SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 1

Senator Ludwig asked the following question:

Could the department detail the actual mischief which this bill is said to address?

a. In the response can the department detail the actual circumstances that have lead to the requirement for this bill, and detail how this bill will remedy the situation?
b. In the response can the department provide the detailed account or circumstance or where there is said to be a policy failure in need of a remedy?

The answer to the honourable senator's question is as follows:

The *Crimes Amendment (Bail and Sentencing) Bill 2006* is one of the outcomes of the intergovernmental Summit on Violence and Child Abuse in Indigenous Communities and is designed to respond to the issues raised at this summit. In particular, the Australian Government is concerned that all Australians are treated equally under the law and wishes to ensure that every Australian is subject to the law's protection and equally subject to its authority. The Bill is designed to verify that no customary or cultural law excuses criminal behaviour, including unlawful violence or sexual abuse and to ensure that victims and witnesses, particularly those in remote communities, are adequately protected.

This Bill is designed to remedy those situations in which the consideration of customary law or cultural practice has led or may lead to inappropriately lenient sentences. The Australian Government takes the view that the cultural background of a person should not necessarily be identified as a special consideration in sentencing. More importantly, a claim that criminal conduct was justified by customary law or cultural practice should never be used to avoid full and proper punishment for any offence.

The Australian Government is taking the lead on this issue and hopes that this Bill will act as a model for similar legislative changes in all States and Territories.

Further information can be found on pages 33, 37–38, and 42–44 of the proof Hansard of the Committee's hearing on 29 September 2006.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 2

Senator Ludwig asked the following question:

Were each of the State and Territories consulted in respect of the actual detail of the proposed bill?
a. If not, why not?
b. If so can you detail the nature of the action?
c. If so, what was their response?
d. If so, can you detail when the consultation was done and summarise responses received by the AG's Department?

The answer to the honourable senator's question is as follows:

The States and Territories have been consulted on the proposed legislative amendments at the intergovernmental Summit on Violence and Child Abuse in Indigenous Communities and at the Council of Australian Governments meeting on 14 July 2006. At COAG all jurisdictions agreed that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse and that their laws will reflect this, if necessary by future amendment. All jurisdictions also agreed to improve the effectiveness of bail provisions.

The legislative reforms in relation to bail are also the subject of a paper being prepared with input from all jurisdictions by the Standing Committee of Attorneys-General for presentation to the November meeting of COAG.

More detailed discussion has occurred during bilateral negotiations on the COAG Indigenous outcomes. Bilateral negotiations have so far been held with South Australia (9 August 2006), Western Australia (16 August 2006), New South Wales (8 September 2006), and the Northern Territory (4 October 2006), with all jurisdictions being encouraged to follow the Australian Governments lead on this issue.

For further information see pages 33, 36 and 37 of the proof Hansard of the Committee's hearing on 29 September 2006.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 3

Senator Ludwig asked the following question:

Has the Department to date requested any State or Territory to pass similar complimentary legislation as proposed in this bill?

a. If not, is there an intention to make such a request?
   i. If so, when?
b. If so, has any response been received?

If so, can those responses be provided to the committee?

The answer to the honourable senator's question is as follows:

See the answer to question 2.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 4

Senator Ludwig asked the following question:

In drafting the bill was the Indigenous Justice and Legal Assistance Division of the Department consulted?
a. If not, why not?
b. If it was consulted, can you provide any responses from them to the committee?

The answer to the honourable senator's question is as follows:

The Indigenous Justice and Legal Assistance Division of the Department was consulted during the drafting of this bill. This, and the advice of other areas of the Department, was incorporated into advice that the Department provided to the Government about the Bill. Accordingly, it would not be appropriate to provide it to the Committee.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

(Question No. 5)

Senator Ludwig asked the following question:

Can the Department provide:

i. the number of identified Indigenous persons who are presently being held on bail and/or
ii. remanded in custody awaiting sentencing or
iii. have been sentenced and are presently in jail by State or Territory who are determined to be subject to Federal responsibility?

b. For each instance, pleased detail the type of offence that has been laid or the person charged and/or sentenced with

The answer to the honourable senator's question is as follows:

i. The Commonwealth DPP is currently making inquiries with their regional offices.

ii. The Commonwealth DPP is currently making inquiries with their regional offices.

iii. The Department is responsible for providing advice on the administration of federal offenders' sentences, including decisions on parole, release on licence, interstate transfers, permission to travel overseas and application for exercise of the Royal Prerogative of Mercy.

As at 1 September 2006, the total number of federal prisoners was 687.

Federal Offenders—All Categories

State/Territory	F	M	TOTAL
ACT	0	3	3
NSW	58	344	402
NT	3	12	15
QLD	18	58	76
SA	3	11	14
TAS	5	7	12
VIC	6	90	96
WA	10	61	71
Total	**103**	**584**	**689**

In discharging this function, whether or not the offender is an Indigenous person is not a relevant factor.

Attached is a breakdown of federal prisoners per type of offence as at 1 September 2006.

Drugs

State/Territory	F	M	TOTAL
ACT	0	2	2
NSW	51	296	347
NT	0	7	7
QLD	1	31	32
SA	1	6	7
TAS	0	0	0
VIC	2	69	71
WA	4	44	48
Total	**59**	**455**	**514**

Drugs importation offences under section 233B of the *Customs Act 1901*; includes offenders who at the same time might have been convicted of other Commonwealth crimes

Crimes Act 1914

State/Territory	F	M	TOTAL
ACT	0	0	0
NSW	2	25	27
NT	1	1	2
QLD	11	10	21
SA	1	1	2
TAS	2	0	2
VIC	3	9	12
WA	2	6	8
Total	**22**	**52**	**74**

Includes offences such as damaging Commonwealth property and child sex tourism

Illegal Fishing

State/Territory	F	M	TOTAL
ACT	0	0	0
NSW	0	0	0
NT	0	2	2
QLD	0	0	0
SA	0	0	0
TAS	0	0	0
VIC	0	0	0
WA	0	0	0
Total	**0**	**2**	**2**

Financial

State/Territory	F	M	TOTAL
ACT	0	0	0
NSW	1	7	8
NT	0	0	0
QLD	0	2	2
SA	0	0	0
TAS	0	0	0
VIC	0	4	4
WA	0	1	1
Total	**1**	**14**	**15**

Financial crimes include offences under the *Financial Transactions Report Act*, corporations, excise, fraud, proceeds and taxation offences

Note: Some federal offenders have been convicted for more than one offence. The offenders have been categorised in this report on the basis of the principal offence for which they were convicted.

In discharging this function, whether or not the offender is an Indigenous person is not a relevant factor.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

(Question No. 6)

Senator Ludwig asked the following question:

Can the Department provide:

i. the number of Illegal Fishers who are presently being held on bail and/or
ii. remanded in custody awaiting sentencing or
iii. have been sentenced and are presently in jail by State or Territory who are determined to be subject to Federal responsibility?

b. For each instance, pleased detail the type of offence that has been laid or the person charged and/or sentenced with

The answer to the honourable senator's question is as follows:

i. The Commonwealth DPP is currently making inquiries with their regional offices.

ii. The Commonwealth DPP is currently making inquiries with their regional offices.

iii. As at 1 October 2006, there are two illegal foreign fishers imprisoned for federal offences.

b. These two people were convicted of offences against section 101 of the *Fisheries Management Act 1991*.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 7

Senator Ludwig asked the following question:
Has the department consulted with any indigenous communities and/or community representatives about the bill?

a. If so, can you detail those consultations, including a list the communities/ community representatives consulted and when they were consulted and any responses received?
b. If not, why not?

The answer to the honourable senator's question is as follows:

The Department has not directly consulted with Indigenous groups about the Bill.

The primary consultation on these legislative amendments occurred through the intergovernmental Summit on Violence and Child Abuse in Indigenous Communities held on 26 June 2006, the outcomes of the Summit and the Council of Australian Governments meeting of 14 July 2006. There was significant publicity around the issues raised in these forums, including the proposed legislative amendments.

The Ministerial Taskforce on Indigenous Affairs met with the National Indigenous Council (NIC) on 21 June 2006 at which issues of child abuse and family violence and other matters relevant to the forthcoming Summit were discussed. The NIC supported the Summit's focus on law and order issues and the need for a whole-of-government approach to address those issues.

For further information see pages 32, 36, 39, and 40 of the proof Hansard of the Committee's hearing on 29 September 2006.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 8

Senator Ludwig asked the following question:

Has the department consulted with any police forces about the bill?

a. If so, can you detail those consultations, including a list the police forces consulted and when they were consulted and any responses received?
b. If not, why not?

The answer to the honourable senator's question is as follows:

The Department has not consulted with any police forces about this bill.

The outcomes of the Summit were discussed at the Australasian Police Ministers' Council meeting held 29 June 2006.

See also the answer to question number 7.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 9

Senator Ludwig asked the following question:

Has the department consulted with any police unions about the bill?

a. If so, can you detail those consultations, including a list the police unions consulted and when they were consulted and any responses received?
b. If not, why not?

The answer to the honourable senator's question is as follows:

The Department has not consulted with any police unions about this bill.

The outcomes of the Summit were discussed at the Australasian Police Ministers' Council meeting held 29 June 2006.

See also the answer to question number 7.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 10

Senator Ludwig asked the following question:

Has the department consulted with any lawyers representative organisations (e.g. ICJ, Bar Associations, the Law Council of Australia etc.) about the bill?

a. If so, can you detail those consultations, including a list the police unions consulted and when they were consulted and any responses received?
b. If not, why not?

The answer to the honourable senator's question is as follows:

The Department has not consulted with any lawyers' representative organisations about this bill.

The Department received and considered the Law Council of Australia's submission to COAG: *Recognition of Cultural Factors in Sentencing.*

See also the answer to question number 7.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 11

Senator Ludwig asked the following question:

Has the Department consulted with the DPP about the proposals contained in the current Bill?

The answer to the honourable senator's question is as follows:

Yes.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 12

Senator Ludwig asked the following question:

Could the department explain how this measure sits with the recommendations of the Royal Commission into aboriginal deaths in custody? Limiting your answer to the application of this specific legislation, for each departure from those recommendations specify:

a. Why the recommendation was not followed?
b. Whether the recommendation is now considered by the Department to be invalid or redundant?
   i. If so, provide an explanation for the Department's view.

The answer to the honourable senator's question is as follows:

The recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) were extensive, 339 in total, and cover a broad range of issues. The Australian Government is taking a balanced approach in relation to the needs of victims and communities.

The RCIADIC recommendations most relevant to the Bill include recommendations 89, 90, 91 and 242, which relate to bail. The proposed legislative amendments will not directly affect any actions taken to respond to recommendations 89, 90, 91 and 242.

For further information see pages 34–35 and 38–39 of the proof Hansard of the Committee's hearing on 29 September 2006.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

(Question No. 13)

Senator Ludwig asked the following question:

With regard to subsection 15AB(2), could the department:

a. Explain how it envisages the bail authority taking into consideration the matters described in the subsection.
b. Provide some examples of the sorts of circumstances where those matters might affect the decision of the bail authority, and the way in which it might affect that decision.
c. Indicate whether in taking into account the matters described in the subsection, additional weight is likely to be given if the offender or alleged offender comes from the same remote community themselves?

The answer to the honourable senator's question is as follows:

a. Section 15AB(1) requires the bail authority to take into consideration the impact on the victim (or alleged victim) and any witness (or potential witness) when determining whether to grant bail to a person charged with or convicted of an offence or when determining conditions of bail. Section 15AB(2) further requires a bail authority to assess the potential impact of granting bail on the victim (or alleged victim) or witness (or potential witness) if the victim (or alleged victim) or witness (or potential witness) is living in a remote community.

b. Section 68 of the *Judiciary Act 1903* picks up and applies State and Territory bail laws to federal bail proceedings where federal provisions do not exist. These State and Territory Bail Acts set out the conditions on which bail can be granted. This amendment gives primacy in the bail process to the protection of the victim (or alleged victim) and any witness (or potential witness) and will ensure that a bail authority takes the interests of such persons into account in cases that fall within the scope of the new section 15AB of the Crimes Act. New section 15AB also requires that where the victim (or alleged victim) and any witness (or potential witness) are living in or located in a remote community, the bail authority must take this into account when considering granting bail. This amendment will ensure that bail authorities give appropriate weight to the special circumstances of the victim (or alleged victim) and any witness (or potential witness) in remote communities.

c. This amendment will ensure that bail authorities give appropriate weight to the special circumstances of victims and potential witnesses in remote communities.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

(Question No. 14)

Senator Ludwig asked the following question:

Could the department provide definitions of the term 'cultural background' as removed from paragraph 16A(2)(m) and the term 'cultural practices' as inserted into subsection 16?

The answer to the honourable senator's question is as follows:

'Cultural background' is not defined in the Crimes Act. 'Cultural practice' will not be defined in the Crimes Act and the ordinary meaning of this phrase will apply.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 15

Senator Ludwig asked the following question:

With regard to letter to the Committee dated 28 September 2006 from First Assistant Secretary, James Popple, stating that "the Bill will remove 'cultural background' from the list of matters that 'must' be considered" during sentencing:

a. Does the department believe 'cultural background' should be considered by the court during sentencing, if the matter is relevant?
   i. If so, outline the likely circumstances where 'cultural background' is likely to be relevant.
b. Given that subsection 16A(2) state that 'the court must take into account such of the following matters as are *relevant*', does the department agree that the Act as it stands only requires the courts when sentencing to consider 'cultural background' where it is relevant?
   i. If so, could the department explain how the requirement to consider 'cultural background' where relevant is inappropriate?
   ii. Could the department explain why Mr Popple's letter, which suggests that the consideration of 'cultural background' is currently a mandatory requirement, appears to contradict this subsection which allows the court to determine whether or not the offender's 'cultural background' is relevant?
   iii. Could the department explain why the reference to 'cultural background' needed to be removed rather than simply amend the Act to specify more precisely when and how 'cultural background' might be relevant?
   iv. Could the department explain why the reference to 'cultural background' needed to be removed to ensure that the law applies "equally to all Australians" but references to character, antecedents, age, means and physical or mental condition of the person could all be retained?
c. Given, as Mr Popple also noted, subsection 16A(1) still requires a court "to consider 'all the circumstances' of the offence' could the department indicate whether it believes this catch-all statement makes subsection 16A(2) unnecessary?
   i. If so, explain why the entire subsection was not removed instead of just the reference to 'cultural background'?
   ii. If not, explain the purpose of subsection 16A(2), in particular how it might complement section 16A(1)?
   iii. If not, does the department agree that section 16A(2) could be used as something of a checklist for the judges and magistrates to refer to, and that an exclusion of an item such as the cultural background could suggest an intention that it not be taken into account?

The answer to the honourable senator's question is as follows:

a. The legislative amendments will not prevent a sentencing judge considering all circumstances of a case when determining sentencing; including an offender's cultural background. However, a sentencing judge will not be allowed to consider claims that criminal behaviour was excused, justified, authorised, required or less serious because of some form of customary law or cultural practice.

   i. Examples of circumstances where 'cultural background' may be relevant are:
      - Where an offender introduces evidence that they will receive or have received tribal punishment, a court will still be able to consider these claims in relation to sentencing and bail hearings.
      - Where an offender lives in a stable manner in a family/community structure that operates in a customary law environment, eg in a remote community, then the court would be still be able to consider these facts in relation to sentencing and bail hearings.
      - Where an offender may possibly receive a sentence of incarceration, the fact that Indigenous Australians experience particular issues that can lead to death in custody and have in the past experienced a higher rate of deaths in custody than non-Indigenous Australians, is a relevant fact that the court would be still be able to consider in relation to sentencing and bail hearings.

   For further information see pages 38 and 40 of the proof Hansard of the Committee's hearing on 29 September 2006.

b. Yes.

   i. At the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, held in June 2006, the Minister for Families, Community Services and Indigenous Affairs, expressed concern about the relatively high level of violence and abuse in Indigenous communities. The Australian Government has decided that it is inappropriate that 'cultural background' should be used to excuse such violence and abuse.

   ii. The outline of the Department's responses, attached to Dr Popple's letter to the Committee of 28 September 2006, referred to matters which must be considered by a court in sentencing an offender. This was a reference to subsection 16A(2) of the Crimes Act which refers to matters that a court 'must take into account' in sentencing an offender where those matters are 'relevant and known to the court'.

   iii. On 14 July 2006, COAG issued a statement that 'no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse'. The second reading speech of the Bill, stated that an offender's cultural background should not automatically be considered, when a court is sentencing that offender, so as to mitigate the sentence imposed.

iv. As stated in the second reading speech of the Bill, the Australian Government is concerned about the relatively high level of violence and abuse in Indigenous communities. The Government has introduced this Bill to ensure that that 'cultural background' cannot be used so that the criminal behaviour concerned is seen as less serious.

c. Subsection 16A(2) of the Crimes Act sets out a non-exhaustive list of 13 factors that the court must take into account in sentencing an offender, to the extent that such factors are relevant and known to the court. Its purpose is to direct the court to consider these matters. Subsection 16A(1) enables the court to consider these and any other relevant matters. However, new section 16A(2A) provides that a court must not take into account any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or rendering less serious the criminal behaviour to which the offence relates.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. 16

Senator Ludwig asked the following question:

In his Second Reading Speech, the Parliamentary Secretary to the Minister for Defence states that the Bill forms one element of the Federal Government's approach to addressing the high levels of family violence and child abuse in Indigenous communities. One of the other initiatives is the creation of a National Indigenous Violence and Child Abuse Intelligence Task Force to facilitate the sharing of information and intelligence on crimes of violence and child abuse.

a. Can you provide the committee with further information on how this Task Force will operate?
b. Can you provide the committee with further information on the other initiatives being developed in this area?

The answer to the honourable senator's question is as follows:

a. The National Indigenous Violence and Child Abuse Intelligence Task Force was established on 13 July 2006 within the Australian Crime Commission. The initiative is resourced by the Commonwealth, and the States and Territories, and will see involvement from the Australian Federal Police, State and Territory police forces and other agencies.

   The objectives of the National Indigenous Violence and Child Abuse Intelligence Task Force include:

   - Improving the national coordination of the collection and sharing of information and intelligence on violence and child abuse in remote and urban Indigenous communities.

   - Enhancing the national understanding of the nature and extent of violence and child abuse in remote and urban Indigenous communities.

   - Providing intelligence and other advice to relevant Commonwealth, State and Territory organisations on violence and child abuse in remote and urban Indigenous communities, including organised criminal involvement in drugs, alcohol, pornography and fraud.

   - Conducting research into the impact of improved intelligence and information coordination and into the identification of good practice in the prevention, detection and responses to violence and child abuse in Indigenous communities.

b. Other complementary initiatives being developed to address high levels of family violence and child abuse in Indigenous communities include community legal education and judicial education. See the answer to question number Q2.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

(Question No. Q1)

Senator Payne asked the following question at the hearing on 29 September 2006:

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

The answer to the honourable senator's question is as follows:

The Crimes Amendment (Bail and Sentencing) Bill 2006 makes amendments to the sentencing and bail provisions in the Commonwealth *Crimes Act 1914.* The Commonwealth DPP is making inquiries with their regional offices as to the number of cases (if any) where cultural background has been considered in federal sentencing proceedings.

The amendments do not modify or make any changes to Commonwealth offences. Customary law does not constitute a defence to criminal prosecution in any jurisdiction in Australia.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Question No. Q2

Senator Payne asked the following question at the hearing on 29 September 2006:

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

The answer to the honourable senator's question is as follows:

Other non-legislative initiatives being developed to address high levels of family violence and child abuse in Indigenous communities include community legal education and judicial education.

Community legal education will be provided to ensure Indigenous Australians understand their legal and human rights and responsibilities, including that customary law and cultural practices cannot override legal and human rights. This initiative is intended to inform Indigenous Australians about how to access a range of services and help individuals to build effective relationships with law enforcement and support agencies. Indigenous Australians will be encouraged and supported to speak out against violence and abuse, including to report and give evidence where appropriate, through structured mentoring of elders and community leaders, and engagement with women and youth.

Judicial education will be provided through an initiative to fund the National Judicial College of Australia to deliver Indigenous cultural awareness training to assist judges and magistrates to better understand Indigenous issues surrounding criminal sentencing, customary law and cultural practices, and appropriate administration of bail regimes.

The Australian Government is seeking State and Territory funding and in kind support for these initiatives through bilateral negotiations.

For further information see pages 33 and 35 of the proof Hansard of the Committee's hearing on 29 September 2006.