Australian Government

Attorney-General's Department

Criminal Justice Division

Review of customary law amendments to bail and sentencing laws

November 2009

Contents

Executive summary

Amendments were made to Commonwealth and Northern Territory legislation in 2006 and 2007 to limit consideration of customary law and cultural practice in bail and sentencing decisions, and require bail authorities to consider the potential impact of granting bail on any victims or witnesses. The amendments to Commonwealth laws also removed the requirement for a court to consider a person's cultural background when determining an appropriate sentence or deciding whether to discharge an offender without conviction. The purpose of this review was to assess the impact of those amendments to inform a decision by Government on whether to retain, repeal or amend them.

1. Feedback received from stakeholders indicated that there was little evidence available on which to base an assessment of the impact of the amendments. For instance, stakeholders were aware of only one case, in the NT, where the amendments limiting consideration of customary law and cultural practice in sentencing decisions were cited.[1] However, stakeholders raised several concerns about the amendments, focussing mainly on:

- the potential for inequity arising from limits on judicial discretion to consider all relevant factors
- the amendments not being an appropriate or effective vehicle for addressing issues of family violence and sexual abuse in Indigenous communities
- whether there is any evidence of Indigenous offenders being treated more leniently by the courts than non-Indigenous offenders
- possible unintended negative consequences, such as disadvantaging Indigenous offenders charged with non-violent offences, and
- the complexity of the amendments and potential for significant disparities in interpretation among judicial officers.

2. Most stakeholders were in favour of repealing the amendments that limited consideration of customary law and cultural practice and removed requirements to consider the cultural background of an offender, or an alleged offender. However, stakeholders were generally in support of retaining the provisions requiring a court to specifically consider victims and witnesses in bail decisions.

3. Several law reform commissions have examined the extent to which customary law and cultural background should be considered in bail and sentencing decisions. The resulting recommendations include:

- a general legislative endorsement of the practice of taking Aboriginal customary laws into account in bail and sentencing decisions
- a legislative requirement for a court to consider the cultural background of an offender, or alleged offender, in bail and sentencing decisions, and
- that recognition of Aboriginal customary laws be consistent with international human rights standards.

4. In the literature reviewed, several commentators suggested alternative measures to prevent customary law being inappropriately taken into account in sentencing decisions. These included

[1] This was the case at the time stakeholder input was sought. Since stakeholder input was received, the NT provisions were cited and applied in *The Queen v Wunungmurra* [2009] NTSC 24, examined in Part 6 of this report.

regulating the receipt of customary law information in sentencing proceedings, judicial cultural awareness training and community legal education for Indigenous Australians.

5. A comparison of the Commonwealth and NT laws with those of other Australian jurisdictions, Canada, New Zealand and the United Kingdom revealed that these jurisdictions generally allow broad discretion in bail and sentencing decisions, and do not limit consideration of matters such as customary law and cultural practice. Some jurisdictions also expressly require that the cultural background of an offender, or an alleged offender, be taken into bail and/or sentencing decisions.

6. Most of the amendments are unlikely to be found to be inconsistent with Australia's international or domestic human rights obligations. However, there is some risk that the amendments limiting consideration of customary law and cultural practice in bail and sentencing decisions could be found to be indirectly racially discriminatory. This risk may be minimised by reinstating judicial discretion to consider these factors where relevant. The risk may also be mitigated by restricting the application of those provisions to offences involving violence or sexual abuse, where the offending behaviour infringes upon an individual's human rights.

Options for reform

7. Five options for reform are identified, as follows. The options are outlined in further detail in Part 6 of this report.

- Retain the amendments in current form.
- Retain the amendments, but limit the application of the customary law provisions to violent or sexual offences.
- Repeal the customary law and cultural background amendments to bail and sentencing laws.
- Repeal the customary law and cultural background amendments to bail and sentencing laws and amend Commonwealth and NT laws to regulate the receipt of customary law and cultural practice information in bail and sentencing proceedings.[2]
- Retain the amendments, but limit the application of the customary law provisions to violent or sexual offences, and amend Commonwealth and NT laws to regulate the receipt of customary law and cultural practice information in bail and sentencing proceedings.

8. The provisions requiring a bail authority to consider the impact of granting bail on any victims or witnesses would be retained under each of these options.

9. The first option is recommended at this time as there is little evidence available on which to base an assessment of the impacts of the amendments, and no evidence to indicate the amendments are having unintended negative consequences. If there are cases where the amendments are interpreted more broadly than was intended, or it becomes apparent that the amendments are having unintended negative consequences, further consideration could be given to reform options.

[2] NT sentencing legislation already contains a provision regulating the receipt of information on Aboriginal customary law. That provision would be expanded to encompass any customary law or cultural practice.

Part 1 – Introduction and overview

Purpose of the review

10. The purpose of the review was to assess the impact of amendments made to Commonwealth legislation in 2006, and NT legislation in 2007, concerning the consideration of customary law, cultural practice and cultural background in bail, sentencing and other criminal justice proceedings. Changes made by the amendments included:

- prohibiting consideration of any form of customary law or cultural practice as a reason for mitigating or aggravating the seriousness of criminal behaviour in decisions relating to bail, sentencing and discharge of offenders without conviction
- requiring a bail authority to consider the potential impact of granting bail on any alleged victims or witnesses, especially those in remote communities, and
- removing the requirement for a court to consider a person's cultural background when determining an appropriate sentence or deciding whether to discharge an offender without conviction in relation to a Commonwealth offence.

11. While the amendments limit consideration of customary law and cultural practice in bail and sentencing decisions, they were not intended to operate as a blanket prohibition on consideration of these factors. The provisions are outlined in further detail in Part 2.

12. A focus of the review was to identify examples of any unintended consequences for prosecution agencies, defendants, witnesses and the judiciary, resulting from the amended provisions. The review was limited in scope and did not include consideration of issues concerning the recognition of customary law in the broader criminal justice system, or other areas where recognition of customary law arises (for example, in native title or family law).

Methodology

13. The review was informed by stakeholder feedback, a literature review and analysis of comparable provisions in other jurisdictions.

14. Stakeholder input was sought directly from relevant government and non-government entities involved in the bail and sentencing process, namely:

- the NT Attorney-General (incorporating input from NT agencies and courts)
- the Commonwealth Director of Public Prosecutions
- the Law Council of Australia
- NT Family Violence Prevention Legal Services, and
- Aboriginal and Torres Strait Islander Legal Services.

15. As well as more general input, stakeholders were invited to provide information, if known, on:

- the number and type of cases where the amendments have been cited, considered or applied, and the outcomes in such cases

- where a court or relevant authority did not consider customary law as a result of the amendments, the type of material excluded and whether this affected justice outcomes, and
- general trends emerging in judicial decisions involving application of the amendments.

16. The Attorney-General's Department conducted a literature review of relevant academic articles and publications from 2006 to 2008, and inquiries conducted by the Australian, New South Wales, Western Australian and NT law reform commissions, to gather further evidence of the impact of the amendments and canvass academic and legal opinion on relevant issues. Further information on how articles and publications were selected for the literature review is at Part 4.

17. In addition, the Attorney-General's Department reviewed Australian State and Territory legislation and Canadian, New Zealand and United Kingdom laws, to compare the treatment of cultural background, cultural practice and customary law in provisions dealing with bail, sentencing and forensic procedures.

Report overview

18. **Part 2** of the report outlines the amendments made to Commonwealth and NT bail and sentencing legislation concerning customary law, cultural practice, cultural background and protection of victims and witnesses, and the amendments to Commonwealth forensic procedure provisions. It also provides information on events leading up to, or impacting on, the amendments, including: the 2006 Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities and subsequent Council of Australian Governments (COAG) decision, and the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Commonwealth amendments.

19. **Part 3** of the report contains a summary and analysis of stakeholder feedback. The Department received input from:

- the then NT Attorney-General
- the Commonwealth Director of Public Prosecutions (CDPP)
- the Law Council of Australia (LCA)
- the Law Society Northern Territory (LSNT), and
- a joint submission from Aboriginal and Torres Strait Islander Legal Services (ATSILS) in NSW, Victoria, Queensland, WA, South Australia, the Australian Capital Territory and the NT.

20. The response from the then NT Attorney-General incorporated feedback from the NT Chief Justice, Chief Magistrate, Law Society and Office of the Director of Public Prosecutions.

21. **Part 4** details the outcomes of a literature review that included relevant academic literature from the beginning of 2006 to the end of 2008, and reports of the Australian, NSW, WA and NT law reform commissions.

22. **Part 5** provides an outline of comparable laws concerning bail, sentencing and forensic procedures in Australian States and Territories and in Canada, New Zealand and the United Kingdom.

23. **Part 6** draws together and analyses information gathered through stakeholder input, the literature review and comparisons of the 2006 and 2007 amendments with equivalent laws in other jurisdictions. Some of the issues raised by stakeholders and commentators are explored in further detail to inform the development of options for reform. These include the extent to which the provisions are consistent with Australia's international and domestic human rights obligations, sentencing and other legal principles, community legal education, judicial cultural awareness training and the receipt of information about customary law by the courts. Five options for reform are identified, and a recommendation made on which option to pursue.

Part 2 - Background

24. This Part outlines in further detail the amendments to Commonwealth and NT legislation, and provides information on events leading up to, and impacting on, the amendments.

Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities

25. An Intergovernmental Summit was held on 26 June 2006 to develop a national action plan to address community safety in Indigenous communities, with a particular focus on the protection of Indigenous women and children. At the Summit, ministers from the then Federal Government and all Australian States and Territories agreed that the levels of violence and child abuse in Indigenous communities warranted a comprehensive national response, and discussed action that could be taken to address these issues and improve community safety.[3]

26. Ministers acknowledged at the Summit that better resources, improved methods and a long-term approach would be essential to achieve the breakthroughs necessary to address issues of violence and child abuse. To this end, a National Strategy for Action to Overcome Violence and Child Abuse in Indigenous Communities was developed and ministers agreed to put the strategy to COAG for consideration. The strategy outlined agreements and measures in relation to: customary law and bail, law enforcement, developing Indigenous leadership, protection for victims of violence and abuse, drug and alcohol rehabilitation services, children's health and wellbeing, corporate governance and compulsory school attendance.

27. All governments agreed that customary law in no way justifies, authorises or requires violence or sexual abuse against women and children. The then Federal Government undertook to review bail conditions in relation to Commonwealth offences to ensure that adequate protection was given to victims and witnesses in remote areas, and encouraged State and Territory governments to do the same. It also indicated its intention to amend Commonwealth legislation to remove the requirement for a court to consider the cultural background of a federal offender when determining an appropriate sentence, and to exclude from sentencing discretion claims that criminal behaviour was justified, authorised or required by customary law or cultural practice.

28. A copy of the Summit Communiqué is at **Appendix A**.

Council of Australian Governments decision

29. The outcomes of the Summit were discussed at the COAG meeting of 14 July 2006 and leaders agreed that a targeted national response focussing on improving the safety of Indigenous Australians was required. COAG reaffirmed its commitment to the National Framework on Indigenous Family Violence and Child Protection (which it had initially agreed to in June 2004) and affirmed the importance of continuing to address all aspects of the underlying causes of family violence and child abuse.[4]

30. COAG agreed to adopt a collaborative approach to addressing issues such as policing, justice, support and governance, underpinned by bilateral agreements between the Commonwealth

[3] M. Brough, (then Minister for Families, Communities and Indigenous Affairs), *Communiqué - Safer Kids, Safer Communities*, 26 June 2006.

[4] Council of Australian Governments, *Council of Australian Governments' Meeting 14 July 2006 Communiqué*, Canberra, 14 July 2006, viewed 28 November 2008, <http://www.coag.gov.au/coag_meeting_outcomes/2006-07-14/index.cfm>.

and States and Territories, to ensure that tailored initiatives could be developed to address the specific needs of different jurisdictions, regions and communities.

31. COAG agreed to provide more resources for policing in very remote areas where necessary, to improve the effectiveness of bail provisions, and to establish a National Indigenous Violence and Child Abuse Intelligence Task Force to support existing intelligence and investigatory capacity. COAG also agreed to invest in community legal education, to ensure Indigenous Australians are informed about their legal rights and access to assistance and are encouraged to report incidents of violence and abuse.

32. In relation to customary law, COAG recognised that 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, and that laws in each jurisdiction would reflect this, if necessary by future amendment.

33. An extract from the 14 July 2006 COAG Communiqué is at **Appendix B**.

The 2006 amendments to Commonwealth bail and sentencing laws

34. On 14 September 2006, the then Federal Government introduced the Crimes Amendment (Bail and Sentencing) Bill 2006. The purpose of the Bill was to amend the sentencing and bail provisions in the Crimes Act in accordance with the July 2006 COAG decision.[5]

35. The Bill was referred to the Senate Legal and Constitutional Affairs Committee for review by 16 October 2006.

Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006

36. The Committee publicly invited submissions to the inquiry and directly sought the input of over 130 organisations and individuals. Fourteen submissions and 12 witnesses informed the final report.[6] The Committee noted that, with the exception of the Federal Attorney-General's Department and Victoria Police, all submissions and witnesses expressed concerns about the various amendments and their practical operation.

37. The Committee identified several issues raised in submissions to the inquiry, including:

- lack of consultation on the Bill
- arguments that the Bill was misguided and ill-conceived, and would do little, if anything, to address violence and child abuse in Indigenous communities in a practical sense
- the discriminatory nature of the Bill
- arguments that the Bill ran contrary to the findings of major relevant inquiries in Australia, such as the Royal Commission into Aboriginal Deaths in Custody
- arguments that the Bill would restrict judicial discretion, and

[5] Parliament of the Commonwealth of Australia, Crimes Amendment (Bail and Sentencing) Bill 2006, Explanatory Memorandum, 2006

[6] Copies of submissions, hearing transcripts and the Committee's report are available at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/crimes_bail_sentencing/index.htm.

- arguments that the Bill would undermine important initiatives involving Indigenous customary law, such as circle sentencing.

38. When first introduced, provisions in the Bill limiting consideration of customary law and cultural practice in bail and sentencing decisions were drafted such that a court would be prevented from taking account of customary law or cultural practice to decrease a penalty, but not to increase a penalty. The Committee recommended that these provisions be amended so that customary law and cultural practice could not be taken into account to mitigate or aggravate the seriousness of criminal behaviour. Government amendments were introduced to address this recommendation, and the final form of the amendments provide that as well as being precluded from consideration as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of criminal behaviour, customary law or cultural practice could not be taken into account as a reason for aggravating the seriousness of criminal behaviour.

39. The Committee recommended that 'cultural background' be retained in the list of factors a court must take into account when passing sentence. This was not accepted by the then Government.

40. The Committee recommended that the Senate pass the Bill subject to its two abovementioned recommendations.

41. Senators Crossin, Kirk and Ludwig submitted a dissenting report which recommended that the Bill not proceed, even with amendments that address the Committee's recommendations.

Bail

42. The *Judiciary Act 1903* (Cth) provides that State and Territory bail laws apply to a person charged with a Commonwealth offence, unless the contrary is indicated in Commonwealth law. Section 15AA of the Crimes Act limits that general discretion by providing that bail must not be granted to persons charged with, or convicted of particular offences, including terrorism offences, unless exceptional circumstances apply. Before the 2006 amendments, State and Territory laws otherwise governed the factors a court must, must not or may consider, when making bail decisions.

43. The *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) (CABS Act) amended the Crimes Act by inserting:

- a new provision (paragraph 15AB(1)(b)) to prohibit an authority, when deciding whether to grant bail in relation to a Commonwealth offence, from taking into consideration any form of customary law or cultural practice to mitigate or aggravate the seriousness of the criminal behaviour of an alleged offender, and
- new provisions (paragraph 15AB(1)(a) and subsection 15AB(2)) to require an authority, when granting and imposing bail conditions for Commonwealth offences, to consider the potential impact on victims and witnesses, especially those in remote communities.

Sentencing

44. In contrast to bail decisions, the matters a court must take account of in determining the sentence to impose upon conviction of a federal offence are determined solely by Commonwealth laws. The Crimes Act contains general sentencing principles for determining the sentence to be imposed for a federal offence. Subsection 16A(1) provides that a court must impose a sentence that is of a severity appropriate in all circumstances of the offence. Subsection 16A(2) provides a list of

matters that must be taken into account, in addition to any other matters, if they are relevant and known to the court. Before the 2006 amendments, the list included, at paragraph 16A(2)(m), the cultural background of the offender. There were no provisions directing that any particular matter must not be considered. A court therefore had the discretion to also consider customary law or cultural practice in any context in which it was relevant.

45. The CABS Act amended the Crimes Act by:

- inserting a new provision (subsection 16A(2A)) to prohibit a court, when sentencing in relation to a Commonwealth offence, from taking into consideration any form of customary law or cultural practice to mitigate or aggravate the seriousness of the criminal behaviour of an offender, and

- removing 'cultural background' from the list of matters (at subsection 16A(2)) a court must take into account when exercising sentencing discretion.

Other decisions in the criminal justice process

46. During debate of the Bill in the Senate, a potential inconsistency was identified. Namely, that the Bill would remove the requirement to consider an offender's cultural background when determining an appropriate sentence, but not for decisions to discharge an offender without conviction. The then Government introduced further amendments to address this inconsistency, and also to omit cultural background and Aboriginal customary beliefs from a list of matters that a constable, senior constable or magistrate must consider before requesting consent to, or ordering, forensic procedures.

Discharge without conviction

47. Section 19B of the Crimes Act provides that, in deciding that despite a charge being proved, it is appropriate to dismiss a charge or to discharge an offender without proceeding to conviction, a court must consider particular factors. Before the amendments, the factors a court's decision could be based on were:

- the character, antecedents, cultural background, age, health or mental condition of the person
- the extent to which the offence is of a trivial nature, or
- the extent to which the offence was committed under extenuating circumstances.

48. While section 19B does not contain a general provision permitting consideration of other factors, the sentencing factors set out at section 16A are also relevant to the exercise of discretion under section 19B.[7]

49. The CABS Act amended the Crimes Act by:

- inserting a new provision (subsection 19B (1A)) to prohibit a court, when deciding whether to discharge a federal offender without recording a conviction, from taking into consideration any form of customary law or cultural practice to mitigate or aggravate the seriousness of the criminal behaviour of an offender, and

[7] Section 16A applies when determining the sentence to be passed, or the order to be made, in respect of a federal offender.

- removing 'cultural background' from the list of matters (at paragraph 19B(1)(b)) a court must take into account when exercising that discretion.

Forensic procedures

50. Part 1D of the Crimes Act contains provisions that regulate how forensic procedures are to be carried out on suspects. Sections 23WI, 23WO and 23WT provide that, before a constable requests consent to a forensic procedure, or a senior constable or magistrate orders a forensic procedure, he or she must consider a number of factors. Before the 2006 amendments, these factors included the suspect's cultural background and, if there were reasonable grounds to believe a suspect was an Aboriginal or Torres Strait Islander, the suspect's customary beliefs. Constables, senior constables and magistrates were also required to consider a person's religious beliefs more broadly, instead of only in the context of the intrusiveness of the procedure, as is now the case.

51. The CABS Act amended the Crimes Act by amending existing provisions (sections 23WI, 23WO and 23WT) to provide that constables, senior constables and magistrates are not required to consider a suspect's cultural background or Aboriginal customary beliefs when requesting consent for and/or ordering forensic procedures.

Conclusion

52. The 2006 amendments limit the contexts in which customary law and cultural practice may be considered, but were not intended to exclude them entirely as factors that may be taken into account in bail and sentencing decisions. The amendments prevent customary law and cultural practice being taken into account as a reason for mitigating or aggravating the seriousness of criminal behaviour. However, it was intended that bail conditions could continue to take into account any relevant family or community structure operating under customary law, such as in a remote community. Similarly, in determining a sentence, it was intended that a court could still take into account whether an offender has received, or will receive, tribal punishment for his or her behaviour.

53. The 2006 amendments do not prevent a court from considering the cultural background of an offender when passing sentence or discharging an offender without conviction. Similarly, a constable, senior constable or magistrate is not prevented from considering a suspect's cultural background or Aboriginal customary beliefs when determining whether to request consent to, or order, a forensic procedure. However, in each case, the amendments removed the express requirement to consider these factors. The amendments also restricted the requirement to consider a suspect's religious beliefs to the context of whether or not there is a less intrusive, but reasonably practical, way of obtaining evidence that would tend to prove or disprove that he or she committed a particular offence.

The 2007 amendments to Northern Territory bail and sentencing laws

54. The Northern Territory Emergency Response (NTER) was announced on 21 June 2007 by the then Federal Government in response to evidence of abuse and potential neglect of children in the NT. Part of the legislative package enacted by the Commonwealth Parliament to support the NTER included amendments to NT bail and sentencing laws.

55. Before the amendments made by the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act), the matters a court was to consider in bail and sentencing decisions for NT offences were determined only by the laws of that jurisdiction.

56. The *Bail Act 1982* (NT) contains an exhaustive list of matters a court must consider when deciding whether or not to grant bail, and does not provide a general discretion to take account of any relevant matter. A court is required to consider a person's background and community ties only when determining the likelihood that the person will appear in court for the offence. Before the amendments, there was no express requirement to consider cultural practice or customary law in any context. However, there was scope to consider such factors when considering the circumstances of the offence for the purpose of determining the likelihood that the person will appear in court for the offence, and when considering the needs of the person to be free for any lawful purpose.

57. There was no express requirement under the *Sentencing Act 1995* (NT) for a court to consider cultural background, cultural practice or customary law when passing sentence or making an order concerning an NT offence. However, before the amendments, a court had the discretion to consider any relevant circumstance.

Northern Territory National Emergency Response Act 2007 (Cth)

58. The NTNER Act, passed on 17 August 2007, included provisions to amend bail and sentencing laws in the NT by:

- prohibiting a court, when sentencing or making an order in relation to an NT offence, from taking into consideration any form of customary law or cultural practice to lessen or aggravate the seriousness of the criminal behaviour of an offender
- prohibiting an authority, when granting and imposing bail conditions for an NT offence, from taking into consideration any form of customary law or cultural practice to lessen or aggravate the seriousness of the criminal behaviour of an alleged offender, and
- requiring a bail authority, when granting and imposing bail conditions for NT offences, to consider the potential impact on victims and witnesses, especially those in remote communities.

59. The amendments removed the discretion to consider customary law and cultural practice in bail and sentencing decisions when determining the seriousness of the offence. However, they were not intended to prevent consideration of those factors in other contexts. For example, in determining the needs of the person to be free for a lawful purpose when deciding whether to grant bail, a court could take account of an alleged offender's wish to attend an important ceremony.

60. An independent review of the NTER was conducted by the NTER Review Board and a report provided to the Federal Government on 13 October 2008. However, the amendments to NT bail and sentencing provisions were not considered as part of that review.

Part 3 – Stakeholder feedback on the amendments

61. Stakeholders involved in the bail and sentencing process were asked to provide any information, if available, on several specific points, to enable an assessment of the practical impact of the amendments. They were also invited to provide general input on matters connected with the review. The information specifically sought concerned:

- the number and type of cases where the amendments have been cited, considered or applied, and the outcomes in such cases
- where a court or relevant authority did not consider customary law as a result of the amendments, the type of material excluded and whether this affected justice outcomes, and
- general trends emerging in judicial decisions involving application of the amendments.

62. The Department received input from:

- the then NT Attorney-General
- the Commonwealth Director of Public Prosecutions (CDPP)
- the Law Council of Australia (LCA)
- the Law Society Northern Territory (LSNT), and
- a joint submission from Aboriginal and Torres Strait Islander Legal Services (ATSILS) in NSW, Victoria, Queensland, WA, SA, the ACT and the NT.

63. The response from the then NT Attorney-General incorporated feedback from the NT Chief Justice, Chief Magistrate, Law Society and Office of the Director of Public Prosecutions. The LCA and ATSILS included their submissions to the Senate Inquiry and other relevant material as attachments.

64. The stakeholder feedback indicated that there was little evidence available on which to base an assessment of the impact of the amendments. As a result, much of the feedback received focused instead on the potential impacts of the amendments, and whether they were an appropriate policy response to the problem they were aimed at addressing.

65. Since stakeholder input was received, the NT provisions were cited and applied in *The Queen v Wunungmurra* [2009] NTSC 24. This case is examined in Part 6 of this report.

Proceedings where the provisions have been cited, considered or applied

66. The LCA considered it is too early to properly assess the impact of the amendments made by the NTNER Act. The LCA was not aware of any cases in which customary law or cultural background evidence has been raised to which those amendments would apply. In feedback provided through the then NT Attorney-General, the Chief Magistrate advised that the provisions have not arisen for consideration in the summary courts.

67. ATSILS also indicated that an assessment of the impact of the amendments made by the NTNER Act may be premature. ATSILS noted that factors raised to justify criminal behaviour are not generally considered in bail decisions, because such decisions are made in the context of a presumption of innocence. However, ATSILS have encountered situations where magistrates have read the bail provisions more broadly than was intended, and put to defence counsel that a defendant's wish to attend a funeral could not be considered, as the magistrate was precluded from

considering customary law or cultural practice. On such occasions, defence counsel was able to successfully argue that such a reading was inconsistent with the intention of the provisions.

Instances of customary law or cultural practice not being considered because of the amendments

68. ATSILS were aware of only one NT case where the sentencing provisions were cited – *R v Leroy Gibson* (2008, unreported, NT Supreme Court, SC 20724133).[8] In that case, the defendant pleaded guilty to three offences of sexual intercourse with a female under 16 years of age. Martin CJ noted in his sentencing remarks that:

- the acts of sexual intercourse occurred when the defendant was 18 to 19 years of age, and the victim 13 to 14 years of age
- the acts occurred in the context of a relationship that began the year before, and which was viewed by the defendant and others in the community as a traditional Aboriginal marriage
- the acts occurred with the consent of the victim, in the homes of the defendant's and victim's parents, and
- those who might be expected to let the defendant know that a sexual relationship with the victim was wrong, in fact encouraged the relationship.

69. Of most relevance to the review, Martin CJ stated the following.

> In referring to these matters, I am not taking into account any cultural law or practice. I am forbidden by the law from doing that. However, regardless of the reason, it remains a significant fact that as a young man you had the approval for the relationship, not only from your parents, but also from the child's parents. Their approval extended to occupying the same bed together within the homes of both sets of parents.[9]

70. In determining the sentence to be imposed, Martin CJ took account of the defendant's guilty plea and a combination of circumstances, including the defendant's young age and the consensual nature of the relationship, in passing a shorter sentence than would otherwise have been imposed. Ultimately, the offender was sentenced to two years on each count, to be served concurrently.

Evidence or argument excluded or not led because of the amendments

71. It is not clear whether the defence argued in *R v Leroy Gibson* that the defendant should receive a lesser sentence because his relationship with the victim was recognised as a traditional marriage. However, the judge's sentencing remarks make it clear that he was conscious to consider facts relevant to the defendant's relationship to the victim without reference to customary law.

72. The CDPP advised that it is not aware of any cases where submissions concerning customary law or cultural practice have been made, and then disregarded because of the provisions. Further, the CDPP indicated that it was not in a position to know whether defence lawyers have been prevented from making submissions that otherwise would have been made.

[8] Sentencing remarks are available at http://www.supremecourt.nt.gov.au/remarks.
[9] *R v Leroy Gibson*, as above.

73. Similarly, ATSILS had not experienced particular types of evidence or argument being excluded or not led. However, ATSILS were concerned that it could occur in upcoming cases, and could result in unjust outcomes for defendants in the NT who:

- are being prosecuted for sexual offences with an alleged victim under 16 years of age and wish to lead evidence of a customary marriage
- wish to lead evidence that their offending was the result of a curse, or
- wish to explain that their behaviour was a result of the victim infringing customary law.

Emerging trends in judicial decisions

74. ATSILS considered that offences of consensual sex with a child under 16 years of age now receive harsher sentences because customary law cannot be considered as a mitigating factor.

Other stakeholder feedback

75. The majority of stakeholder feedback fell outside the specific information requested, and much of it was critical of the amendments. Stakeholders expressed several concerns about the amendments, including that they:

- could lead to inequitable treatment and unjust outcomes by not allowing or requiring adequate consideration of cultural differences
- apply equally to violent and non-violent offences (when the focus of the 2006 COAG decision was violence and sexual abuse)
- have the potential to erode Aboriginal culture and undermine the positive impacts of Aboriginal sentencing courts, and
- are confusing and complicated.

76. The then NT Attorney-General, LSNT, LCA and ATSILS were in favour of repealing the amendments. The CDPP did not express an opinion on whether the amendments should be repealed, retained or modified.

<u>Restrictions on judicial discretion and the potential for inequity</u>

77. The LCA, LSNT and ATSILS argued against restrictions being placed on judicial discretion in bail and sentencing decisions, and submitted that sentencing principles established under common law, and the appeals process, provide adequate mechanisms for ensuring appropriate sentences in each particular case.

78. Each of these stakeholders maintained that for the law to apply fairly to all Australians, it must recognise the differences between people. The LCA argued that it is not laws that allow consideration of cultural factors, but those that limit a court's discretion to consider such factors, that 'create an anomaly in the fundamental legal principle that the law should apply equally to everyone'.[10] The Aboriginal Legal Rights Movement (ALRM) similarly argued that 'equality

[10] Law Council of Australia, *Submission to the review of customary law amendments to bail and sentencing legislation*, 17 November 2008.

before the law implies and requires recognition of the courts of cultural difference in sentencing matters'.[11]

79. While not suggesting that Australian society, or the Courts, should condone criminal conduct or treat it less seriously, the LCA considered that a court should be able to take account of cultural factors, along with any other relevant factors, in determining an appropriate sentence. Similarly, ALRM noted that where courts have the discretion to consider customary law factors, the weight it attributes to such factors is also a matter of discretion:

> It does not create a necessary or mathematical reduction of sentence, indeed if the Court is not satisfied of its importance, or thinks it has been raised in a spurious or opportunist way it does not have to give it any mitigating effect at all.[12]

80. The LCA was also careful to point out that it was not advocating that someone's cultural background should be considered for its own sake. Rather, that cultural factors should be able to be taken into account where they go some way to explaining the commission of an offence:

> There are also clear distinctions to be made, for example, between a violent offender charged with malicious wounding during a violent altercation while under the influence of alcohol, and a person carrying out traditional punishment with the sanction of their community and according to that community's customary laws.[13]

81. ATSILS argued that there is no evidence to suggest that courts accept that criminal behaviour is excused or justified on the basis of customary law, rather that judges have been 'highly circumspect, very careful and considered in their determination of cases in which customary law questions have arisen.'[14] The LCA also argued that errors in sentencing are relatively rare and are not limited to cases involving Indigenous offenders or those of specific ethnic origins. Further, the LCA noted that prosecutorial policies across Australian jurisdictions provide that sentences considered to be manifestly inadequate will be appealed.

82. Aboriginal Legal Service (NSW/ACT) (ALS) argued that while the amendments would not preclude consideration of cultural background, removing it as a factor that must be considered in sentencing sends the message that it is unimportant.[15] ALS was concerned that this could lead to disadvantage associated with an offender's cultural background not being duly considered by courts. Similarly, the LCA argued that a consequence of the amendments would be that an offender whose culture accords with mainstream values and beliefs would have an advantage at sentencing over an offender who lives his or her life according to a different cultural system.[16]

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[11] Aboriginal Legal Rights Movement, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006*, 26 September 2006 (attached with ATSILS submission to the review).

[12] Ibid.

[13] Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006*, 26 September 2006 (attached with submission to the review).

[14] Aboriginal and Torres Strait Islander Legal Services, letter to Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, 3 July 2006 (attached with ATSILS submission to the review).

[15] Aboriginal Legal Service (NSW/ACT), *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006*, 4 October 2006 (attached with ATSILS submission to the review).

[16] Law Council of Australia, *Recognition of cultural factors in sentencing*, submission to the Council of Australian Governments, 10 July 2006.

83. Both ATSILS and ALRM noted that courts have begun to require proper evidence in cases where customary law issues are raised (eg evidence from anthropologists and other experts).[17] ATSILS considers this a 'proper development' that will ensure courts can be appropriately satisfied of the veracity of claims put before them.

Human rights considerations

84. The LCA cites the then Human Rights and Equal Opportunity Commission (HREOC, now the Australian Human Rights Commission) as stating that Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) creates a positive obligation on States to protect the culture of minorities. Further, that the right of minorities to enjoy their own culture is a recognised human right. The LCA cites HREOC as arguing that the balancing process involved in sentencing would be distorted in a way inconsistent with that right if cultural practice was precluded from consideration.

85. ATSILS argued that if the then proposed amendments to the Crimes Act were enacted, they would operate as an 'implied express repeal' of the *Racial Discrimination Act 1975* (Cth) (RDA). ATSILS refer to *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337 as establishing that implied express repeal of a special measure or equality measure is within the Commonwealth's legislative power.[18] The judgement in that case refers to a principle established in *Goodwin v Phillips* [1908] HCA 55, 7 CLR 1 – in short, that where provisions of a more recent Act are wholly inconsistent with an earlier Act concerning the same issue, then the earlier Act is repealed by necessary implication.

Whether the amendments are appropriate to their stated purpose

86. Some stakeholders noted that while the intent of Parliament was to ensure that certain factors could not be relied on to excuse violent offences, in reality the amendments would apply equally to non-violent offences. ALRM suggested that if the amendments were a response to concerns about family violence and child abuse, their application should be restricted to offences concerning such conduct.[19]

87. ALS noted that in NSW, the most common type of Commonwealth offence with which Aboriginal people are charged is social security fraud.[20] It argued that it is common 'cultural practice' in many Aboriginal communities for a person to share whatever resources they temporarily hold with members of their extended family. ALS considers that excluding this practice from consideration in determining the sentence for an Aboriginal person convicted of social security fraud would result in a miscarriage of justice. The LCA raised similar concerns about the application of the amendments to social security fraud offences, but did not provide any specific examples of this having occurred.

88. Stakeholders also expressed concern that an implication of the amendments is that Aboriginal culture or customary law condones family violence and sexual abuse. ALS stated that it does not believe that child sexual assault and family violence are part of present day Aboriginal culture.[21] The LCA argued that the amendments propagate a 'false suggestion that customary law

[17] ATSILS, letter to Race Discrimination Commissioner, as above, ALRM, submission to Senate Inquiry, as above.
[18] ATSILS, letter to Race Discrimination Commissioner, as above.
[19] ALRM, submission to Senate Inquiry, as above.
[20] ALS, submission to Senate Inquiry, as above.
[21] ALS, submission to Senate Inquiry, as above.

condones violence and abuse by men against women and children'.[22] The LCA also stated that it understands that the Commonwealth amendments have had 'no impact on the protection of Aboriginal and Torres Strait Islander women and children from violence and sexual abuse'.[23] While it may be the case that Aboriginal customary law does not condone domestic violence or sexual abuse, it appears from the *The Queen v Wunungmurra* (examined in Part 6 of this report) that in some cases it may permit or require physical punishment.

89. Finally, the then NT Attorney-General pointed out that no other Australian jurisdiction had followed the Commonwealth's lead and enacted similar legislation in response to the 2006 COAG decision.

Complexity of the amendments

90. ATSILS submitted that the distinction between the contexts in which customary law may and may not be considered under the amendments is complex and confusing. ATSILS argued that for offences such as recklessly or negligently causing serious harm, a defence of duress could be raised at trial if the defendant pleads guilty. They cite Mildren J as stating that if that defence is unsuccessful or unavailable, 'the fact that the defendant operated under the influence of a threat would be a relevant sentencing consideration', but that a court could only consider this in circumstances where it can be argued that the relevant fact is that the defendant acted under duress, rather than in accordance with custom.[24] ATSILS considered that such a complex situation would 'almost inevitably' lead to unjust outcomes, and that this complexity also arises where customary law is raised in relation to a defence of provocation or honest claim of right. This arises because evidence of customary law put to the court in support of a claim of provocation may or may not be able to be considered in sentencing, depending on how a particular judge characterises such evidence. That is, evidence of customary law cannot itself be considered, but evidence of provocation brought about by virtue of customary law may be.

91. ATSILS argued that it would be unjust for evidence that may be considered in determining a defendant's criminal responsibility at trial to be precluded from consideration when determining that defendant's moral culpability at sentence.

Lack of evidence that Indigenous offenders are treated more leniently by the courts

92. The LCA argued that there is a lack of evidence to support the contention that Indigenous offenders receive more lenient sentences than non-Indigenous offenders. Arguing that there is no statistical basis to claims that Indigenous offenders receive 'special treatment', the LCA pointed to the high incarceration rate of Indigenous Australians, and stated that average prison terms imposed on Indigenous offenders have increased since the findings of the Royal Commission into Aboriginal Deaths in Custody were released.

93. The LCA also argued that the sentence passed by the NT Court of Criminal Appeal in the 'promised bride' case, *The Queen v GJ* [2005] NTCCA 20 (*GJ*),[25] is comparable to the average sentence range for equivalent offences in NSW. Further, it argued that the case was widely misrepresented in media reporting, which characterised the case as involving rape and kidnapping, and tended to imply the defendant had raised a 'customary law defence'. In making that argument,

[22] LCA, submission to the review, as above.
[23] Ibid.
[24] Aboriginal and Torres Strait Islander Legal Services, *Joint submission to the review of customary law amendments to bail and sentencing legislation*, 27 November 2008
[25] A case summary is provided at **Appendix C**.

the LCA pointed out that the defendant was in fact charged with consensual sexual intercourse with a minor, despite the facts of the case apparently supporting a more serious charge. The LCA stated that it is not unusual for the prosecution to accept a guilty plea to lesser charges where circumstances would make it difficult to prove a more serious charge. The LCA quotes the NT Director of Public Prosecutions, Richard Coates, who has explained some of the factors contributing to such decisions being taken. Coates stated that Indigenous understandings of the role of a witness in an offence can lead to witnesses being reluctant or refusing to give evidence that would be essential to proving a charge, which leaves prosecutors in the position of either accepting a plea to lesser charges or discontinuing the case altogether.

Possible unintended consequences

94. The LCA argued that 'repudiation of traditional laws and practices' by Australian Parliaments could have a negative impact on the communities and lives of Indigenous people, by sending a message to Indigenous Australians that traditional laws and customs are not valued or worthy of recognition.[26] In turn, the LCA contends, the authority of the elders responsible for teaching and enforcing traditional laws and customs is reduced, and Indigenous communities are destabilised.

95. ATSILS stated that they have come across confusion and hurt in some of the remote communities they service at the failure of the Australian legal system to recognise customary law. They also believe that a possible unintended consequence of the amendments is that defendants whose criminal behaviour was influenced by customary law or cultural practice may decide to plead not guilty, even if the prospects for acquittal are weak, due to concerns that such evidence could not be taken into account during sentencing.

96. ATSILS and ALS argued that the then proposed Commonwealth amendments would undermine Aboriginal sentencing courts.[27] ATSILS argued that recognition of cultural difference is fundamental to the successful operation of these courts, and that to remove their power to consider customary law and cultural practices would reduce their capacity to work in the interests of justice and the communities they serve. The NT Chief Magistrate, in feedback provided through the then NT Attorney-General, also expressed concern about the possible impact of the amendments on Aboriginal sentencing courts. As outlined in Part 2 of this report, the amendments limit, rather than preclude consideration of customary law and cultural practice. The amendments affect the factors that any type of sentencing court can take into account when determining the seriousness of criminal behaviour, but were not intended to otherwise impact on Aboriginal sentencing courts.

97. The NT Chief Magistrate was also concerned that courts could be precluded from using Aboriginal kinship relations in positive ways such as the imposition of a rehabilitation order under which an offender is placed under the supervision of kin. The amendments limit the extent to which customary law and cultural practice can be taken into account in bail and sentencing decisions. However, they are not intended to operate to prevent a court from using kinship relations to assist with an offender's rehabilitation.

Double jeopardy

98. The LCA argued that precluding consideration of customary law in bail and sentencing decisions could result in Indigenous offenders effectively being punished twice for the same

[26] LCA, submission to the review, as above.
[27] ATSILS, letter to Race Discrimination Commissioner, as above, ALS, submission to Senate Inquiry, as above.

offence, violating the legal principle of double jeopardy. The LCA considers it important for courts to be able to take account of traditional punishment and Indigenous offender has, or will, receive when passing sentence. ALRM also raised this concern.[28]

99. As outlined in Part 2, the amendments removed the discretion to take account of customary law and cultural practice in bail and sentencing decisions as reasons for mitigating or aggravating the seriousness of criminal behaviour. However, they were not intended to prevent consideration of these factors in other contexts, such as traditional punishment an Indigenous offender has, or will, receive.

Amendments concerning victims and witnesses, and complementary measures

100. The then NT Attorney-General stated that the NT Government rejects the need for provisions requiring bail authorities to give specific consideration to whether a victim or witness resides in a remote community. The LCA and ALS both expressed support for the amendments requiring courts to specifically consider the interests of victims and witnesses in determining whether bail should be granted.[29] The CDPP also supports the retention of these provisions. The CDPP stated that it is important for victims and witnesses who agree to assist the criminal justice system by giving evidence in prosecution proceedings to be afforded the consideration and protection of the system they are seeking to assist.

101. The LCA noted that the amendments were to be introduced along with other measures such as community legal education and judicial cultural awareness training.[30] The LCA expressed support for those measures, but argued that the benefits of judicial training in cultural awareness would be largely defeated by the amendments, which would limit the extent to which judicial officers could utilise such knowledge.

[28] ALRM, submission to Senate Inquiry, as above.
[29] LCA, *Recognition of cultural factors in sentencing*, as above, ALS, submission to Senate Inquiry, as above.
[30] LCA, submission to Senate Inquiry, as above.

Part 4 – Review of relevant literature

A literature review was conducted to gather further evidence of the impact of the amendments and canvass academic and legal opinion on relevant issues.

Methodology

102. All Australian Law Reform Commission (ALRC) reports relevant to sentencing, cultural issues and customary law were selected for inclusion in the literature review. Reports by State or Territory law reform commissions that specifically addressed recognition of customary law or sentencing of Aboriginal offenders were also included.

103. The Department conducted an INFORMIT search of electronic databases listed under Law and/or Indigenous categories, for Australian articles and publications from 2006 to 2008. The following keyword search combinations were used:

- 'customary law' and 'bail'
- 'customary law' and 'sentencing'
- 'cultural practice' and 'bail'
- 'cultural practice' and 'sentencing'
- 'cultural background' and 'bail', and
- 'cultural background' and 'sentencing'.

104. Searches of the Attorney-General's Information Service and the Indigenous Justice Clearing House were also conducted using the same search parameters.

105. Articles and publications identified by these searches were assessed for relevance to the review based on abstracts, with those containing mention of the 2006 and 2007 amendments (including references to proposed amendments) and related issues selected for further review. A significant report released in the time period examined, known as the 'Little Children are Sacred' report, was not identified through the searches, but was considered as part of the literature review. Thirty-five articles and publications were included in the final review, excluding the law reform commission reports.[31]

The views of law reform commissions in Australia

106. The following reports by Australian law reform commissions were identified as relevant to the review:

- Australian Law Reform Commission, *The recognition of Aboriginal customary laws*, Report 31, 1986
- Australian Law Reform Commission, *Sentencing*, Report 44, 1988
- Australian Law Reform Commission, *Multiculturalism and the law*, Report 57, 1992
- New South Wales Law Reform Commission, *Sentencing: Aboriginal offenders*, Report 96, 2000

[31] Multiple articles published by the same author in separate publications, but containing identical content, have been counted as one for the purposes of the review.

- Northern Territory Law Reform Commission, *Report of the committee of inquiry into Aboriginal customary law*, 2003
- Australian Law Reform Commission, *Same crime, same time: Sentencing of federal offenders*, Report 103, 2006, and
- Law Reform Commission of Western Australia, *Aboriginal customary laws*, Project 94, 2006.

107. Recommendations in the above reports were generally supportive of recognition of cultural factors and Aboriginal customary law, and their consideration in bail and sentencing decisions. Relevant recommendations included:

- a legislative endorsement of the practice of taking account of customary law in bail and sentencing decisions, where relevant
- expressly requiring a court to consider an offender's cultural background in bail and sentencing decisions, including when determining whether to discharge an offender without recording a conviction
- preserving judicial discretion in bail and sentencing decisions
- explicitly recognising fundamental sentencing principles in legislation, and
- recognising customary law consistently with international human rights standards.

Legislative endorsement of consideration of customary law in bail and sentencing decisions

108. In Report 31, the ALRC recommended a general legislative endorsement of the practice of taking Aboriginal customary laws into account in sentencing decisions.

> It should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time.[32]

109. Similar recommendations were made by the NSW Law Reform Commission (NSWLRC) and the Law Reform Commission of WA (LRCWA). The NSWLRC endorsed the conclusions reached by the ALRC in its Report 31. The NSWLRC considered that while there was ample existing authority at common law to enable courts to recognise Aboriginal customary law in sentencing, the importance of recognition is such that it should not remain dependent on the approaches of individual judicial officers. The NSWLRC recommended a legislative requirement to consider Aboriginal customary law where relevant, to promote consistency and clarity in the law.

110. The LRCWA recognised that some defendants may argue that family violence or sexual abuse is acceptable under customary law. However, it did not accept that this justified preventing courts from considering customary law in sentencing decisions. The LRCWA thought it was best left to a court to balance customary law and other considerations, such as Australia's international human rights obligations. Making specific reference to the 2006 COAG decision, the LRCWA considered legislative amendments to preclude consideration of customary law to be unnecessary and inappropriate.

[32] Australian Law Reform Commission, *The recognition of Aboriginal customary laws*, Report 31, 1986.

111. The ALRC also considered customary law and sentencing in Report 44, and most recently in Report 103. In Report 44, the ALRC recommended that:

> The fact that an offender is Aboriginal should not be a matter relevant to sentence but special factors arising from disadvantages suffered by Aboriginals, or Aboriginal customary practices, should be considered.[33]

112. In Report 103 the ALRC affirmed its commitment to the recommendations made in Report 31, including that 'legislation should endorse the practice of considering traditional laws and customs, where relevant', when sentencing an offender who is Aboriginal or Torres Strait Islander, provided such considerations do not derogate from international human rights principles.[34]

113. In Report 31, the ALRC also recommended that the customary laws of any Aboriginal community to which the defendant, or a victim of the offence, belonged, should be taken into account when determining both whether or not to grant bail, and in setting conditions for bail. The LRCWA recommended in Project 94 that legislation provide that where the accused is an Aboriginal person, consideration must be given in bail decisions to any known Aboriginal law or other cultural issues relevant to bail. This recommendation was made on the basis that the criteria to be considered in bail decisions under the *Bail Act 1982* (WA) had the potential to disadvantage Aboriginal people applying for bail, by focusing mainly on western concepts such as employment and home ownership, and not a person's cultural ties to a community.

Legislative requirement to consider cultural background in bail and sentencing decisions

114. The ALRC's approach to listing, in legislation, factors to be considered in sentencing, has shifted over time. However, it has consistently maintained that a court should be required to consider the cultural background of an offender when determining an appropriate sentence. In Report 44, the ALRC recommended that legislation provide a list of factors that a court must consider in sentencing decisions, including the cultural background of the offender. The ALRC recommended that the list be non-exhaustive, so as to promote consistency in sentencing practice without limiting a court's discretion to consider other factors where they are relevant. In Report 57, the ALRC affirmed its position and recommended that the Crimes Act be amended to require an offender's cultural background to be taken into account at sentence, to ensure that it was not overlooked where it is relevant. The Crimes Act was amended to give effect to this recommendation in 1994.

115. While in Report 103, the ALRC suggested a different approach to the presentation of factors to be considered in sentencing, it recommended that courts continue to be required to take account of an offender's cultural background when passing sentence.

116. The LRCWA similarly recommended that an offender's cultural background be among the factors that a court must consider when passing sentence. It noted that there was sufficient case law to allow a court to take account of an offender's Aboriginal background when passing sentence, but that there was not a consistent approach. The LRCWA was of the view that there should be legislative guidance instructing courts to consider the cultural background of an offender when determining an appropriate sentence, to ensure that important issues associated with culture are not overlooked. It recommended that cultural background be included as a factor in a non-exhaustive list of factors a court must consider when passing sentence.

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[33] Australian Law Reform Commission, *Sentencing*, Report 44, 1988, recommendation 111.

[34] Australian Law Reform Commission, *Same crime, same time: Sentencing of federal offenders*, Report 103, 2006, recommendation 29-1.

117. In anticipation of the 2006 amendments to remove cultural background from a list of factors a sentencing court must consider under the Crimes Act, the LRCWA firmly rejected the argument that permitting courts to take into account the cultural background of an offender when passing sentence is contrary to the principle of equality before the law. In making its recommendation, the LRCWA pointed out that the cultural background of an offender would be just one of several factors a court must take into account, and that a court would retain the discretion as to how much weight to attach to each particular factor in any given case.

118. The LRCWA also considered that the cultural background of an accused is a relevant factor in bail decisions, and recommended that legislation require that it be considered in determining whether or not to grant bail.

Legislative requirement to consider cultural background when deciding whether to discharge an offender without conviction

119. In Report 57, the ALRC recommended that a court be expressly required to consider an offender's cultural background when determining whether to discharge an offender without conviction, to promote consistency and ensure that an offender's cultural values and beliefs are not overlooked where relevant. The Crimes Act was amended to give effect to this recommendation in 1994. While recommending a different approach to listing factors in legislation in Report 103, the ALRC maintained its position that a court should be required to take account of an offender's cultural background in such decisions.

Preserving judicial discretion

120. As the amendments limited the matters that may be taken into account in bail and sentencing decisions, general recommendations about judicial discretion are a relevant consideration. While recommending that courts be required to consider certain factors, law reform commissions were in favour of courts retaining discretion to consider any other factor relevant to the offence or the offender.

121. In Report 31, the ALRC stated that a general sentencing discretion should be available in all cases, which would allow special mitigating factors to be taken into account. It went on to make the following recommendation in Report 44.

> The sentencing court must retain a significant amount of discretion. The most appropriate way to promote consistency in sentencing is to encourage sentencers to frame their decisions in a way that will allow meaningful comparisons to be drawn between them so that the matters that were taken into account, and their significance in the case, can be easily seen and compared.[35]

122. In that report, the ALRC recommended that a permissive and open ended list of sentencing factors be provided in legislation, to provide guidance without limiting judicial discretion.

123. The LRCWA emphasised the importance of judicial discretion to maintaining the principle of substantive (as opposed to formal) equality before the law.

[35] ALRC, Report 44, as above, recommendation 102.

Sentencing principles

124. In Report 103, the ALRC outlined five fundamental sentencing principles: proportionality, parsimony, totality, consistency and individualised justice. It recommended that federal sentencing legislation should state that these fundamental principles must be applied when sentencing a federal offender in order to achieve the stated purposes of sentencing. The ALRC observed that the Crimes Act contains references to only three of the five sentencing principles – proportionality, parsimony and totality – and suggested that the inclusion of all five principles would emphasise their importance to the judiciary and legal practitioners.

125. The ALRC described the principle of individualised justice as requiring a court to impose a sentence that is just and appropriate in all the circumstances of the particular case. Consideration of factors related to the personal background and circumstances of an offender facilitates the application of this principle. Such factors would include aspects of customary law or cultural practice relevant to the offence, and the cultural background of an offender.

126. The ALRC stated that individualised justice can only be attained when judicial officers are allowed a broad sentencing discretion that allows them to consider and balance multiple facts and circumstances when determining an appropriate sentence. The ALRC considered that legislation that provides for judicial discretion within a broad framework allows greater flexibility in individual matters, and thereby increases the scope for individualised justice. By limiting a court's discretion to consider customary law and cultural practice, the amendments may impede individualised justice.

127. The ALRC described the principle of consistency as requiring consistency in both approach and outcomes. That is, it requires courts to apply the same purposes and principles and consider the same types of factors, and also to impose sentences within the appropriate range for both the objective seriousness of the offence and the subjective circumstances of the offender. The ALRC considered that inconsistency in sentencing could lead to reduced deterrence and public confidence in the criminal justice system. The customary law amendments could be seen either as facilitating or impeding the attainment of sentencing consistency, depending on whether it is considered that the principle of equality before the law requires treating offences of similar seriousness in a similar way or requires that offenders with different personal backgrounds and circumstances be treated differently. The second reading speech for the Bill that introduced the Commonwealth amendments indicates that the then Government saw the amendments as according with the principle of equality before the law.

Consistency with international human rights standards

128. While generally supporting recognition of Aboriginal customary law, Australian law reform commissions have acknowledged the importance of such recognition being consistent with international human rights standards.

129. In Report 31, the ALRC argued that human rights arguments cannot be used to justify a general objection to recognising Aboriginal customary laws, and that the consistency of laws or practices with human rights standards must be examined in context. In Report 57 and Report 103, the ALRC reaffirmed its view that Aboriginal customary laws should be recognised to the extent they are consistent with human rights principles.

130. The NT Law Reform Commission (NTLRC) expressed the view that where traditional law authorises acts contrary to human rights obligations under the general law, elements of traditional law must at least be modified.

131. The LRCWA made the following recommendation.

> That recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case-by-case basis. In all aspects of the recognition process particular attention should be paid to the rights of women and children and the right not to be subject to inhuman, cruel or unusual treatment or punishment under international law.[36]

132. The LRCWA identified recognition of customary practices that contravene international laws and the recognition of collective versus individual rights as potential areas for conflict between Aboriginal customary law and international human rights law. It concluded that blanket recognition of Aboriginal customary law is not possible, and that the potential for recognition of particular practices to impact on individual human rights should instead be determined on a case by case basis.

Journal articles and reports

133. In most of the documents reviewed, the authors argued against limiting consideration of customary law and cultural practice, and in favour of retaining cultural background as a factor that must be considered, in bail and sentencing decisions. The main arguments advanced against the amendments were as follows.

- A court should have discretion to consider all relevant factors in bail and sentencing decisions.
- Sentencing errors can be effectively dealt with through the appeals process.
- Limiting the consideration of certain cultural factors will satisfy formal equality, but not substantive equality before the law, and is thereby likely to produce unjust outcomes.
- The amendments will not be effective in addressing issues of family violence and sexual abuse in Indigenous communities, and may have unintended negative consequences.
- The evidence available does not support a contention that Indigenous offenders receive more lenient sentences than their non-Indigenous counterparts.
- The amendments do not accord with, and in fact go against, the recommendations of inquiries by several law reform commissions.
- Aboriginal culture and customary law do not condone family violence and sexual abuse.

134. Commentators also addressed how best to obtain the appropriate balance between group and individual human rights, and the rights of victims and offenders.

135. Several articles contained recommendations on how to prevent spurious claims that certain behaviour was required or authorised under customary law or by cultural practice being accepted by a court towards mitigation or aggravation of an offence.

[36] Law Reform Commission of Western Australia, *Aboriginal customary laws*, Project 94, *2*006, recommendation 5.

Judicial discretion and the appeal process

136. Several commentators argued for retaining judicial discretion to consider cultural factors such as customary law in bail and sentencing decisions and relying on the appeals process to correct erroneous decisions.

137. Calma criticised the Commonwealth amendments as being contrary to common law sentencing principles that require all material facts relevant to an offender's cultural background to be taken into account, and for overlooking the fact that courts are not obliged to give significant weight to cultural factors, which may be outweighed by others.[37] Others put forward similar views, arguing that the amendments hamper the ability of judicial officers to ensure sentences that are just in all the circumstances of a particular offence, and that the most effective way of ensuring offenders are appropriately punished is to allow courts discretion to consider the full range of factors relevant to an offence.[38] Warner argued that the difficulties involved in determining cases that genuinely involve traditional violence and those that involve 'bullshit traditional violence' do not justify abandoning the attempt to do so.[39] In contrast, Carney, the then Leader of the Opposition in the NT, was in favour of precluding consideration of customary law from sentencing decisions, arguing that customary law is regularly used in NT courts in an attempt to reduce or excuse an offender's culpability.[40]

138. Some argued that the judiciary should be specifically encouraged or required to consider customary law or cultural factors in sentencing decisions. Dodson points to a LRCWA recommendation that courts should be required to consider any aspect of customary law relevant to an offence, while Quinlan suggests that courts should be encouraged to consider customary practice, cultural practice and cultural background, to avoid discrimination against cultural minorities.[41]

139. Gibbs and others have argued that appeals against inadequate sentences are the appropriate course for addressing errors in sentencing, not limiting the discretion of the judiciary.[42] For example, Calma states that checks and balances exist under Australian law through the appeal process, and that public prosecutors consistently appeal cases where insufficient weight has been given to the seriousness of an offence at sentencing.[43]

140. Some referred to specific cases to illustrate this point, with a number of commentators pointing out that while traditional marriage was taken into account as a mitigating factor in the sentence handed down in *Pascoe v Hales* (unreported, NT Supreme Court, JA 49 of 2002 (20112873)) (*Pascoe*)[44] and the original sentence in *GJ*, both sentences were increased on appeal.[45]

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[37] T Calma, Address to the Indigenous Legal Issues Forum, 35th Australian Legal Convention, 24 March 2007, published in 4 *Balance* 17.

[38] See, for example, J Hunyor, 'Custom and culture in bail and sentencing: Part of the problem or part of the solution?' (2007) 6 *Indigenous Law Bulletin* 8, K Warner, 'Sentencing review' (2006) 30 *Criminal Law Journal* 373, L Behrendt, 'Politics clouds issues of culture and 'customary law' (2006) 26 *Proctor* 14.

[39] K Warner, as above. 'Bullshit law' (and variations such as 'bullshit traditional violence' and 'bullshit customary law") is a term used to describe distorted customary law used as a justification for violence or sexual abuse.

[40] J Carney, 'Making the case against customary law' (2006) 3 *Balance* 10. Carney did not provide any examples of such cases.

[41] M Dodson, 'Customary law and the sentencing of Indigenous offenders' 20 *Judicial Officers' Bulletin* 37, F Quinlan, 'Sentencing laws will further alienate Indigenous Australians (2006) 16 *Eureka Street* 29.

[42] K Gibbs, 'One size fits all cultures' (2006) 299 *Lawyers Weekly* 113, T Calma, The integration of customary law into the Australian legal system (2007) 25 *Law in Context* 74, F Quinlan, as above.

[43] T Calma, Integration of customary laws, as above.

[44] A case summary of *Pascoe* is provided at **Appendix D**.

Anthony states that the appeal decisions 'emphasised both the need to punish the offender and send a message to the community that promised marriage was not a mitigating factor in statutory rape.'[46] Further, Warner and Toohey note that while Martin CJ publicly acknowledged that he gave too much weight to Aboriginal customary law when sentencing GJ, he also argued that his error did not justify the changes then proposed to Commonwealth sentencing laws.[47]

Potential for inequity

141. Several commentators argued that the amendments work against the principle of equality before the law by precluding consideration of certain cultural factors but not others. They do not agree that the amendments apply equally to all Australians, and maintain that in fact they apply one standard to Indigenous Australians, and Australians of multicultural descent, and another to 'white' Australians.[48] Weston-Scheuber explained this argument by distinguishing between visible and invisible culture. She argues that legislation prohibiting consideration of cultural factors really only excludes consideration of visible culture:

> Invisible culture, however, remains unaffected because it cannot be seen and therefore cannot be excluded. Invisible culture is the culture that is so accepted as part of the normal, or as part of the way of the 'ordinary person', that it is not designated as culture.[49]

142. Hunyor made a similar argument that the amendments present the danger that factors seen to differ from the mainstream will be singled out as 'cultural' and excluded from consideration, while factors that accord with mainstream values will continue to be taken into account in the context of the circumstances of the offence.[50] Hands and Dodson both argued that recognition of customary law as recommended by the LRCWA would reinforce equality before the law by improving substantive equality for Indigenous Australians.[51] Quinlan warned that amendments developed in response to the 2006 COAG decision would need to be developed carefully to avoid further disadvantaging some of the most vulnerable people in the Australian community.[52]

143. Lawrence referred to *R v Mathew Egan* (unreported, NT Supreme Court, SCC 20510088) as an example of a case in which it would have been unjust to exclude customary law as a mitigating factor. In that case, the defendant had committed an assault which he claimed he was obliged to as 'payback'. Lawrence argues that the law permitted the judge to take account of the relevant fact that the offender was obliged under his law to commit the assault as an explanation, though not an excuse, for the crime. [53]

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[45] P Toohey, 'Last Drinks' (2008) 30 *Quarterly Essay* 1, C Fougere, 'Customary law and international human rights: The Queen v GJ (2006) 44 *Law Society Journal* 42, T Anthony, 'Late-modern developments in sentencing principles for Indigenous offenders: beyond David Garland's framework', paper delivered at the 2008 Critical Criminology Conference, 19-20 June 2008, R Wild and P Anderson, *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.

[46] T Anthony, as above.

[47] Warner, as above and P Toohey, 'Stomping ground' (2006) 6 June 2006 *The Bulletin* 32.

[48] K Gibbs, as above, J Hunyor, as above, K Weston-Scheuber, 'Looking out for 'our women': cultural background and gendered violence in Australia' (2007) 14 *James Cook University Law Review* 160.

[49] K Weston-Scheuber, as above.

[50] J Hunyor, as above.

[51] T Hands, 'Aboriginal customary law: The challenge of recognition (2007) 32 *Alternative Law Journal* 42, and M Dodson, as above.

[52] F Quinlan, as above.

[53] J B Lawrence, 'Aboriginal customary law under jeopardy' (2008) 2 *Balance* 22. In fact, the sentencing remarks indicate that while the judge mentioned the need for the court to take account of cultural factors, he was of the view

144. Some articles contained references to the common law principles first established in the NSW case *R v Fernando* (1992) 76 A Crim R 58, which include that:

- the same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' [sic] membership of such a group
- the relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender, and
- that in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.[54]

145. The authors argue that such factors should be considered, and that the application of the principles does not mean that Aboriginality in and of itself is a mitigating factor, rather the defence would need to establish that disadvantage experienced by the offender by virtue of his or her Aboriginality helps to explain an offence.[55] Manez contended that the Commonwealth amendments would preclude such considerations.[56]

146. Calma and Toohey both argued against limiting consideration of customary law on the basis that Indigenous offenders could face a situation of double jeopardy by receiving punishments under both Australian law and traditional law.[57] As outlined in Part 2, the amendments removed the discretion to take account of customary law and cultural practice in bail and sentencing decisions as reasons for mitigating or aggravating the seriousness of criminal behaviour. However, they were not intended to prevent consideration of traditional punishment an Indigenous offender has, or will, receive when determining an appropriate sentence.

Appropriateness of the amendments and possible unintended consequences

147. Several commentators contended that the amendments were an inappropriate response to findings of violence and sexual abuse in Indigenous communities, and would not address such issues. It was argued that in addition to not achieving their stated purpose, the amendments could have unintended negative consequences.

148. Behrendt and others argued that violence committed against Aboriginal women and children is a symptom of a complex social problem. They were of the view that the amendments, instead of addressing the problem, will distract from real solutions such as addressing poverty and low levels

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that the offence did not constitute traditional payback according to Aboriginal culture. It appears from the remarks that the sentence was reduced because the defendant pleaded guilty and displayed contrition, and the non-parole period because of the work the defendant had undertaken in his community and the steps he had taken towards rehabilitation. The sentencing judge also stated that he considered the defendant unlikely to reoffend due to an agreement reached between the families of the defendant and the victim.

[54] *R v Fernando* (1992) 76 A Crim R 58 [62] – [63].

[55] S Manez, 'The road to reconciliation: Should the legal system, Aboriginal customs and government play a role to reinstall some pride and sense of empowerment to Aboriginal people of Australia?' (2007) 14 *E Law Journal* 54, S Omeri, 'Considering Aboriginality' (2006) 44 *Law Society Journal* 74.

[56] S Manez, as above.

[57] T Calma, Integration of customary laws, as above, P Toohey, Last drinks, as above.

of education.[58] Hunyor argued that efforts should be focussed on initiatives that build, rather than undermine, the capacity of Indigenous communities to deal with problems such as family and domestic violence.[59]

149. Weston-Scheuber pointed to the Commonwealth amendments as an attempt to portray violence against women as a problem associated with 'minority culture'. She argued that linking violence with minority culture creates the impression that violence against women can be tackled by removing 'special defences' and treating all people the same way, but that in reality, such violence will continue to be tolerated unless a broader strategy to eliminate cultural violence is adopted.[60] Similarly, Hands and Williams pointed out that child sexual abuse is a problem for all Australians, not only Aboriginal people, and questioned the logic of rejecting Aboriginal law and culture because evidence of child abuse by elders has been uncovered – 'people do not reject religion because some priests have been exposed as paedophiles.'[61]

150. Hands and Williams argued that the Commonwealth amendments go beyond what might be required to give effect to the 2006 COAG decision by applying to all offences, instead of being restricted to violent or sexual offending. They also noted that such offences are not within federal jurisdiction.[62] Further, they and others argued that there is potential for those amendments to apply unfairly to the detriment of non-violent offenders. Hunyor stated that the terms 'cultural practice' and 'customary law' are broad terms that are not defined in the legislation. He believed this could lead to situations such as consideration not being given at sentencing to the reason a person failed to declare overpayment of a welfare benefit being that they were assisting a family member in financial difficulty.[63] Another example given was that of an Aboriginal person facing a charge of breaching bail for failing to attend court, where the failure to attend was the result of attending a funeral or other important ceremony.[64]

151. Concern was also expressed that the amendments could undermine the success of initiatives such as circle sentencing, which seek to engage positively with aspects of customary law, thereby becoming part of the problem instead of contributing to a solution.[65]

152. Wild and Anderson did not comment specifically on the amendments. However, they contend that Aboriginal law has a part to play in preventing the sexual abuse of children. Wild and Anderson found that the overall levels of dysfunction were higher in Indigenous communities where traditional law had significantly broken down. Further, they argued that it is more likely that Indigenous people will respond positively to their own law and culture, than laws imposed upon them.[66]

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[58] L Behrendt, as above, T Calma, Address to the Indigenous Legal Issues Forum, as above, J Hunyor, as above, N Roxon, 'Federal Labor's say on the customary law debate' (2006) 3 *Balance* 12.

[59] J Hunyor, as above.

[60] K Weston-Scheuber, as above.

[61] T Hands and V Williams 'Aboriginal child abuse: The answer is black and white' (2007) 82 *Precedent* 10.

[62] T Hands, as above, and T Hands and V Williams, as above. While it is correct that violent or sexual offences generally come within State and Territory jurisdiction, there are some exceptions. For example, the Crimes Act contains child sex tourism offences at Part IIIA.

[63] J Hunyor, as above.

[64] T Hands and V Williams, as above.

[65] J Hunyor, as above.

[66] R Wild and P Anderson, as above.

Whether there is evidence of Indigenous offenders being treated more leniently by the courts

153. Some have argued that there is no evidence that Indigenous offenders are relying on customary law as an excuse for violent or sexual crime. For example, Gibbs argued that public statistics do not support the claim that Indigenous offenders have been treated more leniently than other offenders.[67] Wild and Anderson were unable to locate any cases where Aboriginal law had been accepted as a defence for an act of violence against a woman or child.[68] Similarly, Hands and Williams stated that there is no evidence of Aboriginal offenders ever being acquitted of a sexual crime on the basis of Aboriginal customary law, and argue that where such arguments have been advanced, courts have invariably rejected them and emphasised the importance of protecting women and children.[69]

154. Coates, NT Director of Public Prosecutions, states that he does not believe that customary law is being used to excuse drunken violence. However, he argued that there are specific societal issues that diminish the effectiveness the justice system's response to the needs of women and children who are the victims of violent offending in the NT's remote Indigenous communities, namely the kinship system and the way witnesses are treated by the family of victims.[70]

155. Warner and Coates pointed to *GJ* as a case that was widely reported in the media as a case of rape, and raised as evidence of lenient sentencing. They both noted that in fact the prosecution had accepted a plea of guilty to sexual intercourse with a child under the age of 16.[71] Coates explained that the NT DPP sometimes faces the dilemma of whether to discontinue a case altogether or accept a plea to lesser charges on negotiated facts due to the reluctance of Indigenous witnesses to provide evidence. He stated that in both *GJ* and *Pascoe*, a decision was taken by the prosecution to accept a plea on lesser charges on negotiated facts, because there was insufficient evidence available to prove the original more serious charges of rape and deprivation of liberty. Warner and Coates referred to the principle established in *R v De Simoni* (1981) 147 CLR 383, that a court may not take into account aggravating circumstances that could have been the subject of a charge or a formal circumstance of aggravation, but were not. Both concluded that negotiated outcomes involving a guilty plea to a lesser charge are problematic in terms of sentencing, and that more needs to be done to support victims and witnesses to give evidence that supports more serious charges where they are appropriate.[72]

156. Others observed that when *Pascoe* occurred, NT law permitted sexual intercourse with a child if the parties were traditionally married, and that non-consensual sexual intercourse within any marriage was legally permitted until relatively recently.[73]

Lack of evidence base to support the amendments

157. There was considerable criticism in the academic literature that the amendments were not based on, or supported by, evidenced research. In particular, many saw the amendments as being in direct opposition to the outcomes and recommendations of Australian law reform commissions that

[67] K Gibbs, as above.
[68] R Wild and P Anderson, as above.
[69] T Hands and V Williams, as above.
[70] R Coates, 'Indigenous sentencing: a Northern Territory perspective' (2006) 4 *Balance* 24. Coates explains that in Indigenous communities, witnesses may be blamed for not looking after the victim or preventing the offence, and held responsible for the commission of the offence.
[71] K Warner, as above, R Coates, as above.
[72] K Warner, as above, R Coates, as above.
[73] T Hands and V Williams, as above, T Anthony, as above.

have examined the issues of cultural background and customary law in bail and sentencing, and the majority of submissions to the Senate Inquiry.[74]

Human rights considerations

158. Most commentators agreed that customary law and cultural practice should only be recognised to the extent allowable under domestic and international human rights laws. However, there was disagreement on the extent to which such laws allow or require recognition.

159. Brown argued that some judicial officers have given more weight to customary law factors argued on behalf of defendants than to human rights instruments designed to protect young girls. He took the position that modern international human rights conventions implemented to protect women and children should carry more weight than 'claims by middle aged men that they are acting in accordance with their culture and traditional beliefs.'[75]

160. Many pointed to the need to strike an appropriate balance between group and individual rights. Hunyor observed that enjoyment of culture is a human right, as recognised by article 27 of the ICCPR, but that this does not mean that it comes at the expense of the rights of others.[76] Calma stated that human rights standards strike an appropriate balance between individual and group interests, and do not enable the rights of one group or person to 'trump' the rights of another person. He went on to argue that human rights standards condone neither the breach of the rights of individuals through the operation of customary law, nor the non-recognition of customary systems of law.[77] Manez and Hunyor argued that the judicial system is sophisticated enough to resolve conflicts that may occur between individual and group rights on their merits as they occur, and that excluding certain factors from sentencing discretion distorts the balancing process.[78]

161. Fougere stated that the position of HREOC was that an offender's understanding of traditional law is a factor relevant to sentencing, but that it was given undue weight in *GJ*. Fougere documented HREOC's attempt to give evidence at the appeal as a non-party, and noted that while that attempt was unsuccessful, comments made by the judiciary demonstrated that it is aware of the principles on which international human rights conventions are founded.[79]

162. McConvill referred to criticism of the then proposed amendments to the Crimes Act on the basis that they would discriminate against Indigenous Australians by singling out Aboriginal customary law. He argued in favour of the amendments, whether or not they are racially discriminatory, contending that in the context of cases of violence that had occurred in Indigenous communities 'the elimination of all forms of racial discrimination should not be accepted as gospel.'[80]

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[74] T Calma, Address to the Indigenous legal issues forum, as above, J Hunyor, as above, T Hands and V Williams, as above, F Quinlan, as above, M Dodson, as above, N Roxon, as above, K Warner, as above.
[75] K Brown, 'Customary law: Sex with under-age 'promised wives'' (2007) 32 *Alternative Law Journal* 11.
[76] J Hunyor, as above.
[77] T Calma, Integration of customary law, as above.
[78] Manez, as above, and Hunyor, as above.
[79] C Fougere, as above.
[80] J McConvill, 'Racial discrimination may be in order', (2006) *On Line Opinion*, reprinted in *Indigenous Australians and the law*, (Eds) E Johnston, D Rigney, M Hinton, 2007.

Violence and Aboriginal culture

163. While Carney argued that there can be 'no doubt that a culture of violence exists in Aboriginal communities',[81] most commentators argued against the view that Aboriginal customary law or culture condones violence against women. Calma stated that he has not come across evidence of any Indigenous culture condoning violence against women, and argued that Aboriginal law, properly applied, does not condone family violence.[82] Calma's statements were supported by others, who argued that customary law has been 'demonised', stereotyped and misrepresented in media debate.[83] Quinlan expressed concern that the motivations underlying the Commonwealth amendments 'no matter how well-intentioned, may be grounded in the very misconceptions of Aboriginal customary law, against which the NSW Law Reform Commission warned.'[84] Similarly, Wild and Anderson identified as a dangerous myth the argument that Aboriginal law is the cause of high levels of sexual abuse in Indigenous communities. They saw it as dangerous in two ways – by masking the complex nature of the problem, and by provoking a hostile reaction from Aboriginal people that will impede efforts to deal with the problem.[85]

164. Calma and Brown also commented on Aboriginal customs with specific reference to promised wives. Calma stated that sexual intercourse with a promised wife that involves force, or without consent, is not customary in Aboriginal law, while Brown suggested that in sentencing Pascoe, the judge overlooked the fact that it is doubtful he was acting in accordance with customary law.[86]

165. Davis argued that Indigenous women have been disadvantaged and discriminated against not through genuine customary law, but by the use of distorted or 'bullshit' customary law to legitimate crimes committed by Aboriginal men against them. She contended that the use of such justifications is encouraged by remarks by the judiciary, such as those of Gallop J in *Pascoe*, which indicate a belief that rape or other violence against women is not considered as seriously by Aboriginal people as it is by others.[87] Roxon supported the need for action to prevent the use of 'bullshit customary law' to excuse violent crimes, stating that such misuse does a disservice to those trying to improve the justice system and the lives of Indigenous people.[88]

166. While it may be the case that Aboriginal customary law does not condone domestic violence or sexual abuse, it appears from the *The Queen v Wunungmurra* (examined in Part 6 of this report) that in some cases it may permit or require physical punishment.

Alternatives to limiting sentencing discretion

167. There was support among commentators for measures that focus on community and judicial education and improving evidentiary procedure, rather than limiting judicial discretion, to prevent customary law being inappropriately taken into account in sentencing decisions.

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[81] J Carney, as above.
[82] T Calma, Address to the Indigenous legal issues forum, as above, T Calma, Integration of customary laws, as above.
[83] T Hands, as above, Dodson, as above, Omeri, as above, J Lewis, ''Jedda' defends customary law against federal attack' (2007) 45 *Law Society Journal* 28, P Sutton, 'Customs not in common: Cultural relativism and customary law recognition in Australia (2006) 6 *Macquarie Law Journal* 161.
[84] F Quinlan, as above.
[85] R Wild and P Anderson, as above.
[86] T Calma, Integration of customary laws, as above, K Brown, as above.
[87] M Davis, 'A culture of disrespect: Indigenous peoples and Australian public institutions' (2006), 8 *UTS Law Review* 135.
[88] N Roxon, as above.

168. Calma argued that both the judiciary and the public need to be educated about the true nature of Aboriginal customary law to address misconceptions and misinformation.[89] Behrendt supported this view, stating that an appropriate response to courts accepting evidence that violence against women is acceptable in Aboriginal culture is judicial education that addresses inaccurate representations of Aboriginal culture.[90]

169. Calma also advocated for community legal education with a human rights focus being provided to Indigenous communities, stating that education programs about conflicts between customary and criminal law has been suggested by the NT Court of Criminal Appeal. He stated that little information about the Australian legal system reaches Indigenous communities, and for many, the only information they have about the legal system is obtained from contact with the system as an offender, or as a family member of an offender.[91]

170. One of the issues Calma believed Indigenous people who practice customary law require education on is that of consent. This includes the age of consent under Australian laws. This suggestion was supported by the findings of Wild and Anderson, namely that many Aboriginal people remained confused about the age of consent, and how other Australian laws relate to traditional marriages. Calma argued that while messages about consent are important for all Australians, and are currently provided in urban environments through campaigns such as the 'No means no' advertisements, we need to ensure such messages reach Indigenous communities in a suitable language and format.[92] Wild and Anderson suggested education aimed at ensuring the human rights of all people are understood, as well as dialogue with and support for Indigenous communities to modify their practices in line with human rights standards.[93]

171. Another alternative, put forward by several commentators, is to amend legislation to ensure that only reliable information about customary law and cultural practice will be received and considered by a court. Proponents of this alternative approach pointed to amendments made to NT legislation by the *Sentencing Amendment (Aboriginal Customary Law) Act 2004* (NT) as a model, arguing that the safeguards it introduced address the problem of 'bullshit customary law' while still allowing reliable evidence to be taken into account.[94] Dodson stated that the LRCWA recommended similar provisions be introduced in WA, along with provisions requiring anyone providing information or evidence on customary law to disclose his or her relationship to the defendant and/or the victim, and requiring a court to take into account submissions made by an appropriate member of the victim's community.[95]

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[89] T Calma, Integration of customary law, as above.
[90] L Behrendt, 'Law and order is only part of the solution' (2006) *Australian Policy Online*, reprinted in *Indigenous Australians and the la*w, (Eds) E Johnston, D Rigney, M Hinton, 2007.
[91] T Calma, Integration of customary law, as above.
[92] Ibid.
[93] R Wild and P Anderson, as above.
[94] T Calma, Integration of customary law, T Calma, Address to the Indigenous legal issues forum, P Toohey, Last drinks, as above, K Brown, as above, M Dodson, as above, K Warner, as above.
[95] M Dodson, as above.

Part 5 – Comparable provisions in Australia and internationally

172. To place the amendments in context, it is useful to compare the Commonwealth and NT laws affected by the amendments with equivalent laws in other jurisdictions.

173. This part provides an overview of provisions concerning the consideration given to cultural factors in the context of bail, sentencing and forensic procedures under Australian State and Territory legislation and that of Canada, New Zealand and the United Kingdom. These countries reflect a sample of practice that occurs in comparable Commonwealth countries. These particular countries allow for ease of comparison, given the analogous nature of their legal systems.

Bail

174. As outlined in Part 2 of this report, State and Territory bail laws apply to a person charged with a Commonwealth offence, unless the contrary is indicated in Commonwealth law. Paragraph 15AB(1)(b) of the Crimes Act limits that discretion by providing that a bail authority must not consider customary law or cultural practice as a reason for mitigating or aggravating the seriousness of alleged criminal behaviour.

175. Prior to the 2007 amendments, the NT Bail Act provided some scope for consideration of customary law and cultural practice. The amendments limited that scope by providing that a bail authority must not consider customary law or cultural practice as reasons for mitigating or aggravating the seriousness of alleged criminal behaviour. The amendments did not affect the discretion to consider an alleged offender's cultural background, or the express requirement to consider background and community ties in assessing the probability of a person appearing in court.

176. In NSW, Victoria, Queensland, WA, SA, Tasmania and the ACT, customary law or cultural practice may be considered under broadly framed provisions. For example, in SA, the court may take into account 'any other relevant matter'.[96] Queensland provisions also provide that a court may, if the alleged offender is an Aboriginal or Torres Strait Islander, consider submissions from a community justice group about any cultural considerations.[97]

177. In Victoria, Queensland and WA, a bail authority is expressly required to consider an alleged offender's background and/or community ties. In NSW, a bail authority is required to consider an alleged offender's background and community ties only in assessing the probability of a person appearing in court. SA, Tasmania and the ACT each have a general discretion to consider cultural background under broadly framed provisions.

178. Canada, New Zealand and the United Kingdom each have broadly framed provisions concerning matters to be considered in bail applications. In Canada, the court must have regard to 'all the circumstances'.[98] In New Zealand and the United Kingdom, a court must consider 'relevant factors'.[99] In each of these jurisdictions, there is discretion to consider customary law, cultural practice and cultural background where the issue is relevant to a particular offence or offender, but no express requirement to do so.

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[96] *Bail Act 1985* (SA); s 10.
[97] Bail Act 1980 (Qld): s15
[98] *Criminal Code 1985* (Canada); s 515.
[99] *Bail Act 2000* (NZ); s 8. *Bail Act 1976* (UK); schedule 1.

Sentencing

179. As outlined in Part 2, Commonwealth sentencing laws provide a court broad discretion to consider any relevant matter. Subsection 16A(2A) limits that discretion by providing that customary law or cultural practice must not be considered as reasons for mitigating or aggravating the seriousness of criminal behaviour. Similarly, in the NT, a court has broad discretion to consider any relevant matter under the non-exhaustive list of factors set out in the *Sentencing Act 1995* (NT).[100] The NTNER Act limited this discretion by providing that a court must not consider customary law or cultural practice as reasons for mitigating or aggravating the seriousness of criminal behaviour.

180. With the exception of the ACT, where the court must consider cultural background in determining a sentence, the remaining States and Territories have provisions that are framed broadly to ensure a court has discretion to take account of all relevant factors when sentencing. For example, in WA the court may consider any aggravating or mitigating factors in determining a sentence.[101] In addition, in SA and the NT, a court may receive information about Aboriginal customary law and community views before it passes sentence on an Indigenous offender.[102] In Queensland, a court must, if the offender is an Aboriginal or Torres Strait Islander, consider any submissions from a community justice group about any cultural considerations.[103]

181. In Canada and New Zealand a court may consider customary law or cultural practice under broadly framed provisions.[104] Further, both jurisdictions are expressly required to consider cultural background when passing sentence.[105] In the United Kingdom, in mitigating a sentence, a court may consider any relevant matters.[106]

Discharge of offenders without proceeding to conviction

182. As outlined in Part 2, Commonwealth and NT laws allow some scope for consideration of customary law, cultural practice or cultural background when determining whether to discharge an offender without proceeding to conviction. However, a court must not consider customary law or cultural practice as reasons for mitigating or aggravating the seriousness of criminal behaviour.[107]

183. All other Australian jurisdictions have broadly framed provisions that provide a court with the discretion to consider any relevant matter. For example, in NSW, a court may consider, in addition to matters specifically listed, 'any other matter that the court thinks proper to consider'.[108] In Victoria, a court is required to consider 'all the circumstances' of the case.[109]

184. In Canada, New Zealand and the UK, courts are given similar discretion to take into account any relevant matter, which could include customary law, cultural practice or cultural background. In Canada, for example, a court has the discretion to consider the best interests of the accused, as long as they are not contrary to the public interest.[110]

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[100] *Sentencing* Act 1995 (NT); s 5.
[101] *Sentencing Act 1995* (WA); ss 6-8.
[102] *Criminal Law (Sentencing) Act 1988* (SA); s 9C. *Sentencing Act 1995* (NT); s 104A.
[103] *Penalties and Sentences Act 1992* (Qld); s 9.
[104] *Criminal Code 1985* (Canada); s 718. *Sentencing Act 2002* (NZ); s 8.
[105] *Criminal Code 1985* (Canada); s 718. *Sentencing Act 2002* (NZ); s 8.
[106] *Powers of Criminal Courts (Sentencing Act) 2000* (UK); s 158.
[107] *Crimes Act 1914* (Cth); s 19B(1A).
[108] *Crimes (Sentencing and Procedure) Act 1999* (NSW); s 10.
[109] *Sentencing Act 1991* (Vic); s 8.
[110] *Criminal Code 1985* (Canada); s 730.

Forensic Procedures

185. As outlined in Part 2, a police officer or magistrate has broad discretion under Commonwealth law to consider any relevant matter before requesting or ordering a suspect to undergo a forensic procedure. They are also expressly required to consider the religious beliefs of a suspect in determining the intrusiveness of the procedure.[111]

186. In Australian States and Territories, police officers or magistrates (depending on the jurisdiction) generally have discretion to consider all relevant matters, which could include religious beliefs, Indigenous customary beliefs or cultural background, under broadly framed provisions. In NSW, SA and the ACT, a police officer or magistrate is expressly required to consider cultural background.[112]

187. In Canada, a peace officer or Provincial Court Judge may request or order a forensic procedure, if he or she considers it to be in the best interests of justice to do so, having regard to all relevant matters.[113] In New Zealand, a police officer or High Court Judge may request or order a forensic procedure, if it is reasonable in all the circumstances. A High Court Judge may also take into account any other matter that he or she considers relevant.[114]

188. In the UK, a police officer may request or order a forensic procedure, if he or she believes on reasonable grounds that the suspect is involved in the commission of a recordable offence, and may take account of other relevant matters.[115] Where a suspect refuses to consent to an intimate forensic procedure without good cause, a court may draw such inferences from the refusal as appear proper in any proceedings against that person for an offence.

Comparative tables

189. The following tables summarise the approaches to consideration of cultural factors in relation to bail, sentencing and forensic procedures across the various jurisdictions discussed, as follows:

- **Table 1A** summarises the various legislative approaches, across Australian jurisdictions, to the consideration of customary law, cultural practice and cultural background in the context of bail applications, sentencing and the discharge of offenders without conviction.
- **Table 2A** compares legislative approaches, across Australian jurisdictions, to the consideration of religious beliefs, Indigenous customary beliefs and cultural practice in relation to forensic procedures on suspects.
- **Tables 1B** and 2**B** provide an international comparative perspective on the equivalent provisions of Canada, New Zealand and the United Kingdom.

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[111] *Crimes Act 1914*; ss 23WI, 23WO & 23WT.
[112] *Crimes (Forensic Procedures) Act 2000* (NSW); ss 8, 11, 17, 18, 20 & 24. *Criminal Law (Forensic Procedures) Act 2007* (SA); ss 15 & 19. *Crimes (Forensic Procedures) Act 2000* (ACT); ss 22, 23, 28, 29, 32 & 34.
[113] *Criminal Code 1985* (Canada); ss 487.04 & 487.05, 487.06.
[114] *Criminal Investigations (Bodily Samples) Act 1995* (New Zealand); ss 5 & 16.
[115] *Police and Criminal Evidence Act 1984* (UK); ss 62 & 63.

Table 1A - Consideration of customary law, cultural practice and cultural background in bail and sentencing decisions: Australian jurisdictions

Jurisdiction	Consider customary law?	Consider cultural practice?	Consider cultural background?	Legislation
Bail applications				
Cth[116]	May (limited)	May (limited)	May	*Crimes Act 1914*; s 15AB *Judiciary Act 1903*; s 68
NSW	May	May	Must (limited)[117]	*Bail Act 1978*; s 32
Vic	May	May	Must	*Bail Act 1977*; s 4
Qld	May	May	Must	*Bail Act 1980*; ss 15 & 16
WA	May	May	Must	*Bail Act 1982*; Schedule 1, Part C, Clauses 1 and 3
SA	May	May	May	*Bail Act 1985*; ss 9 & 10
Tas	May	May	May	*Justices Act 1959*; ss 34 & 35 *Bail Act 1994*; ss 5 & 7
ACT	May	May	May	*Bail Act 1992*; s 22
NT[118]	May (limited)	May (limited)	Must (limited)[119]	*Bail Act 1982* (NT); s 24
	May (limited)	May (limited)	May	*Northern Territory National Emergency Response Act 2007* (Cth); s 90
Sentencing				
Cth	May (limited)	May (limited)	May	*Crimes Act 1914*; s 16A
NSW	May	May	May	*Crimes (Sentencing and Procedure) Act 1999*; s 21A
Vic	May	May	May	*Sentencing Act 1991*; s 5
Qld	May	May	Must (limited)	*Penalties and Sentences Act 1992*; s 9
WA	May	May	May	*Sentencing Act 1995*; ss 6-8
SA	May	May	May	*Criminal Law (Sentencing) Act 1988*; ss 9C & 10
Tas	May	May	May	*Sentencing Act 1997*; ss 80 & 81
ACT	May	May	Must	*Crimes (Sentencing) Act 2005*; s 33

[116] Section 68 of the *Judiciary Act 1903* allows for the application of State and Territory laws in bail applications, so far as they are applicable to persons charged with Commonwealth offences. Therefore, customary law, cultural practice or cultural background may be considered under broadly framed State and Territory provisions. However, under section 15AB of the *Crimes Act 1914* (Cth), customary law or cultural practice must not be taken into account as reasons for mitigating or aggravating the seriousness of alleged criminal behaviour.

[117] Under the *Bail Act 1978* (NSW) an alleged offender's background must be considered, but only in relation to the probability of the person appearing in court in respect of the offence for which bail is being considered: s32.

[118] Part 6 of the *Northern Territory National Emergency Response Act 2007* (Cth) specifically precluded the consideration of customary law or cultural practice as reasons for mitigating or aggravating the seriousness of alleged criminal behaviour in bail decisions: s 90(1)(b).

[119] Under the *Bail Act 1982* (NT) an alleged offender's background must be considered, but only in relation to the probability of the person appearing in court in respect of the offence for which bail is being considered: s 24.

Jurisdiction	Consider customary law?	Consider cultural practice?	Consider cultural background?	Legislation
NT[120]	May	May	May	*Sentencing Act 1995* (NT); s 5
	May (limited)	May (limited)	May	*Northern Territory National Emergency Response Act 2007* (Cth); s 91
Discharge of offenders without conviction				
Cth	May (limited)	May (limited)	May	*Crimes Act 1914*; ss 16A and 19B
NSW	May	May	May	*Crimes (Sentencing and Procedure) Act 1999*; s 10
Vic	May	May	May	*Sentencing Act 1991*; s 8
Qld	May	May	May	*Penalties and Sentences Act 1992*; s 12
WA[121]	May	May	May	*Sentencing Act 1995*; s 46
SA[122]	May	May	May	*Criminal Law (Sentencing) Act 1988*; s 15
Tas	May	May	May	*Sentencing Act 1997*; s 9
ACT	May	May	May	*Crimes (Sentencing) Act 2005*; s 17
NT[123]	May	May	May	*Sentencing Act 1995* (NT); s 8
	May (limited)	May (limited)	May	*Northern Territory National Emergency Response Act 2007* (Cth); s 91

Table 1B - Consideration of customary law, cultural practice and cultural background in bail and sentencing decisions: International jurisdictions

Jurisdiction	Consider customary law?	Consider cultural practice?	Consider cultural background?	Legislation
Bail applications				
Canada	May	May	May	*Criminal Code 1985*; s 515
New Zealand	May	May	May	*Bail Act 2000*; s 8
United Kingdom	May	May	May	*Bail Act 1976*; Schedule 1
Sentencing				
Canada	May	May	Must	*Criminal Code 1985*; s 718

[120] Part 6 of the *Northern Territory National Emergency Response Act 2007* (Cth) specifically precluded the consideration of customary law or cultural practice as reasons for mitigating or aggravating the seriousness of alleged criminal behaviour at sentence: s 91.

[121] The *Sentencing Act 1995* (WA) sets out a two-part decision making process. A court must be satisfied both that the circumstances of the offence are trivial or technical and that having regard to other relevant matters, it is not just to impose any other sentencing option: s46.

[122] Under the *Criminal Law (Sentencing) Act 1988* (SA), a court may only discharge an offender without conviction where it finds the offence so trifling that it is inappropriate to impose a penalty. The matters a court may consider in determining that this is the case are left to a court's discretion: s15.

[123] Part 6 of the *Northern Territory National Emergency Response Act 2007* (Cth) specifically precluded the consideration of customary law or cultural practice as reasons for mitigating or aggravating the seriousness of alleged criminal behaviour in determining an order to be made concerning a person who has committed an NT offence: s 91.

Jurisdiction	Consider customary law?	Consider cultural practice?	Consider cultural background?	Legislation
New Zealand	May	May	Must	*Sentencing Act 2002*; s 8
United Kingdom	May	May	May	*Powers of Criminal Courts (Sentencing Act) 2000*; s 158
Discharge of offenders without conviction				
Canada	May	May	May	*Criminal Code 1985*; s 730
New Zealand	May	May	May	*Sentencing Act 2002*; ss 106 & 107
United Kingdom	May	May	May	*Powers of Criminal Courts (Sentencing Act) 2000*; s 12

Table 2A - Consideration of religious beliefs, Indigenous customary beliefs and cultural background in forensic procedures: Australian jurisdictions

Jurisdiction	Consider religious beliefs?	Consider Indigenous customary beliefs?	Consider cultural background?	Legislation
Forensic Procedures				
Cth	Must	May	May	*Crimes Act 1914*; ss 23WI, 23WO & 23WT
NSW	May	May	Must	*Crimes (Forensic Procedures) Act 2000*; ss 8, 11, 17, 18, 20 & 24
Vic	May	May	May	*Crimes Act 1958*; ss 464R, 464S, 464SA & 464T
Qld	May	May	May	*Police Powers and Responsibilities Act 2000*; ss 447, 449, 458 & 461
WA	May	May	May	*Criminal Investigation Act 2006*; ss 91, 97, 98 & 100
SA	May	May	Must	*Criminal Law (Forensic Procedures) Act 2007*; ss 15 & 19
Tas	May	May	May	*Forensic Procedures Act 2000*; ss 9, 12 & 17
ACT	May	May	Must	*Crimes (Forensic Procedures) Act 2000***;** ss 22, 23, 28, 29, 32 & 34
NT	May	May	May	*Police Administration Act 1979* (NT); ss 145, 145A & 145B

Table 2B - Consideration of religious beliefs, Indigenous customary beliefs and cultural background in forensic procedures: International jurisdictions

Jurisdiction	Consider religious beliefs?	Consider Indigenous customary beliefs?	Consider cultural background?	Legislation
Forensic Procedures				
Canada	May	May	May	*Criminal Code 1985*; ss 487.04 & 487.05, 487.06
New Zealand	May	May	May	*Criminal Investigations (Bodily Samples) Act 1995*; ss 5 & 16
United Kingdom	May	May	May	*Police and Criminal Evidence Act 1984*; ss 62 & 63

Part 6 – Analysis and conclusions

190. This Part draws together the information gathered through stakeholder input, the literature review and comparisons of the 2006 and 2007 amendments with equivalent laws in other jurisdictions. Some of the issues raised by stakeholders and commentators are explored in further detail, including human rights issues and suggestions relating to community legal education, judicial training and provisions regulating to receipt of customary law information by the courts.

191. Several options for reform, identified based on the outcomes of the review, are set out at the end of this Part.

Views of stakeholders, law reform commissions and commentators

192. Stakeholders were able to provide little information on the impact of the amendments, with some indicating that the amendments have not been in place long enough to enable the impacts to be meaningfully assessed. A lack of evidence concerning the impact of the amendments could be seen either as grounds for retaining or repealing them. On the basis of potential negative impacts, most stakeholders argued for the amendments that limit consideration of customary law to be repealed. Stakeholders also argued for repeal of the amendments to Commonwealth legislation that removed the cultural background of an offender or alleged offender as a factor that a court must consider when passing sentence or determining whether to discharge an offender without conviction.

193. Arguments made in the literature were largely against the amendments, with most commentators in favour of courts retaining discretion to consider customary law and cultural practice along with any other relevant factors. However, as with the stakeholder feedback received, these arguments tended to have a theoretical basis due to the lack of evidence available on the practical application and impacts of the amendments. Arguments common to both stakeholder input and the literature included that:

- courts should retain the discretion to consider all factors relevant to an offence or alleged offence, to prevent inequitable outcomes and facilitate individualised justice
- the amendments are not an appropriate or effective vehicle for addressing issues of family violence and sexual abuse in Indigenous communities, and
- the amendments may have unintended negative consequences, such as disadvantaging Indigenous Australians charged with non-violent offences.

194. Stakeholder feedback also highlighted the complexity of the amendments and the potential for disparities in interpretation among judicial officers.

195. The suggestion was made, in both stakeholder feedback and the literature, that a better approach to ensuring that unsupported customary law arguments are not given undue weight would be to introduce provisions to regulate the receipt of information about customary law by the courts. Amendments to NT legislation made by the *Sentencing Amendment (Aboriginal Customary Law) Act 2004* (NT) were suggested as a model.

196. Some commentators also suggested judicial cultural awareness training and community legal education for Indigenous communities as alternatives to limiting judicial discretion.

197. Australian law reform commissions have recommended that courts be required, or at least have the discretion, to consider customary law in bail and sentencing decisions, to the extent that

they are consistent with human rights principles. They have also recommended that courts be required to consider the cultural background of an offender, or an alleged offender, in bail and sentencing decisions. Commissions further emphasised the importance of judicial discretion to enabling sentences that are just in all the circumstances of the offence and the offender.

198. There was broad support among stakeholders for the amendments to bail provisions concerning consideration of victims and witnesses, and also for measures such as judicial cultural awareness training and community legal education. Stakeholders did not comment on the amendments to Commonwealth legislation concerning matters that must be considered before requesting or ordering forensic procedures, and the issue was not taken up in the literature.

Consideration of customary law, cultural practice and cultural background in other jurisdictions

199. The bail and sentencing legislation of each Australian jurisdiction, except for the Commonwealth and the NT, allows for consideration of customary law and cultural practice in bail and sentencing decisions without limitation. Most States and Territories provide a court with broad discretion to consider all relevant factors in sentencing decisions and some require a bail authority to consider an alleged offender's cultural background. No other jurisdiction has introduced legislative amendments to give effect to the 2006 COAG decision.

200. Canadian, NZ and UK legislation allow broad discretion in bail and sentencing decisions, permitting factors such as customary law, cultural practice and cultural background to be considered where relevant. In addition, Canadian and NZ legislation requires a court to take account of an offender's cultural background when passing sentence.

Equality before the law

201. In the second reading speech for the Bill that introduced the Commonwealth amendments, the provisions limiting consideration of customary law were described as ensuring that all Australians, regardless of their background, would be equal before the law.[124] The amendments are, on their face, non-discriminatory. However, some stakeholders and commentators have argued that in practice the amendments disadvantage offenders whose cultural practices do not accord with mainstream values and beliefs.

202. Equality before the law is a fundamental concept of Australia's legal system, and at international law. Article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) requires that:

> State 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.[125]

[124] Second Reading Speech, Crimes Amendment (Bail and Sentencing) Bill 2006, Canberra, 14 September 2006, Senate Official Hansard No. 10, 2006, viewed 15 May 2009, <http://www.aph.gov.au/hansard/senate/dailys/ds140906.pdf>.

[125] *Convention on the Elimination of All Forms of Racial Discrimination*, Article 5

203. The principle has been explained by Judge Tanaka of the International Criminal Court of Justice as follows:

> The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal . . . To treat unequal matters differently according to their inequality is not only permitted but required.[126]

204. This statement highlights the distinction between formal equality - treating all people the same without reference to their individual circumstances, and substantive equality - treating people according to their individual circumstances to achieve actual equality. The Human Rights Committee and the CERD Committee have stated that different treatment will not constitute discrimination if the criteria for such differentiation are reasonable and objective and the aim is to achieve a legitimate purpose.[127] Similarly, as indicated in the LRCWA's Project 94, the pursuit of formal equality may, in practice, have the result of creating or perpetuating inequality before the law.[128]

205. In Report 31, the ALRC considered the argument that recognition of Aboriginal customary law would be discriminatory or 'unequal'. The ALRC considered that a customary law defence (that would exonerate a defendant from criminal liability for an offence he or she committed in accordance with customary law) may withdraw legal protection from other members of the community by affecting the level of protection afforded to victims. However, it did not consider that the same issue arose with respect to giving consideration to Aboriginal customary law when determining an appropriate sentence. Rather, the ALRC went on to recommend that a court be specifically required to consider the customary laws of the community to which an Aboriginal offender belonged.[129]

206. Similarly, the LRCWA was of the view that allowing consideration of relevant Aboriginal customary laws or other cultural issues in sentencing decisions is necessary to achieving substantive equality. The LRCWA argued that permitting consideration of these factors does not discriminate against non-Aboriginal people, as non-Aboriginal people are likewise entitled to present factors concerning their social, religious and family background during sentencing proceedings.[130]

Distinctions between recognition of customary laws, defences and considerations in bail and sentencing decisions

207. As noted in Part 1 of this report, the review was limited in scope. The review did not extend to an examination of whether or not Indigenous or other customary laws should be formally recognised within the Australian legal system. Rather, its focus was whether consideration of factors associated with customary law, cultural practice and cultural background should be permitted or required in bail and sentencing decisions, and if so, any limitations that should be placed on such considerations. The review did not examine whether aspects of Indigenous or other customary laws should be incorporated into the Australian legal system and this report does not contain any recommendations on that issue.

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[126] *Ethiopia v South Africa; Liberia v South Africa* (Second Phase) [1966] IJC Rep 6, 303-4.
[127] Human Rights Committee, General Comment 18 [13], CERD Committee, General Comment 14 [2].
[128] LRCWA, Project 94, as above.
[129] ALRC, Report 31, as above.
[130] LRCWA, Project 94, as above.

208. There is also an important distinction between statutory defences and factors to be taken into account in bail and sentencing decisions. A customary law defence would exonerate a defendant from criminal liability for an offence if it could be shown that he or she committed the offence in accordance with customary law. If such a defence were successful, it would result in acquittal. Bail decisions take place before guilt or innocence has been established, and sentencing decisions only where a defendant has pleaded or been found guilty. While both processes involve consideration of a range of factors, the purpose of taking those factors into account is not to determine whether or not a person should be found guilty of an offence. Australian laws do not provide for a customary law defence, and none of the options for reform outlined below would involve the introduction of such a defence.

Sentencing principles

209. As outlined in Part 4 of this report, the ALRC, in Report 103, outlined five fundamental sentencing principles: proportionality, parsimony, totality, consistency and individualised justice. The ALRC recommended that Commonwealth sentencing legislation require the application of these principles to sentencing of federal offenders. It could be argued that there is a degree of tension between the principles of proportionality, which requires that a sentence be proportionate to the objective seriousness of the offence, and individualised justice, which requires that a sentence take account of all circumstances of the individual case. However, sentencing inherently involves balancing multiple factors to arrive at a sentence that is appropriate in all the objective and subjective circumstances of the offence and the offender. It is therefore not the case that facilitating individualised justice by allowing broad judicial discretion will impede proportionality in sentencing. Nor is the case that proportionality is necessarily facilitated by imposing limits on judicial discretion to consider certain factors when making sentencing decisions.

Interpretation of the amendments

210. It was evident from stakeholder input and the literature review that the amendments are sometimes understood to operate more broadly than was intended. The amendments are understood by some as precluding any consideration of customary law and cultural practice in bail and sentencing decisions. For example, many have argued that the amendments violate the principle of double jeopardy by preventing a court, when passing sentence, from considering traditional punishment that an offender has received, or will receive. Stakeholder feedback also indicated that some magistrates have interpreted the bail provisions as preventing consideration of a defendant's wish to attend a funeral ceremony.

211. The Commonwealth amendments removing the requirement to consider an offender's cultural background when passing sentence or determining whether to discharge an offender without conviction are sometimes misunderstood. Some have misinterpreted the amendments as preventing a court from taking an offender's cultural background into account. As indicated in Part 2 of this report, these amendments do not prevent a court from considering an offender's cultural background. Rather, they removed the express requirement for a court to take account of that factor.

212. *R v Leroy Gibson* is outlined in Part 3 of this report. In that case, Martin CJ stated in his sentencing remarks that he was not taking into account any cultural law or practice – 'I am forbidden by the law from doing that'.[131] However, in listing the circumstances he considered in determining an appropriate sentence, Martin CJ refers to the relationship between the offender and

[131] *R v Leroy Gibson*, as above.

the victim as being viewed as a marriage that was approved of by both sets of parents. Martin CJ's sentencing remarks indicate that in coming to a decision on an appropriate sentence, he balanced the views of the parents and the Aboriginal community of the offender and victim against the views and concerns of the wider community.

213. In *The Queen v Wunungmurra*, which occurred after stakeholder feedback was received and the literature review was undertaken, Southwood J took a narrow interpretation of the customary law amendments, in line with their intended operation. The case is examined in further detail below.

Community legal education and judicial cultural awareness training

214. There is some support from law reform commissions for both community legal education and judicial cultural awareness training. For example, the LRCWA recommended the development of initiatives to inform Aboriginal people about criminal laws, court procedures and services available in the criminal justice system.[132] It went on to recommend:

> That in developing these initiatives, particular attention be given to providing information about any criminal laws and international human rights standards that may potentially conflict with Aboriginal customary laws.
>
> That these initiatives be developed in conjunction with Aboriginal communities and organisations.
>
> That these initiatives be locally based and, where possible, be presented by Aboriginal people and delivered in local Aboriginal languages.[133]

215. The ALRC and the LRCWA have both recommended that judicial officers undertake cultural awareness training designed and delivered in consultation with, or the involvement of, Indigenous Australians.[134]

Community legal education for Indigenous Australians

216. One of the outcomes of the July 2006 COAG meeting was a decision to invest in community legal education (CLE) for Indigenous Australians, to ensure they are informed about their legal rights, know how to access assistance, and are encouraged to report incidents of violence and abuse.[135]

217. In 2007, the Attorney-General's Department provided funding to nine Family Violence Prevention Legal Services (FVPLSs) to employ fifteen CLE workers, and to HREOC, to develop and deliver a training module aimed at preparing the CLE workers for employment. The primary role of the CLE workers is to raise awareness among Indigenous Australians about Australian law, and also to clarify the relationship between Australian law and customary law.[136]

218. HREOC delivered its five-day training module to thirteen CLE workers in Sydney in March 2008. The training covered a range of topics, including Australian laws and courts,

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[132] LRCWA, Project 94, as above, recommendation 26.
[133] Ibid.
[134] ALRC, Report 103, as above, LCRWA, Project 94, as above.
[135] COAG, Communiqué, as above.
[136] Human Rights and Equal Opportunity Commission, *Evaluation of the HREOC training program for community legal education workers*, 2008.

Aboriginal and Torres Strait Islander courts and justice systems, customary law, the interaction between Australian law and customary law, and human rights.

219. CLE workers are trained in both Australian law and customary law, to the extent that it is relevant to preventing violence in Indigenous communities. They assist Indigenous Australians who observe customary law to understand that they are also subject to the laws of the State or Territory in which they reside, as well as the laws of the Commonwealth. They are also trained to assist Indigenous Australians to understand the difference between Australian law and customary law, in terms of sentencing and punishment. Their role is not to present customary law as being in opposition to Australian law, but rather, to emphasise respect for both laws and find correlations between the two.

220. CLE also highlights the availability of various Aboriginal and Torres Strait Islander specific courts and community-based programs. For example, participants are made aware of circle sentencing, offender rehabilitation programs and Indigenous diversion programs. They are also made aware of courts such as SA's Ngunga Court and Queensland's Murri Court, which aim to incorporate Indigenous customary law approaches to the sentencing of Indigenous offenders within the framework of Australia's existing legal system.

221. CLE workers are also able to provide guidance on the practical implications of the CABS Act and amendments to NT bail and sentencing laws made by the NTNER Act.

222. The CLE program is funded to the end of the 2010-11 financial year.

Judicial cultural awareness training

223. In 2007, the Attorney-General's Department also provided $500,000 funding, over four years, to the National Judicial College of Australia (NJCA) to deliver cultural awareness training to judicial officers, with a focus on Indigenous Australians. The aim of the training is to assist judicial officers in gaining a greater understanding of Indigenous issues, and also to provide them with information about matters in which the role or involvement of Indigenous people might call for particular skills or different approaches.

224. The training is guided by a curriculum framework, which was developed in consultation with Indigenous communities and judicial officers and builds upon the NJCA's National Curriculum.[137] The curriculum framework is designed to establish a flexible scheme within which courses might be designed and tailored to meet the needs of particular judicial officers and the Indigenous communities they serve. It also contains suggestions about the methodology to be adopted in devising and delivering training, with a particular emphasis on the importance of meaningful consultation with, or involvement of, Indigenous people.

225. The curriculum framework contains suggested topics for inclusion in training, including the role and impact of customary law, Indigenous people's experience of the criminal justice system, specific legislation or legal changes affecting Indigenous people, family violence, and sentencing of Indigenous offenders.

[137] National Judicial College of Australia, *Australia's Indigenous people – a curriculum framework for professional development programs for Australian judicial officers*, Canberra, viewed 16 January 2009, <http://www.njca.com.au>.

226. The curriculum framework is subject to ongoing evaluation, in consultation with Indigenous communities and relevant Indigenous services, with a view to being adapted and further developed as required.

227. The judicial training program is funded to the end of the 2010-11 financial year, with an evaluation of the training to be completed at that time.

Evidence of customary laws during sentencing proceedings

228. The *Sentencing Amendment (Aboriginal Customary Law) Act 2004* (NT) inserted section 104A into the *Sentencing Act 1995* (NT). Section 104A provides that if a party to sentencing proceedings seeks to present information about Aboriginal customary law, he or she must give notice to the other parties, outlining the substance of the information, so that each of the other parties has a reasonable opportunity to respond to the information. It also provides that information about an aspect of Aboriginal customary law that may be relevant to the offence or the offender must be presented to the court in the form of evidence on oath, an affidavit or a statutory declaration. In the second reading speech, the then Minister for Justice and Attorney-General of the NT stated that the Bill aimed to ensure that courts receive fully tested evidence about relevant customary law issues when sentencing an offender.[138]

229. The LRCWA has stated that it considered that if customary law is to be taken into account at sentencing, it must be on the basis of reliable evidence or information.[139] To achieve that aim, and to ensure false claims about Aboriginal customary law are discouraged, it made the following recommendation.

> That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide:
>
> 1. That when sentencing an Aboriginal person the court must have regard to any submissions made by a member of a community justice group, an Elder and/or respected member of any Aboriginal community to which the offender and/or the victim belong.
>
> 2. 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 sentencing the offender must allow the other party (or parties) a reasonable opportunity to respond to the submissions if requested.
>
> 3. That if an Elder, respected person or member of a community justice group provides information to the court then that person must advise the court of any relationship to the offender and/or the victim.[140]

230. The LRCWA also recommended that exceptions to the hearsay and opinion rules should be provided for evidence relevant to Aboriginal customary law. The *Evidence Amendment Act 2008* (Cth) inserted provisions in the *Evidence Act 1995* (Cth) to provide such exceptions. The amendments were made in response to the 2006 report, Uniform Evidence Law, by the ALRC, NSWLRC and Victorian Law Reform Commission. The purpose of these provisions is to make it easier for a court to obtain evidence of Aboriginal and Torres Strait Islander traditional laws and customs, where appropriate.

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[138] Dr Peter Toyne, Second reading speech, Sentencing Amendment (Aboriginal Customary Law) Bill 2004, Darwin, 13 October 2004, Hansard 9th Legislative Assembly, viewed 9 February 2009, <http://notes.nt.gov.au/lant/hansard/hansard9.nsf>.

[139] LRCWA, Project 94, as above.

[140] LRCWA, Project 94, as above, recommendation 39.

Australia's international and domestic human rights obligations

231. There is some risk that the amendments limiting consideration of customary law and cultural practice in bail and sentencing decisions could breach the prohibition on discrimination in Article 2 of the ICCPR and Article 2 of the CERD.[141] This risk arises because the provisions, especially the NT provisions, may have a disproportionate effect on Indigenous Australians that is not clearly based on reasonable and objective criteria, and for a legitimate purpose. While it could be argued that the purpose of the provisions is the protection of women and children, it may be difficult to identify a legitimate purpose in instances where no question of conflicting rights arises.

232. A submission was made to the CERD Committee in January 2009, on behalf of several Aboriginal people residing in prescribed areas of the NT, requesting urgent action in relation to the NTER. The submission includes specific reference to the amendments to NT bail and sentencing laws. The Committee has given initial consideration to the submission and expressed concern about a number of the NTER measures, particularly the suspension of the RDA. The United Nations Human Rights Committee also expressed concern at the negative impact of NTER measures on Indigenous Australians' enjoyment of human rights in its concluding remarks on Australia's most recent report on the ICCPR.

233. In the domestic context, the amendments that limit consideration of customary law and cultural practice seem unlikely to breach the RDA, as they apply regardless of a person's race. However, there is some risk that the amendments could be found to be indirectly racially discriminatory. The Federal Court has held that legislation which is racially neutral on its face may still discriminate indirectly on the basis of race.

234. Reinstating judicial discretion to consider customary law and cultural practice, where relevant, would minimise the risk of Australia being found to be in breach of its international or domestic human rights obligations. Restricting the application of the relevant provisions to offences involving violence and sexual abuse may also mitigate the risk of the provisions being found to be indirectly discriminatory.

Support for victims and witnesses

235. It was suggested in some of the literature that to ensure adequate evidence is available to support serious charges, additional assistance is necessary for victims and witnesses. The Attorney-General's Department is working on a range of measures to support and empower victims of crime. The details of these measures are yet to be finalised, but will include a Commonwealth Charter of Victims' Rights, protections for vulnerable and disadvantaged witnesses, and provision for victim impact statements in sentencing federal offenders.

236. The proposed Charter of Victims' Rights is based upon the UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the National Charter for Victims' Rights in Australia, endorsed by the Standing Committee of Attorneys-General in June 1993. The witness protections proposal will extend the existing protections under Part IAD of the Crimes Act beyond child victims of sexual offences, to other classes of vulnerable and disadvantaged witnesses. The provisions for victim impact statements are based on the recommendations of the ALRC in Report 103.

[141] This concerns paragraph 15AB(1)(b) and subsection 16A(2A) of the Crimes Act and paragraph 90(1)(b) and section 91 of the NTNER Act.

The Queen v Wunungmurra

237. In *The Queen v Wunungmurra*, the defendant was charged with causing harm to his wife with the intent to cause serious harm, and aggravated assault of his wife. The defendant informed the court he intends to plead guilty to the charges, but he is yet to be arraigned.

238. The defendant sought to read an affidavit of Ms Laymba Laymba, a senior member of three Aboriginal clan groups who is knowledgeable about the customary laws and cultural practices of the Yolngu people, in support of his plea on sentence. This was sought for the purposes of:

- providing a context and explanation for the defendant's crimes
- establishing the objective seriousness of the defendant's crimes
- establishing that the defendant does not have a predisposition to domestic violence and is unlikely to re-offend
- establishing that the offender has good prospects of being rehabilitated, and
- establishing the defendant's character.[142]

239. The prosecution objected to the affidavit being read to establish the objective seriousness of the crimes, on the basis of s91 of the NTNER Act, but did not object to it being read for the other purposes identified.

240. Southwood J stated that s91 may only be taken to encroach upon general sentencing principles so far as a strict reading of the provision would allow, and that the purpose was not to remove all consideration of customary law and cultural practice form the sentencing process. He considered that s91 precludes consideration of customary law or cultural practice when determining the objective seriousness of an offender's crime and the offender's moral culpability. Further, he considered the effect of s91 to be that in cases where it applies, proportionally greater weight will be given at sentence to the physical elements of the offence and the extent of the invasion of the rights of the victim, and proportionally less to the reasons or motive for committing the offence.[143]

241. In his sentencing remarks, Southwood J was critical of the amendments for precluding consideration of information he considered highly relevant to determining the seriousness of an offence in the particular circumstances of a given case. Specifically, he stated the following.

> The fact that legislation might be considered unreasonable or undesirable because it precludes a sentencing court from taking into account information highly relevant to determining the true gravity of an offence and the moral culpability of the offender, precludes an Aboriginal offender who has acted in accordance with traditional Aboriginal law or cultural practice from having his or case considered individually on the basis of all relevant facts which may be applicable to an important aspect of the sentencing process, distorts well established sentencing principle of proportionality, and may result in the imposition of what may be considered to be disproportionate sentences, provides no sufficient basis for not interpreting s 91 of the Emergency Response Act in accordance with its clear and express terms. The Court's duty is to give effect to the provision.[144]

[142] *The Queen v Wunungmurra* [2009] NTSC 24 [3]
[143] Ibid, [20] – [27]
[144] *The Queen v Wunungmurra* [2009] NTSC 24 [25]

242. Southwood J interpreted the provision narrowly and in accordance with the intended operation. That is, he ruled that the evidence concerning customary law not be admitted for the purpose of establishing the objective seriousness of the defendant's criminal behaviour, but that it be admitted for other purposes, including to provide an explanation and context for the offences. If this interpretation is taken up as a precedent, it appears likely that the provision will only preclude consideration of customary law and cultural practice in sentencing decisions to the limited extent intended.

243. According to Southwood J's remarks, the affidavit contained information on circumstances in which an Aboriginal man from a particular clan group who is also a Dalkaramirri (said to have a similar role to judicial officer) may inflict severe corporal punishment on his wife with the use of a weapon.[145] His remarks indicate that Ms Laymba Laymba states that the defendant was acting in accordance with his duty as a Dalkarra man. This contradicts the argument put by stakeholders and commentators who have argued that Aboriginal customary law does not condone violence. While it may be the case that Aboriginal customary law does not condone domestic violence or sexual abuse, it appears that in some cases it may permit or require physical punishment.

Prosecution guidelines

244. The NT DPP has a series of guidelines for its prosecutors, one of which is on Aboriginal customary law. The guidelines provide assistance for prosecutors involved in cases where issues of Aboriginal customary law arise and contain information on rates of imprisonment, individual human rights, and the place of customary law in Aboriginal people's lives.

245. The guidelines on Aboriginal customary law make it clear that customary law must only be recognised consistently with universal human rights and freedoms. In particular, that the right of Indigenous people to enjoy their culture must not come at the expense of the rights of individual Aboriginal women and children. They also highlight the importance of distinguishing between traditional and non-traditional violence and provide guidance to prosecutors on evidence of Aboriginal customary law.[146]

246. The CDPP maintains an internal Guidelines and Directions Manual (GDM) for its prosecutors and legal officers, which does not contain specific guidance or information on customary law. Consideration could be given to whether guidance such as that provided to NT DPP prosecutors would be useful for CDPP prosecutors.

Options for reform

247. The provisions requiring a bail authority to consider the impact of granting bail on any victims or witnesses would be retained under each of these options. The LCA, ALS and CDPP support these provisions, and there is no suggestion that they have a discriminatory effect.

<u>Option 1: Retain the amendments in current form</u>

248. One option is to retain the amendments in their current form. This is the recommended option at this time.

249. There is little evidence available about the impacts of the amendments. While most stakeholders argued for repeal of the amendments on the basis of potential negative impacts, they

[145] Ibid, [8]
[146] Northern Territory Director of Public Prosecutions, *Aboriginal customary law*, Guideline 20.

were not able to identify cases where the amendments had actually operated to produce unintended consequences. In fact, the recent NT case *The Queen v Wunungmurra* indicates that the amendments are operating as intended.

250. If cases arise where the amendments are interpreted more broadly than was intended, information on the intended effect of the amendments could be disseminated to address that issue.

251. If it becomes apparent that the amendments are having unintended negative consequences, consideration could be given to whether to repeal or amend the provisions at that time.

Option 2: Retain the amendments, but limit the application of the customary law provisions to violent or sexual offences

252. Another option is to retain the amendments, but limit the application of the provisions concerning customary law and cultural practice to violent or sexual offences.

253. The argument was put by stakeholders and in the literature that the amendments go beyond what might be required to give effect to the 2006 COAG decision by applying to all offences, not only those concerning violence or sexual abuse.

254. Limiting the application of the provisions concerning customary law and cultural practice would reduce the risk of unintended negative impacts on non-violent offenders, such as those charged with social security fraud.

255. This option would mean that the Commonwealth provisions are likely to have little application, as most violent or sexual offences are within State and Territory jurisdiction. However, the Commonwealth provisions could serve as model provisions.

Option 3: Repeal the customary law and cultural background amendments to bail and sentencing laws

256. The amendments concerning consideration of customary law, cultural practice and cultural background in bail and sentencing decisions could be repealed.

257. Stakeholders and others have expressed a range of concerns about the potential for negative impacts occurring if the amendments are retained. Repealing the provisions would address those concerns.

258. This option would also minimise the risk of the provisions being found to be indirectly racially discriminatory under domestic or international human rights law. However, it would not address concerns, such as those evident in the 2006 COAG decision, that customary law or cultural practice could be inappropriately relied upon to mitigate or aggravate the seriousness of an offence.

Option 4: Repeal the customary law and cultural background amendments to bail and sentencing laws and amend Commonwealth and NT laws to regulate the receipt of customary law and cultural practice information in bail and sentencing proceedings

259. Another option would be to repeal the amendments concerning consideration of customary law, cultural practice and cultural background in bail and sentencing decisions, and amend Commonwealth and NT laws to regulate the receipt of customary law and cultural practice information in bail and sentencing proceedings. The new provisions could be modelled on s104A of the NT Sentencing Act (reproduced at **Appendix E**), but would not be restricted only to

information concerning Aboriginal customs, and would apply to bail as well as sentencing proceedings.

260. Like option 3, this option would address stakeholder concerns and minimise the risk of the provisions being found to be indirectly racially discriminatory. It would also involve the introduction of safeguards to help ensure that unsupported claims that customary law or cultural practice required or authorised particular behaviour are not accepted by the courts.

261. Regulating the receipt of customary law and cultural practice information by the court would expose false claims and ensure defendants could not rely on unsupported customary law arguments to justify their actions. If it were accepted that there would not be occasions where it could be legitimately claimed that customary law or cultural practice permitted or required certain criminal behaviour, then this option would be consistent with the 2006 COAG decision. However, as there may be situations where such a claim could legitimately be made, this option would not entirely satisfy the terms of the COAG decision.

Option 5: Retain the amendments, but limit the application of the customary law provisions to violent or sexual offences and amend Commonwealth and NT laws to regulate the receipt of customary law and cultural practice information in bail and sentencing proceedings.

262. A further option would be to limit the application of the customary law provisions to violent or sexual offences and amend Commonwealth and NT laws to regulate the receipt of customary law and cultural practice information in bail and sentencing proceedings.

263. Like option 2, this option would reduce the risk of unintended negative impacts on non-violent offenders. In addition, the proposed safeguards would help to ensure that courts receive reliable information about customary law and cultural practices.

264. This option would ensure that violent or sexual crimes cannot be considered more or less serious due to customary law and cultural practice considerations but would not place any limits on judicial discretion to consider such issues for other types of offences.

Appendix A – Summit Communiqué

SAFER KIDS, SAFER COMMUNITIES

"This Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, involving Ministers from the Australian Government and all States and Territories, agrees that the levels of violence and child abuse in Indigenous communities warrant a comprehensive national response.

"We have reconfirmed the principles agreed by the Council of Australian Governments (COAG) in June 2004, under COAG's *National Framework on Indigenous Family Violence and Child Protection*, particularly that:

- everyone has a right to be safe from family violence and abuse;
- preventing family violence and child abuse in Indigenous families is best achieved by families, communities, community organisations and different levels of government working together as partners;
- successful strategies to prevent family violence and child abuse in indigenous families enable Indigenous people to take control of their lives, regain responsibility for their families and communities and to enhance individual and family wellbeing; and
- the need to address underlying causes and to build strong and resilient families.

"While all jurisdictions over recent years have taken significant steps to address the problem, the Summit acknowledged that better resources, improved methods and a concerted, long-term joint effort were essential if the necessary breakthroughs were to be achieved.

"Indigenous children continue to be overrepresented in substantiated cases of child abuse and neglect. Indigenous people also continue to experience increasing levels of violence and abuse. A series of reports – the latest conducted in New South Wales – point to endemic problems, particularly in remoter areas but also evident in some regional and urban areas.

"Action therefore needs to be accelerated – in particular the imperative of giving Indigenous Australians confidence that the justice system will work for them. Indigenous people must enjoy the same level of law and order as applies in the broader community.

"The Australian Government's view is that law and order are also fundamental preconditions to ensuring that the expenditures by governments at all levels – on priorities such as health, housing and education – to overcome poverty and generational disadvantage are not dissipated but made sustainable.

"While many of the issues requiring attention necessarily rest with the States and Territories, a concerted national response depends on agreed actions across jurisdictions, with the active support of the Australian Government.

"We will work with Indigenous people to implement flexible local solutions, acknowledging that all parents have a responsibility to ensure their kids are safe and need to access services provided to ensure their well-being. All adults have a responsibility to report incidents of child abuse. Community leaders have a responsibility to support those reporting and giving evidence against perpetrators.

"We agree that a comprehensive response to the issue of violence and child abuse requires an integrated package covering:

- a legislative and regulatory framework that protects those at risk of, and those who have suffered, violence and abuse;
- adequate policing and child protection resources to deal with issues arising in remote communities;
- a criminal justice system that recognises and adequately addresses the particular issues faced by those living in remote localities;
- appropriate control of alcohol and other substances, and rehabilitation support for those addicted;
- complementary measures, including:
  - compulsory school attendance
  - support for local Indigenous leaders
  - sound community and corporate governance.

"The Attachment outlines this Action Strategy in further detail.

"All jurisdictions agreed to put the action strategy to COAG for consideration and decision on 14 July 2006. Our aim is to give Indigenous people greater confidence and hope that, with their participation, violence and child abuse can and will be overcome in their communities."

ATTACHMENT

NATIONAL STRATEGY FOR ACTION TO OVERCOME VIOLENCE AND CHILD ABUSE IN INDIGENOUS COMMUNITIES

Customary Law and Bail

All Governments agree that customary law in no way justifies, authorises or requires violence or sexual abuse against women and children.

The Commonwealth will review bail conditions in relation to Commonwealth offences and has invited the States and Territories to review their bail legislation so that law enforcement and judicial officers when considering bail give primacy to any risks to the victim; and that, in particular, account be taken of the effect on families and communities, including remote communities, of an accused person returning to the community before their cases have been substantively dealt with by the courts.

The Commonwealth also indicated its intention to amend 16A of the *Crimes Act 1914* to delete reference to any mandatory consideration of cultural background for all offences against Commonwealth law and to exclude from sentencing discretion for all Commonwealth offences claims that criminal behaviour was justified, authorised or required under customary law or cultural practice and has invited the States and Territories to ensure like provisions are implemented in each jurisdiction.

The Commonwealth proposed that these proposals should be forwarded to the next COAG meeting for discussion.

The States and Territories noted that they intend to raise the issues of relevance to State/Territory jurisdictions for detailed discussion at Standing Committee of Attorneys-General.

Law Enforcement

All jurisdictions recognised the vital role of intelligence and effective policing in addressing violence and child abuse in Indigenous communities. They also agreed that relevant criminal activity included organised crime involving drugs and alcohol, pornography and fraud. There was unanimous support for the establishment of a National Intelligence Unit subject to details being determined by the Australian Police Ministers' Council (APMC) meeting on 29 June 2006.

It was agreed that points for discussion at APMC would include:

1. the seconding of AFP or Australian Crime Commission (ACC) officers to each jurisdiction (except the ACT and Tasmania) for intelligence collection and management;
2. Commonwealth funding of personnel at the ACC to deal with intelligence collection and assessment;
3. resources to be contributed by the States and Territories;
4. how seconded AFP officers would liaise with Sate and Territory police to assist in the collection of intelligence; and
5. how State and Territory police would provide any necessary follow-up in relation intelligence gathered.

Some jurisdictions supported establishing strike teams or taskforces led by each jurisdiction to provide specialist capacity to intervene against serial violence and related criminal activity. This matter will be pursued bilaterally. Other jurisdictions indicated they already had strike teams.

It was agreed that the APMC would report to COAG in time for its meeting of 14 July 2006.

Senior Indigenous Network
The Australian Government will invest $4 million to support leadership development of Indigenous women and men in Indigenous communities.

The Australian Government will negotiate bilaterally with the Sates and Territories to target this investment, for example by supporting and expanding existing networks or the establishment of new networks.

The overarching principle in these negotiations will be that the States and Territories match or exceed the Australian Government's investment.

Protection for victims
All jurisdictions recognise the importance of providing additional safe places for victims of violence and abuse. The jurisdictions agreed to undertake bilateral discussions to determine the placement of such services.

All jurisdictions agreed to consider increased legal support for victims.

Drug and Alcohol Rehabilitation Services
All jurisdictions recognise the close links between substance abuse and violence and the need for additional services for those who are addicted. The Australian Government's commitment of up to $50m to jointly fund additional drug and alcohol services was welcomed by the States and Territories. Services will be provided on the basis of need and details of locations will be developed on a bilateral basis.

Health and Well-being of children
The States and Territories welcomed the Australian Government's commitment to trial an extension to the Indigenous Child Health Check in one region. The provision of a special team to conduct some 2000 checks with a further team to provide support and follow-up treatment was acknowledged as an important complementary measure.

Corporate Governance
The Australian Government proposed that funding guidelines be amended to ensure that government funding, from all levels of government, be restricted to organisations managed by fit and proper persons. The States and Territories agreed in principle. The Australian Government is going to do this.

Compulsory School Attendance
While all jurisdictions recognise that attending school is a critical foundation element, there was little agreement about how to ensure that all Indigenous children are enrolled and attend school. This issue, including mechanisms to improve school attendance and data sharing, will be referred to MCEETYA.

Appendix B – Extract from COAG Communiqué

Outcomes of the Indigenous Summit on Violence and Child Abuse in Indigenous Communities

COAG expressed concern that some Indigenous communities suffer from high levels of family violence and child abuse. Leaders agreed that this is unacceptable. Its magnitude demands an immediate national targeted response focused on improving the safety of Indigenous Australians. Despite all jurisdictions having taken steps over recent years to address this problem, improved resourcing and a concerted, long-term joint effort are essential to achieve significant change. COAG understands that these issues exist for Indigenous communities throughout Australia in urban, rural and remote areas.

In June 2004, COAG agreed to the National Framework on Indigenous Family Violence and Child Protection. COAG has reaffirmed its commitment to this National Framework. Leaders also affirmed the need to continue to undertake work addressing all aspects of the underlying causes of family violence and child abuse.

At this meeting, COAG has agreed to adopt a collaborative approach to addressing particularly the issues of policing, justice, support and governance. Bilateral agreements between the Commonwealth and States and Territories will be the key to ensuring this proceeds. This approach, which has been informed by the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities held on 26 June 2006, recognises the differing circumstances in jurisdictions and builds on successful work already being undertaken. It also builds on work by all jurisdictions to implement the principles under the National Framework on Indigenous Family Violence and Child Protection that COAG agreed in June 2004.

The Commonwealth has agreed to make available funds in the order of $130 million over four years to support national and bilateral actions on the basis that the States and Territories have agreed to complement this effort with additional resources to be negotiated on a bilateral basis.

<u>Policing, community education and support for victims and witnesses</u>
Indigenous Australians must be able to rely on, and have confidence in, the protection of the law. To this end, COAG has agreed to provide more resources for policing in very remote areas where necessary, to improve the effectiveness of bail provisions and to establish a National Indigenous Violence and Child Abuse Intelligence Task Force to support existing intelligence and investigatory capacity. Joint strike teams will be established on a bilateral basis, where necessary, to work in remote Indigenous communities where there is evidence of endemic child abuse or violence. COAG has also agreed to invest in community legal education to ensure Indigenous Australians are informed about their legal rights, know how to access assistance and are encouraged to report incidents of violence and abuse. In addition, more support for victims and witnesses of violence and abuse will be provided.

<u>Application of customary law</u>
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.

<u>Complementary measures</u>
COAG has also agreed to work together to fund and administer complementary measures that address key contributing factors to violence and child abuse in Indigenous communities. One of the

main factors is alcohol and substance misuse. Reducing substance misuse can substantially reduce levels of violence and abuse, improve the overall health and wellbeing of Indigenous people, and may also increase educational attainment, household and individual income levels, and reduce crime and imprisonment rates. Many jurisdictions have acted in this area, but more could be done. COAG has agreed to further support communities seeking to control access to alcohol and illicit substances at a local level. States and Territories have agreed to encourage magistrates to make attendance at drug and alcohol rehabilitation programmes mandatory as part of bail conditions or sentencing. COAG has also agreed to provide additional resourcing for drug and alcohol treatment and rehabilitation services in regional and remote areas.

Indigenous leaders and organisations also play a vital role in addressing the problem of violence and abuse. COAG has agreed to support networks of Indigenous women and men in local communities so that they can better help people who report incidents of violence and abuse. All governments agreed that sound corporate governance is important for the stability and effective functioning of communities and non-government organisations. All governments agree in principle that they will only fund non-government organisations that are led and managed by fit and proper persons.

Poor child health and educational attainment can also contribute to an intergenerational cycle of social dysfunction. COAG has agreed to an early intervention measure that will improve the health and wellbeing of Indigenous children living in remote areas by trialling an accelerated roll-out of the Indigenous child health check in high-need regions with locations to be agreed on a bilateral basis. COAG has also agreed that jurisdictions will work together on the important and complex issue of the low rates of school attendance in Indigenous communities, which reduces the future life chances of Indigenous children. All jurisdictions will collect and share truancy data on enrolments and attendance. The Commonwealth will establish a National Truancy Unit to monitor, analyse and report on this data.

Some States and Territories have identified additional areas for collaborative work, which will be pursued bilaterally with the Commonwealth.

Implementation

The overarching bilateral agreements on Indigenous service delivery will be the primary mechanism for implementing the measures. This ensures that tailored approaches can be developed to address the specific needs and recognise the recent initiatives of jurisdictions, regions and communities. COAG has asked the Standing Committee of Attorneys-General (SCAG) to report to the next COAG meeting on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities and to recommend any changes required. COAG has also asked MCEETYA to report to the next COAG meeting on the issue of enforcing compulsory school attendance and detailed arrangements for the establishment of a National Truancy Unit to monitor, analyse and report on truancy data. Progress on implementation of the action strategy will be reported back to COAG in December 2006.

Appendix C – Case summary, *The Queen v GJ*

Facts

GJ, a male, was approximately 54 years of age at the time of the offence, and the female victim was approximately 14 years of age. In June 2004, the victim formed a friendship with a young boy. On 18 June 2004, the victim and the boy both stayed in the home of a mutual friend. GJ believed that a sexual relationship had occurred between the boy and the victim.

On 19 June 2004, GJ and the victim's grandmother went to the house where the victim was staying. The grandmother took the victim outside, where she was struck by GJ with some force over her shoulders and back with a boomerang. GJ and the grandmother took the victim to the grandmother's house, where GJ and the grandmother both struck her.

GJ and the grandmother decided that the victim should go with GJ to his outstation. The victim did not want to go. The grandmother packed some of the victim's belongings and insisted she go with GJ. The victim was taken to GJ's outstation.

That evening, GJ dragged the victim into a bedroom. She kicked and screamed and resisted. GJ asked the victim for sexual intercourse. She said that she was only 14 years old. GJ hit her on the back. No sexual intercourse occurred that night.

The next night, GJ ordered the victim into a bedroom. Once there, GJ removed most of his clothes and pushed the victim onto a mattress. She later told police that GJ was holding a boomerang and threatening her with it. GJ had anal intercourse with the victim, during which she was frightened and crying.

On 22 June 2004, GJ took the victim back to her community. On 24 June 2004, GJ was arrested by police.

GJ admitted to police that he had struck the victim with a boomerang, taken her to his home and had sexual intercourse with her. GJ said that the victim had been promised to him as a wife since she was four years of age. He said that in his culture it was acceptable to have sexual intercourse with a girl when she was 14 years of age. The victim told police that she knew she was promised to GJ under Aboriginal custom, but that she did not like him. She said that she told GJ she was too young for sex, but that he did not listen.

Northern Territory Supreme Court

On 11 August 2005, GJ pleaded guilty to the offences of unlawful assault and sexual intercourse with a child under 16 years of age. He was sentenced to cumulative sentences of five months imprisonment for the first offence and 19 months imprisonment for the second, to be suspended after one month.

Martin CJ accepted that:

- GJ believed that intercourse with the victim was acceptable because she had been promised to him and had reached the age of 14
- based on GJ's understanding and upbringing, he believed that the victim had consented to sexual intercourse, and

- under traditional law, GJ's striking of the child was justified and permissible as punishment for her behaviour.

Martin CJ went on to state that while he accepted the evidence of traditional law, GJ and other members of his community must accept that it is not acceptable to strike a child, and must come to understand that NT law must be accepted by everyone, including those who have grown up under traditional law. He stated that women and children are entitled to the protection of NT laws, including the law that criminalised sexual intercourse with children under the age of 16. While he accepted that GJ believed his actions were acceptable and justified, Martin CJ pointed out that GJ was not required under Aboriginal law to strike the victim or to have sexual intercourse with her.

In determining an appropriate sentence, Martin CJ took account of the seriousness of the offences, the guilty pleas, GJ's personal background and circumstances, the impact of the offences on the victim and the need to protect vulnerable members of the community. He considered that the assault was at the lower end of seriousness, but that the sexual offence was very serious, pointing out the distress, pain and shame it caused for the victim.

In balancing the different factors, Martin CJ stated:

> Your beliefs mean that your own moral culpability is less than those who know that this type of thing is wrong. Recognising these beliefs and their effect upon your culpability is not to condone what you did, but simply to recognise as a factor relevant to sentence the effects of your culture and your state of mind at the time.
>
> On the other hand, I have a duty to protect vulnerable members of the community, particularly women and children in Aboriginal communities, as best I can through the imposition of appropriate penalties.[147]

In determining how much of the sentence should be served, Martin CJ also took into account that GJ had clearly stated that he would not seek the victim to be his wife.

Appeal to the Northern Territory Court of Criminal Appeal

The NT DPP appealed against the sentence imposed on GJ on the basis that it was manifestly inadequate. It submitted that this applied to both the head sentence and the decision to suspend all but one month of the sentence. The DPP made the following points:

> 1. The objective facts were very serious.
> 2. The respondent could rely on customary law only for the limited purpose of reducing his moral culpability.
> 3. Although there were other mitigating circumstances present, there was no contrition.
> 4. The sentences imposed did not give adequate effect to general deterrence and retribution.
> 5. The sentences imposed gave no weight to recent legislative amendments which increased the maximum penalty available [for the sexual offence] from 7 years to 16 years imprisonment.[148]

Mildren J noted the finding that GJ was not obliged to act as he had. He considered that in that circumstance, less weight should be accorded to GJ's traditional beliefs. Mildren J also pointed out that since *Pascoe*, the maximum penalty for the offence of sexual intercourse with a child under

[147] *The Queen v GJ*, (2005, unreported, NT Supreme Court, SCC 20509570)
[148] *The Queen v GJ* [2005] NTCCA 20 [28]

16 years of age had been increased from seven to 16 years imprisonment. He considered that there were several mitigating factors other than customary law considerations:

> The respondent was in effect a first offender. He had pleaded guilty and thereby saved the child from having to give evidence. The respondent is a respected leader in his community who is responsible for teaching young men traditional ways. He is not a sexual predator. He was ignorant of Territory law. He is of positive good character and, as the learned sentencing judge found, unlikely to re-offend. To that extent, personal deterrence was of less significance.

Mildren J went on to recognise that despite these factors, the offences were objectively very serious and that while GJ believed he was justified in acting as he had, he was not remorseful. He concluded that the sentences imposed failed to adequately punish the offender and failed to act as a deterrent to others. Mildren J was of the view that the circumstances called for a head sentence of approximately five years imprisonment, of which a substantial portion should have to be served.

Taking into account the principle of double jeopardy, the court set aside the 19 month sentence, and imposed a sentence of three years, six months for the sexual offence, to be served cumulatively upon the five month sentence for the assault. The court considered that the sentence should be suspended after 18 months on the condition that GJ not communicate directly or indirectly with the victim.

Appendix D – Case summary, *Pascoe v Hales*

Facts

Jackie Pascoe Jamilmira, a male, was 49 years of age at the time of the offence, and the female victim was 15 years of age. Jamilmira lived at an outstation located approximately 120 kilometres east of Maningrida by road.

On 20 August 2001, Jamilmira approached the victim and directed her to come to his house. Once there, Jamilmira told the victim to take off her clothes. When she did not do so, her told her a second time. The victim then took off her clothes. Jamilmira removed his shorts and had sexual intercourse with the victim. Afterwards, the victim started to get up, but sat down at the direction of Jamilmira. The victim stayed overnight at Jamilmira's house. When she tried to leave the next day, Jamilmira became upset and fired a shotgun. The victim remained at the house. Jamilmira was arrested by police the following day.

When asked why he had sexual intercourse with the victim, Jamilmira replied "She is my promised wife. I have rights to touch her body." When asked if he was aware that he had committed an offence, he replied "Yes, I know it's called carnal knowledge. But it's Aboriginal custom, my culture. She is my promised wife."

Northern Territory Court of Summary Jurisdiction

On 30 April 2002, Jamilmira pleaded guilty to the offences of unlawful intercourse with a female under the age of 16 and discharging a firearm in a manner that was likely to endanger, annoy or frighten a person. For the sexual offence, he was sentenced to 13 months imprisonment, to be suspended after four months.

The court took account of evidence that the victim was Jamilmira's 'promised wife' and that according to Aboriginal custom, he was entitled to have sexual intercourse with her. According to the evidence given by Mr Djordila, an Aboriginal man who had grown up at Maningrida, traditionally a mother would promise her daughter to a cousin, and when the girl reaches puberty, she could be married.

The court also took account of a pre-sentence report prepared by NT Correctional Services. Information contained in the report included that:

- Jamilmira had previously been a problem drinker, but had been rehabilitated, and that substance abuse did not appear to be involved in the offence
- while a meeting had not taken place between the two family groups to determine when the victim would be given to cohabit with her promised husband, Jamilmira asserted that he had experienced pressure from the victim's family to fulfil his 'responsibilities' as a promised husband
- the victim's maternal grandmother and uncle confirmed the existence of the 'promised' relationship, and also that they had been consulted and consented to cohabitation between Jamilmira and the victim.

Appeal to the Northern Territory Supreme Court

Jamilmira appealed against the sentence, and was given leave to adduce further evidence.

The court considered a report commissioned on behalf of Jamilmira by Mr Bagshaw, an anthropologist who had conducted long term research amongst eastern Burarra people since 1979. The report provided an overview of the customary marriage practices of the Burrara people of north-central Arnhemland. The report concluded that 'sexual relations between a significantly older man and his promised wife . . . is not considered aberrant in Burarra society. Rather, it is the cultural ideal, sanctioned and underpinned by a complex system of customary law and practice.'[149]

The NT Supreme Court held that the sentence imposed by the magistrate was excessive. The Court set aside the 13 month sentence, and instead imposed a sentence of 24 hours imprisonment, on the basis that more weight should have been given to evidence that Jamilmira was exercising conjugal rights in accordance with Aboriginal custom.

Appeal to the Northern Territory Court of Appeal

The NT DPP appealed against the Supreme Court judgement on the basis that too much weight had been accorded to cultural factors surrounding Jamilmira's conduct, and too little to the need to protect young girls.

The court considered the evidence already provided and also information on promised marriages contained in ALRC Report 31. Martin CJ stated that he was satisfied that Jamilmira was truthfully reflecting the situation as he saw it in telling police that the victim was his promised wife and that he had rights to touch her body according to Aboriginal custom. Factors that Martin CJ specifically referred to as relevant to sentencing Jamilmira included:

- that the maximum penalty for the sexual offence was seven years imprisonment
- the harm done to the victim, as disclosed in a victim impact statement
- the extent to which the offender was to blame for the offence
- the offender's character, age, intellectual capacity and prior criminal history
- that offences of that kind were not prevalent
- the assistance the offender provided to law enforcement agencies in the investigation of his offences
- that the offender had pleaded guilty, but that he did not seem to be remorseful, and
- the time the offender spent in custody awaiting bail.

Martin CJ considered it a mitigating factor that the offence was committed in the context of a culturally encouraged practice that was part of a more complex system and not simply related to sexual gratification. However, he also noted that Jamilmira was aware that he was breaking a NT law. He went on to state:

> Personal and general deterrence must feature as significant factors in sentencing for an offence such as this. I am of the opinion that notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual

[149] Bagshaw, quoted in *Hales v Jamilmira* [2003] NTCA 9 [22]

> intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community.[150]

Martin CJ also took into account that Jamilmira stood in double jeopardy on the appeal. He stated that this was a circumstance in which a lesser sentence than would otherwise be imposed was appropriate.

Riley J considered that the offence was made more serious because Jamilmira deliberately chose to offend. He noted that while Jamilmira may have been under cultural pressure to proceed as he did, there was no cultural obligation on him to do so. Riley J also observed that issues of consent did not arise in relation to the offence of which Jamilmira had been convicted.

The court held that the sentence of 24 hours imprisonment was manifestly inadequate. That sentence was set aside and a sentence of 12 months, to be suspended after one month, imposed in its place.

[150] *Hales v Jamilmira* [2003] NTCA 9 [26]

Appendix E – Section 104A of the NT Sentencing Act

104A Information on Aboriginal customary law and community views

(1) This section applies in relation to the receipt of information about any of the following matters by a court before it passes a sentence on an offender:

(a) an aspect of Aboriginal customary law (including any punishment or restitution under that law) that may be relevant to the offender or the offence concerned;

(b) views expressed by members of an Aboriginal community about the offender or the offence concerned.

(2) The court may only receive the information:

(a) from a party to the proceedings; and

(b) for the purposes of enabling the court to impose a proper sentence or to make a proper order for restitution or compensation (as mentioned in section 104(1) and (2)).

(3) In addition, and despite any other provisions, the court may only receive the information if it is presented to the court as follows:

(a) the party to the proceedings that wishes to present the information (***the first party***) gives notice about the presentation to each of the other parties to the proceedings;

(b) the notice outlines the substance of the information;

(c) the notice is given before the first party makes any submission about sentencing the offender;

(d) each of the other parties has a reasonable opportunity to respond to the information;

(e) the information is presented to the court in the form of evidence on oath, an affidavit or a statutory declaration.

(4) In this section:

Aboriginal community includes a community of Torres Strait Islanders.

Aboriginal customary law includes a customary law of the Torres Strait Islanders.