

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

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Question No. 298

Senator Stott Despoja asked the following question at the hearing on 31 October 2005:

The HREOC President John Von Doussa QC commented that under the draft Bill, “there is no realistic opportunity to challenge a detention order against an individual or a control order against the person’s family” and they are “not told why they’re subject to it, nor is there any way in which they can go about challenging the facts upon which that order is made.” HREOC has suggested that a “special court should be established to review enforcement provisions in the draft Bill.” Mr Von Doussa has said that “Australian laws would enable the proposed special court to keep sensitive information suppressed while allowing a person subject to a detention order to learn the charge against them”. Are you aware of any such considerations by the Government in relation to the establishment of such a court, and in your opinion would such a court be appropriate? If not, what impediments are there to the establishment of such a court?

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

The Government is not considering establishing such a court. The Anti-Terrorism Act (no. 2) 2005 provides that the person and their lawyer may obtain a copy of the order and a summary of the grounds on which the order is made (section 105.32 for preventative detention and section 104.12 for control orders). The summary of grounds is designed to ensure the person is provided with a reason for the order.

An issuing authority in making a continued preventative detention order would have before it the full reasons for the initial preventative detention order. Issuing authorities can be a judge of a State or Territory Supreme Court, a Federal Magistrate, a Judge (Federal or Family Court), a former judge, or a President or Deputy President of the Administrative Appeals Tribunal. Under the Commonwealth regime, there are a number of review mechanisms.

Preventative Detention

- The person who was detained can apply to the Security Appeals Division of the Administrative Appeals Tribunal for review of a decision to make or extend or further extend a preventative detention order.
- There is also a built in merits review process when the police seek a continued preventative detention order which means the issuing authority will consider the order afresh when considering whether to issue a continued preventative order. At that time the person detained or their legal representative can provide the police with additional information concerning the preventative detention order.

- The person may seek review of their detention through the original jurisdiction of the Federal Court and the High Court.
- Once released from Commonwealth detention, the Act provides the State Courts with jurisdiction to review the Commonwealth detention. This provision is important as it allows the State Courts in reviewing detention under a State regime, to review any associated Commonwealth detention and provide the same remedies as are available with respect to the detention of a person under a State regime.

Control Orders

- The person the subject of an interim control order may attend a Federal Court, Federal Magistrates Court or Family Court (the Court) and make representations when the Court decides to confirm, vary or revoke the order.
- The control order does not come into effect until the person, the subject of the order, is notified. The person can apply for the order to be varied, revoked or declared void as soon as the person is notified that an order is confirmed.
- The same court that issued the control order can, on application by the person subject to the control order, revoke it. Normal judicial review processes apply to decisions to issue or revoke control orders.
- The Court in making an order must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. Further, in determining whether to impose each of the obligations, prohibitions and restrictions on the person, the Court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).