

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

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Question No. 67

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

- (a) Has the Attorney taken advice on the constitutionality of procuring the States and Territories to do what the Commonwealth could not otherwise do (ie to detain a person in preventative detention for 14 days)?
- (b) If yes, what was the advice?

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

- (a) Yes. The Chief General Counsel was involved in the development of the proposals and regularly provided advice on all relevant aspects of the package.
- (b) It is not appropriate to discuss the legal advice to government in relation to this legislation. It is the established practice accepted by this Government and previous governments not to disclose legal advice which has been provided to the Government unless the Government decides in a particular case to do so.

This usually extends to questions whether advice has been sought or obtained. In this case, the Prime Minister released details of the Government's proposals to strengthen Australia's counter-terrorism laws on 8 September 2005. At that time, the Prime Minister said "States and Territories will be asked to provide for longer detention periods, similar to those available in the UK which allow for up to 14 days detention, because there are constitutional restrictions on the capacity of the Australian Government to provide this detention". This was mentioned again in the COAG statement of 27 September.

On 9 September, State, Territory and Australian Government officials met to discuss the matters identified by the Prime Minister. At that meeting the Australian Government officials provided an outline of the constitutional issues identified by the Chief General Counsel.

A copy of the Chief General Counsel's advice dated 23 September which was provided to State and Territory officials in the lead up to COAG has been quoted in the media but was not released by the Australian Government.

In an interview on 26 October the Prime Minister was asked about the release of advice. He mentioned the usual practice of not releasing internal advice, but confirmed he had received advice and "there was nothing in the advice I got at the time that caused me any concern". This remains the position of the Government.