committee, for a period of at least two months.

3. RACIAL DISCRIMINATION

11. The Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 ("the Welfare Payment Reform Bill") introduces different "income management" (or "quarantining" regimes for income support recipients which would remove discretion over portions of government income support payments from different classes of recipient. The Welfare Payment Reform Bill would apparently make a person subject to such a regime if:

(a) They live in a "declared relevant Northern Territory area", or

(b) A State/Territory child protection officer requires the person to be so subject, or

(c) They or their partner's child is not enrolled at school, or

(d) They or their partner's child has unsatisfactory school attendance, or

(e) The "Queensland Commission" requires the person to be so subject.

12. The expectation appears to be that all persons in categories (a) and (e) would be Indigenous. Apart from the fact that simply living in a "declared" Northern Territory community would trigger income management arrangements (rather than any individualised problem regarding children), a person in a "declared" Northern Territory Indigenous community would also be disadvantaged in other ways by the operation of the proposed provisions. Most notable here is the removal of the right to external appeal to the Social Security Appeals Tribunal.

13. As stated by the Catholic Bishops of Australia on 5 July[2]:

> Institutionalised racism cannot be acceptable. As Indigenous leaders have pointed out, the policy of imposing penalties on *all* parents receiving certain income support or Family Tax Benefits if they live in remote Aboriginal communities, while equivalent penalties will apply to other Australians *only* if there is evidence of "irresponsible" parenting, is both racially discriminatory and counter-productive. It would appear to breach the Racial Discrimination Act (Cth) and Australia's international law obligations.[3][4] As stated by the Pontifical Commission on Justice and Peace, *"the law must be equal for all citizens without distinction. It is important for ethnic, linguistic or religious minorities…to enjoy recognition of the same inalienable rights as other citizens.*[4[

14. We draw the Committee's attention to the provisions of Article 5 of the International Convention on the Elimination of Racial Discrimination, to which Australia is party, concerning equality before the law in general and in relation to social security:

> Article 5
>
> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee **the right of everyone, without distinction as to race**, colour, or national or ethnic origin, to **equality before the law, notably in the enjoyment of the following rights**:
>
> (a) The right to **equal treatment before the tribunals** and all other organs administering justice; …
>
> (e) Economic, social and cultural rights, in particular: …
>
> (iv) The right to public health, medical care, **social security and social services**

15. The Explanatory Memorandum to the Welfare Payment Reform Bill states, uncontentiously enough, that:

> Preventing discrimination and ensuring equal treatment does not mean treating all people the same. Different treatment based on reasonable and objective criteria and directed towards achieving a purpose legitimate under international human rights law is not race discrimination. In fact, the right not to be discriminated against is violated when governments, without objective and reasonable justification, fail to treat differently people whose situations are significantly different.
>
> The impact of sexual abuse on Indigenous children, families and communities is a most serious issue requiring decisive and prompt action.

16. The same Explanatory Memorandum goes on to argue that:

> The Northern Territory national emergency response will protect children and implement Australia's obligations under human rights treaties. In doing so, it will take important steps to advance the human rights of the Indigenous peoples in communities suffering the crisis of community dysfunction.

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[2] *A Statement from the Catholic Bishops of Australia on dignity and justice for Indigenous Australians* (footnotes removed); reproduced as **Attachment B** to this submission.

[3][4] See *International Convention on the Elimination of All Forms of Racial Discrimination*, Articles 2 and 5 (http://www.ohchr.org/english/law/cerd.htm).

[4][5] *The Church and Racism* (n.3 above), #23.

> In the case of Indigenous people in the Northern Territory, there are significant social and economic barriers to the enjoyment of their rights to health, development, education, property, social security and culture.
>
> The provisions of this bill that relate to the Northern Territory national emergency response and the Queensland Commission reforms are the basis of action to improve the ability of Indigenous peoples to enjoy these rights and freedoms. This cannot be achieved without implementing measures that do not apply in other parts of Australia. The bill will provide the foundation for rebuilding social and economic structures and give meaningful content to Indigenous rights and freedoms. In a crisis such as in the Northern Territory, the Northern Territory measures in the bill are necessary to ensure that there is real improvement before it is too late for many of the children.

17. The sweeping assertion that the measures in the Welfare Payments Reform Bill will "improve the ability of Indigenous peoples to enjoy these rights and freedoms" is simply not substantiated by any demonstration of *how* this might be the case: how any specific measures in the Bill will have this effect. For example, it is not apparent how the Northern Territory "income management" of welfare payments (or "quarantining") would qualify as a "special measure" – it is far from self-evident how external micro-management of a child's parent's expenditure would help that child in the many cases where no previous problem existed. Nor is it clear how removing the right to appeal to the established Social Security Appeals Tribunal will assist relevant Northern Territory Indigenous people to a greater – rather than diminished – enjoyment of their rights.

18. It is inconsistent for the provisions in question to purport to "exclude" racially discriminatory provisions in these Bills from the operation of anti-discrimination legislation, while simultaneously deeming those provisions to be "special measures" under that same legislation.

19. On "special measures", we note the following points made in recent advice from the ACT Human Rights and Discrimination Commissioner to the ACT Chief Minister regarding the Commonwealth Government's 21 June 2007 announcement of "emergency" measures for Northern Territory Indigenous communities (footnotes deleted):[5]

> The UN HRC noted that the principle of equality sometimes requires affirmative action in order to diminish or eliminate conditions, which cause or help to perpetuate discrimination. Affirmative action denotes positive steps taken by a State to improve the status of disadvantaged groups, eg to 'positively' discriminate in favour of disadvantaged groups. The HRC has confirmed that affirmative action is permissible under the ICCPR [International Covenant on Civil and Political Rights] and it is permitted under articles 1(4) and 2(2) of CERD [the Convention on the Elimination of Racial Discrimination], and 'when circumstances so warrant'. The HRC had in mind preferential treatment being granted for a time to the part of the population concerned to correct those conditions.
>
> There is also scope for temporary special measures under s.8 of the federal *Racial Discrimination Act 1975* (and articles 1(4) and 2(2) CERD), but no provision for temporary exemptions. Special measures must: provide a **benefit** to some or all members of a racial or ethnic group; have the **sole purpose** of securing the advancement of the group; be **necessary** to achieve that purpose; and **stop** once the purpose has been achieved. Article 1(4) of CERD says special measures should not "lead to the maintenance of separate rights for different racial groups and …shall not be continued after the objectives for which they were taken have been achieved". Article 2(2) provides a positive obligation on States to take action to ensure that minority racial groups are guaranteed

[5] Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, *Request for advice on discrimination & human rights implications of Commonwealth emergency measures in NT Indigenous communities announced on 21 June 2007*, letter to Mr Jon Stanhope, ACT Chief Minister, dated 26 June 2007, at pp. 4-6 and 10 (available at http://www.hrc.act.gov.au under "Submissions").

the enjoyment of human rights and fundamental freedoms. The CERD Committee's General Recommendation 14 confirms that CERD prohibits indirect discrimination on the basis of race:

> 2….In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.

The obvious risk of paternalism was considered by the Australian High Court in *Gerhardy v Brown* the leading case on special measures. Justice Brennan said "the wishes of the beneficiaries for the measures are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement". The CERD Committee's General Recommendation 23 on Indigenous Rights under the Convention calls upon State Parties to:

> Ensure that members of Indigenous peoples have equal rights in respect of effective participation on public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.

It is very difficult to regard these proposals as 'special measures' when Indigenous communities have not been consulted, as required by CERD. They do not appear to be effective in overcoming disadvantage, and may in fact entrench or worsen existing discrimination.

<u>Permissible limitations on human rights and proportionality test</u>

According to the UN HRC, not every differentiation of treatment constitutes unlawful discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose under the ICCPR. Therefore proportionate measures designed to achieve a legitimate objective are permissible. This is replicated, in part, in section 28 of the *ACT Human Rights Act 2004*, which allows human rights to be subject to reasonable limits. Whether a limitation is 'reasonable' depends on whether it is proportionate. The proportionality test assesses whether:

- the objective is sufficiently important;
- the limitation on the right is rationally connected to the objective;
- the limitation minimally impairs the right or freedom in question, ; and
- is not out of proportion to the objective.

Proportionality involves consideration of the justification for the treatment in question. The UN HRC has proceeded to determine what constitutes reasonable limitations to the ICCPR's discriminatory provisions on a case-by-case basis. **The proposed Federal Government measures in Indigenous communities should be tested using the proportionality framework** as to whether the limitations on s.8 are reasonable. This should be undertaken **on a case-by-case basis**.

20. The broad assertion in the Explanatory Memorandum that the measures in the Welfare Payment Reform Bill "will provide the foundation for rebuilding social and economic structures and give meaningful content to Indigenous rights and freedoms" and "are necessary to ensure that there is real improvement" is far too broad to carry weight.

21. Instead, Catholic Social Services Australia submits that careful – and public – case-by-case consideration, in the manner outlined in Dr Watchirs's advice, is required before any purported "special measure" can be justified, much less legislated or implemented.

22. We would also stress the need for legislated steps deemed "special measures" to include sunset clauses providing for the termination of such measures as soon as practicable.

23. The hearing for this Inquiry will be held the day after International Day for the World's Indigenous Peoples. We urge the Committee to take full account of:

- The wide range of deep-seated reasons underlying the appalling conditions in many Indigenous communities (as spelled out in a number of reports[6]),

- The potential for racially discriminatory aspects of the Bills to prove counter-productive – for example, by having negative implications for self-determination, the value of which has been well-documented,

- Australia's international human rights obligations, and

- The desirability of maintaining our reputation as a good international citizen without racially discriminatory legislation on our statute books.

4. "QUARANTINING" OF WELFARE PAYMENTS

24. On the proposed introduction of "quarantining" of welfare payments *per se*, we note the following:

- It has not been shown how depriving people of personal responsibility is the best way of increasing their capacity or willingness to exercise it.

- Nor has it been shown how income management will necessarily help overcome substance abuse or addictive gambling behaviours

- Studies of U.S. programs linking welfare payments to school attendance have found that "sanction-only programs" without case management resources "do not significantly improve attendance".[7]

- In the absence of adequate support services, quarantining may have unintended and adverse consequences – not least as a result of the demeaning and stigmatizing way in which the system may well be perceived as applying.

- Child neglect and child abuse should be addressed through child protection systems which were designed for that purpose, and not through the welfare system. Funding for child protection systems should be raised to adequate levels as a matter of urgency.

- Why should welfare recipients be treated differently from others in the community – if our concern is the protection of children, is it not for the children of *all* parents, not just those on income support? While we do not believe that the income management system in the Welfare Payment Reform Bill will be effective, as a matter of logic it is not clear why it is being confined to those receiving government income support payments, and not extended to all families receiving Family Tax Benefit from the government.

- It is not for the government to tell individuals how to spend their income.

[6] See e.g. *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred": Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007* at p. 224 – although the catalyst for recent Commonwealth action, the recommendations of this report do not appear to have informed Commonwealth Government policy.

[7] See David Campbell and Joan Wright, "Rethinking Welfare School-Attendance Policies, *Social Service Review* (2005): 2 at p. 4 (summarising seven evaluations of programs linking welfare payments to school attendance).

- The funding to be diverted into the administration of income management across entire communities in the Northern Territory would be better spent on improving both physical and social infrastructure to ensure that those households and families in particular need obtain assistance.

25. In addition to the above, we refer the Committee to the attached transcript of a Radio National *Life Matters* interview about "quarantining" with Frank Quinlan, Executive Director, Catholic Social Services Australia (**Attachment C**).

5. SENTENCING PROVISIONS

26. Clause 91 of the Northern Territory National Emergency Response Bill 2007 prohibits a court from taking into account customary law or cultural practice when sentencing a person for having committed a Northern Territory offence.

27. We do not seek here to address the major issue of the imposition by the Commonwealth of laws on a Territory – instead, our focus is on what the proposed provision would mean for sentencing.

28. The context here is the passage of amendments to the Crimes Act (Cth) in 2006 regarding bail and sentencing. Those amendments were passed without themselves being amended along the substantial lines recommended by the Senate Legal and Constitutional Affairs Committee, which had conducted an inquiry into the amending Bill, the Crime Amendment (Bail and Sentencing) Bill 2006.[8]

29. We reiterate the concerns expressed in our submission to that 2006 Inquiry by the Committee. A copy of that submission is at **Attachment E**, and a related media release is at **Attachment D**.

30. In its report on its 2006 Inquiry into then-proposed (since passed) amendments to the Crimes Act (Cth), the Committee cited extracts from our submission as follows:

> 3.15 In this context (and in strongly opposing the measures contained in the Bill), Catholic Social Services Australia submitted that it is the Commonwealth's responsibility to lead by good example:
>
> > It is incumbent on the Commonwealth Government to ensure that any legislative action it develops in response to the July 2006 COAG Communiqué is measured, just, and not liable to have unintended consequences which might further disadvantage some of the most vulnerable people in the Australian community. This is important not only directly for federal offences, but also indirectly for State/Territory offences to the extent that the Commonwealth model is followed elsewhere. [*citing p.4 of our submission*]
>
> 3.31 Catholic Social Services Australia made a similar argument:
>
> > ... changing sentencing rules is [not] an effective way of addressing the causes of violence in Indigenous communities. That requires action to address poverty, social exclusion and the deficiencies of current support arrangements for families in crisis. [*citing p.12 of our submission*]
>
> 3.61 Many argued that the amendments contained in the Bill will unnecessarily and inappropriately restrict the discretion of courts, resulting in potential injustice for Indigenous

[8] Senate Standing Committee on Legal and Constitutional Affairs, *Report: Crimes Amendent (Bail and Sentencing) Bill 2006*, October 2006.

Australians and Australians of multicultural descent. Most submissions and witnesses centred their comments on proposed amendments to the sentencing process, as contained in Items 4 and 5 of the Bill (new paragraphs 16A(2)(m) and subsection 16A(2A).

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

> ... the current law strikes an appropriate balance by including "cultural background" among a long list of factors which must, to the extent that they are relevant and known to the court, be considered in sentencing for federal offences. If made law, the Bill would remove the reference to "cultural background". This would create an imbalance and risk injustices stemming from inadequate consideration of cultural factors. [*citing p.7 of our submission*]

3.63 Even more significantly, by specifically prohibiting any consideration of cultural practices or customary law, the Bill 'would further disadvantage some of the most vulnerable people in our community because some relevant cultural factors would not be allowed to be weighed on the scales of justice'. [*citing p.9 of our submission*]

31. We remind the Committee that the Committee's own majority conclusions in its 2006 Inquiry mitigate against supporting Clause 91 of the Northern Territory National Emergency Response Bill (2007).

32. Specifically, the Committee's 2006 conclusions included the following points:

- "the Bill's focus is misdirected" (para 3.90)
- "the Bill will do little, if anything, to achieve its stated aim (para 3.90)
- "while the Bill's stated aim is to address violence and child abuse in Indigenous communities, its implications are much wider" (para 3.99)
- "the Bill, as it impacts upon offenders from a multicultural background, has not been fully considered." (para 3.102)
- "The Bill is …likely to have significant consequences if a similar approach is adopted in the states and territories. As evidence to the inquiry strongly indicated, the Bill will inevitably impact most on Indigenous Australians and those with a multicultural background." (para 3.97)
- "The committee endorses the reasons behind the ALRC [Australian Law Reform Commission]'s recommendations that 'cultural background' be specifically inserted into the Crimes Act" (para 3.101)
- "The committee notes the Department's assertion that the Bill is not discriminatory – that the Bill may be drafted in a way that accords with principles of formal equity but, clearly, in practice it is likely to apply only to certain categories of offenders. It does not therefore provide substantive equality to Indigenous offenders or offenders with a multicultural background." (para 3.97)
- "The committee is also mindful of evidence arguing strongly that the Bill conflicts with every major inquiry into the role of cultural background and customary law in the Australian legal system" (para 3.103)

- "the most concerning feature of the Bill is the symbolic message that it sends to the judiciary (and the community at large) and the judicial uncertainty it may create.

- "The committee has concerns in relation to the haste with which the proposals in the Bill have been drafted and introduced into Parliament, without adequate, if any, consultation with Indigenous and multicultural groups…" (para 3.92)

- the issues raised by the Bill are complex and require careful consideration in view of the fact that the issues raised by the Bill "are complex and require careful consideration" (para 3.92).

- "The committee suggests that the Department give consideration to developing consultation mechanisms prior to introducing future amendments into Parliament." (para 3.92

33. Those 2006 majority conclusions of the Committee, which were arrived at with more time for reflection and with the benefit of a public call for submissions, should inform the Committee's current deliberations on the merits of Clause 91.

6. RECOMMENDATION

Catholic Social Services Australia recommends that the Committee recommend the further referral of the Bills to committee, for a period of at least two months.

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AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

July 5, 2007

A Statement from the Catholic Bishops of Australia on dignity and justice for Indigenous Australians

The Catholic Bishops of Australia welcome the high priority the Federal Government has now accorded to addressing the appalling problems facing people in remote Northern Territory Aboriginal communities.

The high incidence in remote Aboriginal communities of child sexual abuse and other unacceptable threats to children's wellbeing has been a matter of growing public concern for some time. Numerous enquiries and commissioned reports have raised these issues and highlighted the deplorable conditions in many Indigenous communities. The most recent such report was *Little Children are Sacred*, by Rex Wild and Pat Anderson.

In our *Social Justice Sunday Statement 2006*, we recounted some of the alarming statistics regarding the poor health, low life expectancy and high incarceration rates of Indigenous Australians. We argued that political will and relatively moderate resources could prevent such disadvantage, and called for positive and decisive action to eliminate these dire circumstances from the everyday experience of many Indigenous people.[1]

While this is not a time for allocating blame, all Australians should accept some collective responsibility for redressing the current shameful state of affairs, and recognise that past wrongs are reflected in present legacies. As Pope John Paul II said when he addressed Indigenous Australians in Alice Springs in 1986:

> *what has been done cannot be undone. But what can now be done to remedy the deeds of yesterday must not be put off till tomorrow.*[2]

We hope that the entire Australian community will now endorse the need for urgent and sustained action.

However, we have significant concerns about the nature of some of the Federal Government's "emergency response" measures announced on 21 June 2007, and about the proposed process for implementing that response:

- Child abuse and child poverty must be addressed by a long-term and comprehensive response – tackling such key causative factors as inadequate social services and infrastructure (including housing), inadequate numeracy and literacy, poor employment opportunities, substance abuse, and community breakdown. Guaranteed, long-term and adequate funding is essential.

- We need much more than a "law and order" response. Children who have been abused and vulnerable families need sympathetic and skilled carers, teachers, medical practitioners and social service practitioners. We need to ensure the full range of culturally appropriate support services to address this issue and foster strong families and communities.

- The response must be respectful of Indigenous culture and identity, and must be undertaken in full and genuine partnership with Aboriginal communities themselves. History clearly demonstrates that effective solutions cannot simply be imposed from above.

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[1] Australian Catholic Bishops Conference, *Social Justice Sunday Statement 2006: The Heart of Our Country – Dignity and justice for our Indigenous sisters and brothers*, p.12.
[2] *Ibid*.

- Recognised Aboriginal community leaders have an important role to play. So too do Church and community organisations working with Aboriginal communities, many of whom have developed strong working relationships over many years of close partnerships.

- The Federal Government must do all in its power to promote the dignity and respect of Aboriginal people, and to acknowledge the many instances of good social practice that have occurred in many communities. Particular care must be taken not to stigmatise all Aboriginal men as abusers.

- Government action should take full account of, and implement where appropriate, the recommendations made in a number of reports, notably *Little Children are Sacred*.

- The Government needs to demonstrate why action to address child abuse in Aboriginal communities requires amendments to land rights and self-government legislation.

- The response must be designed and implemented so as to support, rather than undermine, the future sustainability of remote Aboriginal communities. Talk of "mainstreaming" calls to mind the following warning about the dangers of "ethnocentricity": "The rejection of differences can lead to that form of cultural annihilation which sociologists have called "ethnocide" and which does not tolerate the presence of others except to the extent that they allow themselves to be assimilated into the dominant culture."[3]

- **Institutionalised racism cannot be acceptable. As Indigenous leaders have pointed out, the policy of imposing penalties on *all* parents receiving certain income support or Family Tax Benefits if they live in remote Aboriginal communities, while equivalent penalties will apply to other Australians *only* if there is evidence of "irresponsible" parenting, is both racially discriminatory and counter-productive. It would appear to breach the Racial Discrimination Act (Cth) and Australia's international law obligations.[4] As stated by the Pontifical Commission on Justice and Peace, *"the law must be equal for all citizens without distinction. It is important for ethnic, linguistic or religious minorities…to enjoy recognition of the same inalienable rights as other citizens."*[5]**

We welcome and support the Prime Minister's affirmation that government owes a duty of care to all Australian children. This obligation applies to all children in Australia, irrespective of race or location. Indeed we are all responsible for all children, especially those who are vulnerable or at risk.

Child poverty is itself a form of abuse, making children more vulnerable to other types of abuse. An unacceptable proportion of Australian children are living in poverty, many without secure housing. This too is a long-overdue cause for urgent national concern. We call upon Federal, State and Territory governments to take early and decisive action towards eliminating child poverty and child homelessness from our wealthy country. A national poverty strategy with a special focus on ending child poverty could be the vehicle for this, enabling collaboration among all levels of government and community sector and business groups.

We strongly support the ongoing work of our agencies which seek to provide social services to, and promote the interests of, Indigenous Australians facing disadvantage. Among these are the National Aboriginal and Torres Strait Islander Catholic Council, Catholic Social Services Australia, Centacare NT, the Australian Catholic Social Justice Council, Caritas Australia, Catholic Health Australia and the National Catholic Education Commission.

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[3] Pontifical Commission on Justice and Peace, *The Church and Racism*, 1988, #12.
[4] See *International Convention on the Elimination of All Forms of Racial Discrimination*, Articles 2 and 5 (http://www.ohchr.org/english/law/cerd.htm).
[5] *The Church and Racism* (n.3 above), #23.

Catholic Social Services Australia

Submission to Senate Legal and Constitutional Affairs Committee:

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

27 September 2006

Contact: Mr Frank Quinlan
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SUMMARY

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

The substance of this submission is confined to sentencing.

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

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

TABLE OF CONTENTS

I Introduction

A About Catholic Social Services Australia

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

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

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

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

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

B Purpose and scope of this submission

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

C Relevance of this Bill to our mission

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

7. Criminal justice is inextricably linked to social justice: Indigenous people and people from disadvantaged backgrounds are disproportionately represented in the prison population.[1] The Royal Commission into Aboriginal Deaths in Custody in 1991 stressed the importance of reducing the over-representation of Aboriginal persons in custody. However, the proportion of Indigenous people in the total prison population rose from 14% in 1991 to 22% in 2005.[2] Evidence suggests that experience of arrest and imprisonment reduces employment prospects.[3] So the over-representation of Indigenous people in the criminal justice system is among the factors perpetuating Indigenous disadvantage. These issues are just the tip of the iceberg of those which should be taken fully into account in considering whether and how to change rules governing sentencing of those convicted of Federal offences.

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

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

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

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

[4] See also paragraphs 46-47 below.

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

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

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

10. In view of this COAG agreement, State and Territory Governments may see Commonwealth legislative action as a potential model for their own approaches. It is incumbent on the Commonwealth Government to ensure that any legislative action it develops in response to the July 2006 COAG Communiqué is measured, just, and not liable to have unintended consequences which might further disadvantage some of the most vulnerable people in the Australian community. This is important not only directly for federal offences, but also indirectly for State/Territory offences to the extent that the Commonwealth model is followed elsewhere.

II Need for more extensive consideration, consultation and debate

A Catholic Social Services Australia's concerns

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

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

(i) The 1991 report of the Royal Commission into Aboriginal Deaths in Custody[6] included the following recommendations:

> 104. That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases.
>
> 62. That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for

[5] Council of Australian Governments (COAG) Meeting Communique, 14 July 2006, p.12.
[6] Australia, *Royal Commission into Aboriginal Deaths in Custody, National Report* (Five Volumes) (AGPS, Canberra, 1991-92).

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

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

(iii) The 2000 NSW Law Reform Commission report, *Sentencing: Aboriginal Offenders*,[8] recommended that:

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

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

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

32. That the Sentencing Act 1995 (WA) and the Young Offenders Act 1994 (WA) should be amended by inserting the following provision:

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

[7] Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws* (Report 31, 1986).
[8] NSW Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000).
[9] Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper*, Project 94 (December 2005).

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

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

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

B Recommendation 1

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

(a) The Bill not be adopted in its present form; and that

(b) To enable appropriate consideration, consultation, scrutiny and debate, the Senate should again refer the Bill to the Committee on Legal and Constitutional Affairs – this time with a referral-to-report deadline of at least six months.

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

A What the Bill does

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

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

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

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

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

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

B Catholic Social Services Australia's concerns

(1) Overview

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

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

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

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

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

> 2.1(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws or regulations *which have the effect of* creating or perpetuating racial discrimination wherever it exists" (emphasis added)
>
> 2.2 States Parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, *special and concrete measures to ensure* the *adequate development and protection of certain racial groups* or individuals belonging to them, *for the purpose of guaranteeing* them the *full and equal enjoyment of human rights and fundamental freedoms*… (emphasis added)

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

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

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

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

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

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

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

26. This aspect of the Bill (Item 4) is interlinked with another aspect of the Bill (Item5) which explicitly prohibits sentencing courts from considering "any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or rendering less serious the criminal behaviour to which the offence relates" (see paragraphs 29-45 below). It is not clear how this prohibition would be applied by courts. However, there is a risk that judicial efforts to abide by this explicit prohibition would result in the deliberate disregard of cultural factors which courts would otherwise have regarded as an indispensable element of the sentencing equation.

(5) Application to all Federal offences

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

C Recommendation 2

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

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

A What the Bill does

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

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

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

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

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

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

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

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

B Catholic Social Services Australia's concerns

(1) Overview

33. By prohibiting any consideration of cultural practices or customary law, the Bill, if made law, would further disadvantage some of the most vulnerable people in our community because some relevant cultural factors would not be allowed to be weighed on the scales of justice.

(2) Definitional issues

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

(3) Justice concerns

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

> The Courts have always taken into account any matter relating to the circumstances of an offender, whether it be cultural, religious or socio-economic. Courts should not be prevented from taking account of relevant matters affecting their sentencing decisions…
>
> Customary laws have been recognised by the courts for decades as potentially relevant to the sentencing process in a variety of different matters. However, domestic violence and abuse of children have never been recognised by the courts, or Aboriginal communities, as being justified by customary law.
>
> Limiting the discretion of the courts to consider customary law will not lead to equality – it will result in further disadvantage for one of the world's most disadvantaged minority groups.[11]

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

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

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

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

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

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

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

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

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

(7) Inadequate differentiation of customary law and customary practices

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

(8) Possible effect on lived experience of cultural practices

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

(9) Apparent influence of misconceptions of Aboriginal customary law

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

> 3.112 Any proposal to recognise Aboriginal customary law in sentencing must carry with it a caution to distinguish legitimate and authentic customary law from false assumptions and misconceptions. Specifically, there is a danger that the judiciary, and others involved in the sentencing process, will accept the claim or myth that sexual and domestic violence against women is sanctioned by Aboriginal culture, or, at least, not regarded as seriously as it is in non-Aboriginal culture. This premise must be categorically repudiated.
>
> 3.113 In a number of cases, Aboriginal custom at least, if not customary law, has been relied on to legitimise domestic and sexual violence against Aboriginal women, or to minimise the seriousness of the offence or the suffering of the victims...
>
> 3.114 Fortunately, most judges have dismissed this distortion of Aboriginal culture:
>
> > Ill treatment of women and assaults upon women will not be tolerated by the law and I know of no Aboriginal custom which would refute that as a philosophy.[160]

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

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

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

(10) Application to very wide range of Federal offences

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

C Recommendation 3

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

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

46. Catholic Social Services Australia does not believe that changing sentencing rules is an effective way of addressing the causes of violence in Indigenous communities. That requires action to address poverty, social exclusion and the deficiencies of current support arrangements for families in crisis. We endorse the following remarks by Professor Larissa Behrendt (Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning at the University of Technology, Sydney):

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

Recommendation 4

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

[13] ABC Radio National transcript: *Law Report*, "Abuse in Aboriginal Communities", 30 May 2006.

VI Conclusion and Recommendations 1-4

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

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

1. Recommend that:

   (a) The Bill not be adopted in its present form; and that

   (b) To enable appropriate consideration, consultation, scrutiny and debate, the Senate should again refer the Bill to the Committee on Legal and Constitutional Affairs – this time with a referral-to-report deadline of at least six months.

2. Recommend against the adoption of Item 4 of the Bill.

3. Recommend against the adoption of Item 5 of the Bill.

4. Stress in its report the urgent need for action to address the underlying causes of violence in Indigenous communities – especially poverty, social exclusion and inadequate support for families in crisis.

APPENDIX A

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

Index:

Indigenous Australians

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

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

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

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

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

> The message to give the original Australians a special place in our efforts at building a truly multicultural society was reiterated by Pope John Paul II in 2001 in his message to the Church in Oceania after the Synod in Rome. He wrote:
>
> > *it is the Church's task to help indigenous cultures preserve their identity and maintain their traditions.*
>
> He made special mention in this context of the 'Australian Aborigines whose culture struggles to survive' …
>
> John Paul II called [in 1986] for the 'just and proper settlement that still lies unachieved' in relation to the removal of children. He called specifically for 'just and mutually recognised agreements with regard to these human problems, even though their causes lie in the past'.

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

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

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

As John Paul II commented 20 years ago:

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

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

Discrimination and racism

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

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

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

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

> Equality does not mean uniformity. It is important to recognise the diversity and complementarity of one another's cultural riches and moral qualities. Equality of treatment therefore implies a certain recognition of differences which minorities themselves demand in order to develop according to their own specific characteristics, in respect for others and for the common good of society and the world community. (#23)
>
> Doctrine and examples by themselves are not sufficient. The victims of racism, wherever they may be, must be defended. Acts of discrimination among persons and peoples for racist or other reasons – religious or ideological – and which lead to contempt and to the phenomena of exclusion, must be denounced and brought to light without hesitation and strongly rejected in order to promote equitable behavior, legislative dispositions and social structures. (#26)
>
> Racism will disappear from legal texts only when it dies in people's hearts. However, there must also be direct action in the legislative field. Wherever discriminatory laws still exist, the citizens who are aware of the perversity of this ideology must assume their responsibilities so that, through democratic processes, legislation will be put in harmony with the moral law. Within a given State, the law must be equal for all citizens without distinction. A dominant group, whether numerically in the majority or minority, can never do as it likes with the basic rights of other groups. It is important for ethnic, linguistic or religious minorities who live within the borders of the same State, to enjoy recognition of the same inalienable rights as other citizens, including the right to live together according to their specific cultural and religious characteristics. Their choice to be integrated into the surrounding culture must be a free one. (#29)

"Option for the poor"

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

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

Human dignity

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

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