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

**Clarification of Question No. 1**

**The Committee asked the following:**

Part (b) asked the department to "provide the detailed account or circumstance or where there is said to be a policy failure in need of a remedy." The department's response mentioned that the "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," but it failed to detail any circumstances where this has occurred, in particular the details of the situations where the consideration of customary law or cultural practice ***has led*** to inappropriately lenient sentences.

In accordance with the original question, could the department please provide details of the 'situations' referred to in its response.

**The answer to the question is as follows:**

Examples of situations that the Bill is intended to address include cases where judges or magistrates are presented with arguments in mitigation relying on customary law or cultural practices, which are based on:

- a misunderstanding of the customary law, including an incomplete presentation of what customary law entails (for example, Indigenous leaders in the recent Western Australia Law Reform Commission's *Aboriginal Customary Laws Discussion Paper* note that because customary law arguments are put forward by male defendants in sexual crimes, the version of customary law is limited to those aspects that suit those male defendants)
- lack of understanding of the impact of the crime on the victim, both in terms of physical and emotional impact as well as in terms of the negative consequences of a finding (express or implied) that what happened to them was acceptable to the community (and hence a real sense of isolation rather than victim support)
- a lack of testing that what defendants claim to be customary law is, in fact, accepted as the case, and
- a lack of recognition that even if a practice can be shown to be a part of the background and cultural environment of the defendant (particularly in communities where violence and abuse are prevalent), that such a background does not justify the practice where it is in conflict with the rights of the victim.

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**Clarification of Question No. 2**

**The Committee asked the following:**

This question asked the department whether each of the State and Territories were "consulted in respect of the actual detail of the proposed bill" and if so to provide details of the consultation and the response from the state or territory, as well as a summary of the responses. The department's answer simply mentions the outcomes of the recent intergovernmental Summit and COAG meetings, which themselves were commitments to further action not a response to consultation on the 'actual' bill before the committee.

Could the department re-examine the question, this time providing details of consultation with each of the State and Territories "in respect of the actual detail of the proposed bill", that is consultations on the *Crimes Amendment (Bail and Sentencing) Bill 2006*.

**The answer to the question is as follows:**

States and Territories were not consulted on the detail of the proposed bill, because the bill follows the commitment made by the Commonwealth and all States and Territories at the intergovernmental Summit on Violence and Child Abuse in Indigenous Communities on 26 June 2006 and the COAG meeting on 14 July 2006. This commitment is set out in the COAG communiqué of 14 July which states 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.'

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**Clarification of Question No. 3**

**The Committee asked the following question:**

This question asked whether there has been any request of the States or Territories to "pass similar complimentary legislation as proposed in this bill." The department's response simply referred to its answer to question 2, which again only mentions the outcomes of COAG and the Summit, not whether the States or Territories have actually been asked to pass similar legislation along with the responses that were received, or whether the government intends to make such a request.

Could the department provide an answer to the actual question.

**The answer to the question is as follows:**

An answer to this question was provided by Mr Boersig in his evidence to the Committee [Proof Hansard, 29 September 2006, page 36] and in the Department's previous answer to this question which refers to the Department's answer to question 2. The Department's original answer to question 2 gave details of bilateral negotiations that have so far been conducted, and advised that all jurisdictions are being encouraged to follow the Australian Government's lead by passing legislation on this issue.

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**Clarification of Question No. 5**

**The Committee asked the following:**

This question asked the department to provide the number of identified Indigenous persons who are being held on bail, awaiting sentencing or serving their sentence and are subject to Federal responsibility. In its response the department stated that 'in discharging this function, whether or not the offender is an Indigenous person is not a relevant factor.'

Given, as the department states in its response to question 15 part (b)(iv), "the Australian Government is concerned about the relatively high level of violence and abuse in Indigenous communities" and that "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" whether or not the offender is an Indigenous person is therefore of considerable 'relevance' to this inquiry.

If it is that by 'relevant factor' the department means that it does not record requested information, then it should either attempt to obtain it or given that the question asks for the number of '*identified* Indigenous persons' answer accordingly (i.e. zero).

The question also asked the department to detail 'for each instance' the 'type of offence' that the person was charged/sentenced with. The department's response grouped offences under Acts, which saw offences such as damage to Commonwealth property and child sex tourism lumped together in the Bill. Such offences are hardly of the same 'type' particularly given the Bill's purpose.

Is it possible for the department to properly identify the types of offences, with particular attention given to identifying offences that relate to the purpose of the Bill (i.e. those that deal with violence and abuse)?

**The answer to the question is as follows:**

The statistical information maintained by the Department, does not distinguish prisoners on grounds of race. The Department does not request that information as it is not relevant to the Department's role in the administration of sentencing. States and Territory correctional authorities may hold that information. It could be requested but not obtained in the timeframe for response. The information that was provided to the Committee was in the format that the Department maintains its statistics. Below is a breakdown of the Crimes Act table that was previously provided.

*Crimes Act*

| | |
|---|---|
| Crimes/50BA (possession of child pornography) | 1 |
| Crimes/50BC (commit act of indecency on persons under 16 yrs outside Australia) | 1 |
| Crimes/Tax | 11 |
| Crimes (Internationally Protected Persons) Act | 1 |
| Crimes/Passports | 1 |
| Crimes/Australia Post | 1 |
| Crimes (Currency) Act | 3 |
| Breach of recognizance release order | 3 |
| Crimes/Proceeds of Crime | 3 |
| Crimes/Financial Transactions Records Act | 1 |
| Crimes/social security | 42 |
| Crimes/false statement in statutory declaration | 1 |
| Crimes/defrauding Cth Department | 1 |
| Crimes/false statement in legal proceedings | 1 |
| Crimes/destroy Cth property | 2 |
| Crimes/vexatious call to 000 | 1 |
| **TOTAL** | **74** |

The Commonwealth Director of Public Prosecutions has provided the following information.

(i)-(ii)

The DPP is not aware in each case whether or not a person is of Aboriginal descent. Accordingly, their records in this area are of necessity incomplete. As at 5 October 2006, DPP records indicate that seven persons recorded as being of Aboriginal descent have been granted bail. A further person being prosecuted is in custody.

(b)

Of the seven persons recorded as being on bail, the type of offence involved relates to improperly obtaining Commonwealth payments or benefits. The person in custody has been charged with an offence relating to using a carriage service for child pornography material.

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**Clarification of Question No. 6**

**The Committee originally asked the following:**
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?

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 question is as follows:**

The Commonwealth Director of Public Prosecutions has provided the following information.

(i)-(ii)

As at 5 October 2006 DPP records indicate that no illegal foreign fishers have been granted bail. Eight persons being prosecuted are in custody.

These persons have been charged with fisheries offences and offences relating to threatening to cause harm to or obstructing Commonwealth public officials.

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**Clarification of Question No. 13**

**The Committee asked the following:**

Part (b) of the question asked the department to provide some 'examples' where the matters contained section 15AB(2) might be taken into consideration. The department's response simply repeated the provisions as they exist in the Bill, and made no attempt to describe examples/scenarios of where a bail authority might take the matters into consideration.

Could the department provide some examples (either historic or hypothetical) that demonstrate the circumstances it has in mind and where these amendments would create an improved outcome?

Part (c) of the question asked whether any 'additional weight is likely to be given if an offender' comes from a remote community themselves. The department's response stated that the amendment will ensure 'appropriate weight' is given to the special circumstances of victims and witnesses, it failed to address the impact that the offender's own place of residency would have as was asked by the question itself.

Could the department provide a response which addresses the question and gives the committee an understanding of what the 'appropriate weight' given might look like?

**The answer to the question is as follows:**

The Department's response to these questions outlined how the legislation will work. It is a matter for a bail authority to apply the legislation in particular circumstances and therefore it is not appropriate for the Department to speculate on how a bail authority would determine a matter.

In particular, whether a bail authority would give additional weight if an offender comes from a remote community will depend on the facts of a case.

Factors the bail authority could take into account include the relationship between the offender and the victim, the location of parties or the type of protection and law enforcement services available to the victims.

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**Clarification of Question No. 14**

**The Committee asked the following:**

The question asked for definitions of 'cultural practice' and 'cultural background'. Given the department's response stated that it has not, and presumably does not intend to, define either term in the Crimes Act, could it provide what it believes to be the 'ordinary meanings' of each phrase and an explanation of how the two would differ?

**The answer to the question is as follows:**

When terms are not defined in legislation, the general proposition is that they have their ordinary meaning. These phrases are not capable of a precise definition but relate to patterns, beliefs, activities, influence, and cultural factors. There is clearly some overlap between cultural background and cultural practice.

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**Clarification of Question No. 15(a)**

**The Committee asked the following:**

Part (a) asked whether the department believed "'cultural background' should be considered by the court during sentencing, if the matter was relevant". The department's response to this part of the question simply said that "the amendments will not prevent a sentencing judge from considering all circumstances of a case when determining sentencing; including an offender's cultural background." If it helps clarify the purpose of this question what is being sought is a greater understanding of the purpose or intent of the amendments, so that it can ascertained how well this legislation achieves those goals.

**The answer to the questions is as follows:**

The Australian Government believes that there is a role for the consideration of cultural background by a court during sentencing, provided that customary law or cultural practice does not excuse, justify, authorise, require or lessen the seriousness of criminal behaviour.

The bill retains such a role for cultural background. The following examples have been provided:

- by Mr Boersig in his evidence to the Committee [Proof Hansard, 29 September 2006, page 40]: 'If, on the other hand, they were a defendant who was to go back out into the community and be speared because that was what might happen to them, that factor—that is, that they would be speared—could be taken into account by the court.'

- in the Department's previous response to this question:
  - 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 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 fact that the court could still consider in relation to sentencing and bail hearings.

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**Clarification of Question No. 15(b) and (c)**

**The Committee asked the following:**

Part (b)(i) asked the department to "explain how the requirement to consider 'cultural background' where relevant was inappropriate." The department's response simply reiterated that the "Government has decided that it is inappropriate that 'cultural background' should be used to excuse such violence and abuse." Not only did the department fail to provide an explanation for the position, as was clearly asked in the question, the department's answer was actually completely irrelevant since the question was about the inappropriateness of considering 'cultural background' in sentencing where relevant not as an excuse for violence and abuse.

Part (b)(iv) asked the department to explain why the reference to 'cultural background' needed to be removed to ensure the equal application of law, but references to character, antecedents, age, means and physical or mental condition could all be retained. The department's response failed to even mention any of those other references, let alone explain whether the removal of 'cultural background' meant the principle of 'equality before the law' was being consistently applied.

Part (c) asked whether the department believed that subsection 16A(1) was a catch-all statement that made section 16A(2) unnecessary. The department's response didn't specifically respond to the question.

Part (c)(i) asked whether if the department thought 16A(2) was unnecessary, why it didn't remove the entire section. It is not clear whether the department has answered this question, because partly because of the response to part (c) but also because of the department's failure to enumerate its responses in manner consistent with the question.

Part (c)(ii) asked how 16A(2) compliments 16A(1) where the department viewed both sections as necessary. It appears that the department probably has answered this part of the question, however its failure to properly enumerate its responses makes this unclear.

Part (c)(iii) asked the department whether it agreed that 16A(2) could be used as a checklist for sentencing judges and whether excluding cultural background might signal to judges that they shouldn't take it into account. Whether or not the department agrees remains unclear.

Could the department resubmit its response to question 15, this time ensuring that it enumerates its response in accordance with the original question and also provides a direct answer to each part of the question?

**The answer to the question is as follows:**

(b)(i)

The Department's response to Question 15(b)(i) stated that the Australian Government has decided that it is inappropriate that 'cultural background' should be used to excuse violent and abusive behaviour. This is the Government's policy position. A sentencing court can consider cultural background where it is relevant to determine the appropriate penalty having regard to the personal circumstances of the defendant. Subsection 16A(2A) ensures that the court cannot take customary law and cultural practice into account to render less serious the criminal behaviour.

(b)(iv)

The Department's response to Question 15(b)(iv) stated that the Australian Government has introduced this Bill to ensure that cultural background is not used to excuse violent and abusive behaviour. Cultural background can still be considered if it does not excuse, justify, authorise, require or lessen the seriousness of the criminal behaviour. Character, antecedents, age, means and physical or mental condition of a person are not matters which can be used to lessen the seriousness of the criminal conduct but which should be considered in determining the impact of a possible sentence on the individual.

(c)

The catch-all phrase in section 16A(1) does not make subsection 16A(2) unnecessary.

(c)(i)

Not applicable.

(c)(ii)

The Department's response to Question 15(c) stated that subsection 16A(2) sets out a non-exhaustive list of 13 factors that the Court must take into account in sentencing the offender, to the extent that such factors are relevant and known to the Court. Subsection 16A(1) requires a court to impose a sentence that is of a severity appropriate in all the circumstances of the offence. Subsection 16A(2) provides a checklist of matters that will help achieve a greater consistency in sentencing Commonwealth offenders, but does not limit the matters a sentencing judge is entitled to take into account.

(c)(iii)

The purpose of subsection 16A(2) is to provide a checklist of matters to help achieve a greater consistency in sentencing Commonwealth offenders. It does not limit the matters a sentencing judge may take into account. Exclusion of an item from subsection 16A(2) does not prevent the sentencing judge from taking it into account, subject to the application of subsection 16A(2A).

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**Clarification of Question No. Q1**

**The Committee asked the following:**

Senator Payne's question asked 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 department's response indicated that the Commonwealth DPP is making inquiries with their regional offices.

Given the committee must report to the Senate on 16 October 2006 could the department indicate when it thinks those responses may be available.

In the meantime, could the department also provide details of such cases that were known by the department when this legislation was being drafted?

**The answer to the question is as follows:**

The Commonwealth Director of Public Prosecutions has provided the following information.

In the prosecution for offences against section 211C of the *Environment Protection and Biodiversity Conservation Act 1999* on the Cocos (Keeling) Islands, Cocos Malay hunting traditions were unsuccessfully raised in defending charges of taking birds, namely listed migratory species.

It was submitted on behalf of the Defendant that this consideration should be taken into account as a mitigating factor on sentence and that a conviction should not be recorded. The magistrate did take this consideration into account, however proceeded to recorded a conviction, releasing the person on a recognizance to be of good behaviour for 2 years and in addition ordering the person to pay the costs of the prosecution, namely $2,173.93.