Inquiry into the provisions of the Anti-Terrorism Bill (No.2) 2005.

REPONSES TO QUESTION PLACED ON NOTICE BY SENATORS MONDAY, 14 NOVEMBER.

Compliance of the Bill with Human Rights Obligations

Question No.	Who asked	To whom asked	Hansard Page (14 Nov 2005)	Question
1	Senator STOTT DESPOJA	Mr McDonald	12	Senator STOTT DESPOJA—Can you give the committee a specific rundown on what measures have been taken by the Attorney-General's Department to measure this legislation against our international obligations, particularly in relation to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child? Mr McDonald— In terms of providing some more specific detail, short of it being comprehensive advice, which we do not do, we could give you a document—
7	Senator Crossin	AGD	***This question and all following were placed on notice***	Do you have a view on whether the Bill is compatible with Australia's legally binding obligations under international law, specifically with Australia's legally binding obligations under the UN International Covenant on Civil and Political Rights? If it is, on what basis is that view made?
32 (from Friday)	Senator Brown	AGD	*14 November 2005, Proof Transcript p 12.* Mr McDonald offered to provide a summary document to the committee on the effect of the Office of International Law's analysis of the extent to which the Bill complies with Australia's international human rights obligations. Please provide that document.	

Response to the above three questions follows:

General

The Government's view is that the legislation, including the measures relating to preventative detention, control orders and sedition, are consistent with Australia's obligations under international law, including international human rights law. The Government is satisfied that not only are the measures consistent with those obligations, the legislation contains sufficient safeguards to ensure that its implementation in individual cases will also be consistent.

The International Covenant on Civil and Political Rights (ICCPR) expressly allows governments to limit the exercise of rights such as freedom of movement and freedom of expression where it is necessary to do so to protect national security and public order. The Government is satisfied, based on the advice of law enforcement and security agencies, that the strengthening of our counter-terrorism laws is necessary to protect national security. In answer to Senator Brown, references to "national security" by Mr McDonald is in the same sense as it is used in the Convention. The safeguards in the legislation are designed to ensure that in individual cases freedoms such as freedom of movement and freedom of expression will only be restricted where it is necessary to do so to protect national security and public order. Similarly, other

human rights are couched in terms of 'arbitrary' action, for example the prohibition on arbitrary detention. The test to ensure that detention is not arbitrary is whether it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. In this case, the legitimate aim of the legislation is to protect the public from a terrorist attack or take action in response to a terrorist attack. The legislation provides that each instance of, for example, preventative detention, will be subject to careful consideration by the issuing authority to ensure that it is necessary to achieve the purpose of protecting the public and is therefore not arbitrary.

Preventative Detention

Arbitrary detention

Preventative detention orders will only be made to prevent an imminent terrorist attack, or to preserve evidence of a recent attack.

An initial order will be able to be made by a senior member of the AFP. A continuing order will only be able to be made by a judge, a Federal Magistrate, a former judicial officer or Deputy President of the Administrative Appeals Tribunal (who is a legal practitioner). The President of the AAT, who will also be able to issue a continuing order, must be a Judge of the Federal Court. In both cases the person making the order must be satisfied that there are reasonable grounds to suspect that making the order would substantially assist in preventing an imminent terrorist act from occurring or preserve evidence of a recent terrorist attack. Initial orders may be made for a maximum period of 24 hours, including any extensions. They may be continued for up to a further 24 hours, but the total period of detention must be no more than 48 hours after the person is first taken into custody. As stated above, the test to ensure that detention is not arbitrary is whether it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. The Government is satisfied that the preventative detention regime meets this test and so is not arbitrary or otherwise contrary to international law

Incommunicado detention

Preventative detention is not incommunicado detention. Incommunicado detention involves complete isolation from the outside world such that not even the closest relatives know where the person is located. This is not provided for in the legislation.

There is provision for some contact with family members and others while detained. The ICCPR prohibits arbitrary interference in a person's family life. The Government is satisfied that the restrictions which are placed on communication with family members are not arbitrary, as they are necessary and proportionate to the purpose of the preventative detention. A detainee over 16 but under 18 can also have contact of two hours at a time with both of his or her parents or guardians (section 105.39) unless one of those people are subject to a prohibited contact order.

The right to freedom of expression under Article 19(2) of the ICCPR may be subject to restrictions provided by law, and that are necessary for the protection of national security and public order. The Government is satisfied that restrictions on

communication imposed by the measures are necessary for the protection of national security.

Ex parte nature of preventive detention orders

While the person against whom a preventative detention order is made will not be present when the order is made, he or she will have the right to seek a remedy in relation to the order in court as soon as he or she is informed of it. The Federal Court and the Federal Magistrates Court have the discretion under their Rules to hear such an application as a matter of urgency. The nature of preventative detention orders and the framework of the legislation demonstrate that it is only on the basis of protecting national security and out of necessity that preventative detention orders will be made. Indeed the issuing authority will need to be satisfied that making the order will substantially assist in preventing an imminent terrorist act occurring or to preserve evidence of a recent terrorist attack. A summary of the grounds for the detention will be provided to the detainee.

Conduct of criminal proceedings

The detailed minimum guarantees in article 14 of the ICCPR only apply to criminal charges and protect the rights of persons 'charged with a criminal offence'. Preventative detention orders do not involve criminal charges or punishment. The Government remains committed to fundamental principles such as the presumption of innocence in a criminal trial. The legislation does not impinge on these protections.

Equality of arms

Challenges to the legality of a preventative detention order will be heard by a court. The Bill contains no restriction on the conduct of these proceedings (except in so far as national security may be at risk). The person detained will have a summary of the grounds why he or she was detained and will be able to challenge the detention on that basis.

Access to a Lawyer

A person detained may have a discussion with a lawyer about bringing a complaint to the Ombudsman, a complaint in relation to the conduct of a police officer under relevant legislation, proceedings in a Federal Court to challenge the lawfulness of the preventative detention, or a challenge to the decision to make a preventative detention order in the AAT (section 105.51). The Government believes that restricting the lawyer from letting anyone else know that the person is detained is justified on the basis of the purpose for which the person is preventatively detained, that is, to prevent a terrorist attack or preserve evidence of a terrorist attack. The right to contact a lawyer in relation to other matters will only be restricted in relation to preventative detention, that is, up to a maximum of 48 hours.

Judicial review

The Government is satisfied the legislation is consistent with Australia's obligations under article 9(4) of the ICCPR which provides that "Anyone who is deprived of his

liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." A person who has been detained under a preventative detention order will have the right to contact his or her lawyer, who may bring an action for the purpose of challenging the lawfulness of the detention in the High Court, Federal Court or Administrative Appeals Tribunal (section 105.51). A person who is detained under a preventative detention order must be given a summary of the grounds under which he or she was detained as soon as possible after he or she is detained (section 105.32), and will be able to challenge the lawfulness of the detention on this basis.

Segregation of people preventatively detained from convicted criminals

The AFP may make arrangements with States and Territories to detain persons in State and Territory prisons or remand centres for the duration of their preventative detention (section 105.27). Persons detained under preventative detention orders will be separated from convicted persons to the greatest extent practicable. This is consistent with the existing position regarding separation of accused persons from convicted persons. The ICCPR obliges States parties to segregate accused persons from convicted persons except in exceptional circumstances. Australia has a reservation to the effect that this principle is accepted as an objective to be achieved progressively. The legislation provides that persons detained under a preventative detention order must be treated with humanity and respect for human dignity and must not be subject to cruel, inhuman or degrading treatment (section 105.33).

Convention on the Rights of the Child

A preventative detention order will only be able to be made against a person aged between 16 and 18, where the issuing authority is satisfied the order will substantially assist in preventing an imminent terrorist act occurring or to preserve evidence of a recent terrorist attack. Article 37(b) of the Convention on the Rights of the Child provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily and that the detention of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. The test to ensure that detention is not arbitrary is whether it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. The Government is satisfied that the preventative detention regime in the legislation meets Australia's obligations under the Convention on the Rights of the Child, in that the detention will not be arbitrary, will only be available in relation to an imminent or recent terrorist attack and will be for the shortest appropriate time.

Control orders

An interim control order will be able to be requested by a senior member of the AFP, having obtained the Attorney-General's consent.
The request can be made where there are reasonable grounds to believe that the making of an order would substantially assist in preventing the commission of a terrorist act or the relevant person has received training from, or provided training to, a terrorist organisation. The Court will be able to make the order, for a period of not more than 12 months, if it is satisfied of this fact on the balance of probabilities. A

control order will not be able to be made in respect of a person under 16 years old, and will only be able to be made for a maximum period of 3 months for persons aged between 16 and 18 years. The subject of the order will be able to communicate with a lawyer, who may obtain a copy of the order and a summary of the grounds on which the order was made. Urgent control orders will be possible, provided that the Attorney-General's consent is obtained within 4 hours of the order being made, and provided that all the other requirements can be met within 24 hours. The subject of the order will be able to apply to the Court to have the order revoked, at any time after the order is served on the person.

The Government has assessed that the threat posed to Australia's security is such that the measures in the Bill are necessary and justifiable, and not inconsistent with Australia's international human rights obligations, which provide for restrictions on certain rights (such as freedom of expression and freedom of movement) to protect national security. Also, the Government is satisfied the safeguards in the legislation will ensure the implementation of the control order regime in specific cases will be consistent with Australia's international human rights obligations.

Ex parte nature of control orders

While the person against whom a control order is made will not be present when an interim control order is made, they will have a right to be heard in open court before the control order is confirmed. The interim control order will specify a date on which the person subject to the order is to attend court and that person and his or her legal representative may attend court on that day to make submissions as to why there are no grounds to make the order. The making of a control order does not equate to the determination of a criminal charge or of the rights and obligations in a suit at law of the person subject to the order. A person who is subject to a control order will also have the right to seek revocation of the control order in court any time after he or she is informed of the confirmed control order. The Federal Court and the Federal Magistrates Court have the discretion under their Rules to hear such an application as a matter of urgency. The Government is satisfied that this process is consistent with Australia's obligations under international human rights law.

Conduct of criminal proceedings

The detailed minimum guarantees in article 14 of the ICCPR only apply to criminal charges and protect the rights of persons 'charged with a criminal offence'. Control orders are not criminal charges. The Government remains committed to fundamental principles such as the presumption of innocence in a criminal trial. The legislation does not impinge on these protections.

Equality of arms

Challenges to the legality of a control order will be heard by a court both before the control order is confirmed and later when it may be in force. The Bill contains no restriction on the conduct of these proceedings, (except in so far as national security may be at risk).

Judicial review

A person who is the subject of a control order will be able to apply to a Court to have the order revoked, at any time after the order is served on the person. The subject of the order will be able to communicate with a lawyer, who may obtain a copy of the order and a summary of the grounds on which the order was made. The Government is satisfied that this process is consistent with Australia's obligations under international human rights law.

Sedition

The right to freedom of expression under Article 19(2) of the ICCPR may be subject to restrictions provided by law, and that are necessary for the protection of national security and public order. The Government is satisfied that restrictions on communication imposed by the measures are necessary for the protection of national security. The Government is also satisfied that the defence of "good faith" will adequately ensure that people who make comments without seeking to incite violence or hatred will not be deprived of the freedom of speech. Indeed, subsection 80.2(5) is in part implementation of Article 20 of the ICCPR which requires State parties to prohibit advocacy that incites violence, discrimination or hostility.

Advocacy – Schedule 1

21	Senator Crossin	AGD		Some commentators have suggested that the definition of 'advocate' in Schedule 1 of the Bill is too broad and vague. What is your response?

The proposed amendment to the criteria for listing terrorist organisations relates to organisations that **advocate** terrorist acts. A 'terrorist act' is defined in the same subsections as an action or threat of action, such as causing death or serious harm, that is done with the intention of advocating a political, religious or ideological cause, and done with the intention of coercing government or a section of the public. The advocacy would need to be about such an act, not generalised support of a cause.

"Advocates" is defined in item 9 of Schedule 1 of the Bill to include only those organisations that directly or indirectly counsel or urge the doing of a terrorist act, directly or indirectly provide instruction on the doing of a terrorist act, or directly praise the doing of a terrorist act. The definition is not restricted in terms of the manner in which the advocacy occurs. It covers all types of communications, commentary and conduct

An organisation can currently be listed as a terrorist organisation under the Criminal Code if 'the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act'. This recognises that such communications and conduct are inherently dangerous because it could inspire a person to cause harm to the community. An example of conduct of this type might be where the organisation has arranged for the distribution of a book that tells young people that it is their duty to travel overseas and kill Australian soldiers stationed in another country. Another might be where the organisation puts a message on a web site following a terrorist act stating that it was a brave act that should be repeated.

The definition has been drafted carefully to ensure that organisations whose conduct and communications create a terrorist risk to the community are captured, but statements, for example in generalised support of a cause are not. The Australian Government considers the definition achieves the right balance, and is not too broad.

It should be borne in mind that the definition of 'advocates' (and the offences that rely on that definition) only relates to the process for listing a terrorist organisation in regulations, a process that contains significant safeguards and limitations, including requiring consultation with the States and with the leader of the Opposition. In contrast with the other types of terrorist organisations under the Criminal Code, it is not possible to prove an offence of, for example, association with a terrorist organisation that advocates terrorism, unless that organisation has been listed in regulations. This is regarded as a significant additional safeguard relating to the advocacy definition.

On 18 November, Senator Brandis suggested some alternative wording which may make the "praise" aspect of the definition tighter. The alternative is feasible if the Committee favours confining the definition.

Control Orders – Schedule 4 – Division 104

2	Senator TROOD	Mr McDonald	14	Mr McDonald—The movement from the interim control order to the confirming control order was probably the main issue of discussion with the states. Certainly, the way we had it originally whereby you had a control order, then you were served that without notice and then it was up to you to make an application to have it revoked was something that put the initiative on the respondent. My view on this is that, now we have gone to a situation where you have an interim order and then a confirming order, it is very much on the applicant. This was a problem that was discussed with the states. They said, 'We'd much prefer this to be set up in the way that we have with the domestic or apprehended violence orders.' So I suspect that the comments are more on the old draft than the new, but I will double-check that. Senator TROOD—I think it would be helpful

Senator Trood asked whether the onus of proof in relation to control orders moves to the person controlled, and whether or not the presumption of innocence remains the responsibility of the Crown.

The short answer is that the Crown has to prove the case for a control order.

The request for the interim control order is initiated by the AFP before a federal court (an issuing court) (see sections 104.3 and 104.4 and item 11 of Schedule 4). The rules of evidence in federal courts are provided for by the *Evidence Act 1995* (see section 4 of that Act).

"Civil proceeding" is defined in section 3 of Part 1 of the Dictionary to the Evidence Act to mean "a proceeding other than a criminal proceeding". "Criminal proceeding" is defined to mean "a prosecution for an offence and includes:

(a) a proceeding for the committal of a person for trial or sentence for an offence; and
(b) a proceeding relating to bail".

It is clear from these definitions that a confirmation hearing for a control order is not a criminal proceeding.

Section 140 of the Evidence Act provides that in a civil proceeding the court must find the case of a party proved if it is satisfied the case has been proved on the balance of probabilities. In deciding whether it is so satisfied, the court must take into account the nature of the proceeding, the nature of the subject matter and the gravity of the matters alleged.

At that confirmation hearing, the AFP and the person are entitled to adduce evidence. If the person does not attend the hearing, provided the court is satisfied that the person was served with the interim order, the issuing court can confirm the interim control order (subsection 104.14(4). If the person or their representative attends the confirmation hearing, the court has discretion to void (subsection 104.14(6), revoke (paragraph 104.14(7)(a)), confirm and vary (paragraph 104.14(7)(b)), or confirm without variation (paragraph 104.14(7)(c)). The court controls proceedings in relation to the confirmation of an interim control order (subsection 104.14(3)). The issuing

court is required to consider the original request and any evidence adduced at the confirmation hearing (subsection 104.14(3)).

When an issuing court considers whether to confirm the interim control order under section 104.14, the court must find the case for confirming the interim control order proved if it is satisfied the case for confirming that order has been proved on the balance of probabilities, taking into account the matters mentioned above such as the gravity of the matters alleged. If the case for confirming the order is not proved by the AFP on the balance of probabilities, the court will not confirm the interim control order.

17	Senator Crossin	AGD		The Bill introduces interim and confirmed control orders. Why is there no time limit imposed on an interim order? There is already provision of an urgent interim order in emergency situations. Isn't there a case for limiting the time for an interim order, especially if the conditions amount to house arrest?

The process for obtaining a confirmed control order is that an interim control order is made by an issuing court (section 104.4), the interim order made by the court specifies a day on which the person may attend court for a confirmation hearing (paragraph 104.5(1)(e), the interim control order is served on and explained to the person (section 104.12), that service and explanation must occur at least 48 hours before the day specified for the confirmation hearing (paragraph 104.12(1)), and a confirmation hearing is held (section 104.14). The day specified in the order for the confirmation hearing effectively requires service on the person as soon as possible in order to comply with the requirement that service occur at least 48 hours before the day specified for the confirmation hearing as set out in subsection 104.12(1). If the legislation provided a specific period during which the interim control order could be effective, this could result in operational difficulties in serving the person in time and meeting the specified date for the confirmation hearing.

It is expected that the issuing court would set an early date for the confirmation hearing. If that did not occur, the person could apply to the court for an earlier date (section 104.18).

However, following further consultation with the courts area within the Attorney-General's Department, it would also be open to specify in the legislation that the court should set a date 'as soon as practicable'. This would permit flexibility to work within the court's timetables without unduly fettering the discretion of the court to manage its own affairs.

18	Senator Crossin	AGD		The Bill provides for an *inter partes* hearing to confirm, revoke or vary the interim order. Does this mean that person subject to the interim order will have the burden of disproving the information already put to and relied on by the court?

The AFP must meet all the requirements specified in the Bill before an issuing court can make an interim control order. The same is true for confirming a hearing. Once the interim control order has been served on the person (section 104.12), the order begins to operate. At a later date, an issuing court will consider whether to confirm the interim control order (section 104.14). At that confirmation hearing, the AFP and

the person are entitled to adduce evidence. If the person does not attend the hearing, provided the court is satisfied that the person was served with the interim order, the issuing court can confirm the interim control order (subsection 104.14(4). If the person or their representative attends the confirmation hearing, the court has discretion to void (subsection 104.14(6), revoke (paragraph 104.14(7)(a)), confirm and vary (paragraph 104.14(7)(b)), or confirm without variation (paragraph 104.14(7)(c)). The court controls proceedings in relation to the confirmation of an interim control order (subsection 104.14(3)). The issuing court is required to consider the original request and any evidence adduced at the confirmation hearing (subsection 104.14(3)). If the court is not satisfied that the AFP has established all that is required for the making of a control order, the court will not confirm the order.

19	Senator Crossin	AGD		How many people have been / are held under control orders in the UK?

The AFP has advised that UK authorities have informed them that 15 people have been the subject of UK control orders.

5	Senator BRANDIS	Mr McDonald	20	Senator BRANDIS—It is only not the case if these are not applications for final orders. But, if they are not applications for final orders, then under the rules of court—nothing to do with this statute or the Evidence Act—hearsay evidence would be admissible. Would you take that on notice and look at that for me as well? Mr McDonald—I will take that on board.

Subsection 4(1) of the Evidence Act provides that the Act "applies in relation to all proceedings in a federal court … including proceedings that … are interlocutory proceedings or proceedings of a similar kind".

Whether the proceedings are to be characterised as "interlocutory proceedings" is to be determined not by their form, but by reference to the kind of relief sought. For example, in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 3) (1996) 63 FCR 55 at 58; 142 ALR 450*, Lindgren J. noted that while there is no definition of "interlocutory proceeding" in the Evidence Act, the expression appears in the Law Reform Commission's Report No 38 *Evidence* (ALRC 38), which described them as "proceedings that are not final, usually dealing with procedural problems that arise in preparing a case for trial, but including proceedings for injunctions pending the trial of an action". In that case, it was held that a proceeding for a permanent injunction should not be regarded as an interlocutory proceeding for the purposes of the Evidence Act.

Control orders are issued by federal courts: the Federal Court of Australia, the Family Court of Australia, and the Federal Magistrates Courts (see item 11, page 15 of the Bill).

An ex parte application for an interim control order would be regarded as an interlocutory proceeding for the purposes of the Evidence Act. Confirmation hearings would be regarded as "proceedings in a federal court" for the purposes of the Evidence Act. Accordingly, subsection 4(1) of the Evidence Act means the provisions of that Act would apply to both applications for interim control orders and confirmation hearings.

Section 59 of the Evidence Act provides that hearsay is generally not admissible to prove the existence of the fact asserted. However, the Evidence Act also contains a large number of exceptions to the hearsay rule that apply both in civil and criminal proceedings. The application of those exceptions means hearsay could be accepted in an application for an interim control order and a confirmation hearing.

For example, section 75 of the Evidence Act provides that the hearsay rule does not apply to "interlocutory proceedings" if the party adducing it also adduces evidence of its source. Accordingly, provided information about the source of the information is adduced in an application for an interim control order, it is likely that hearsay evidence could be included in the application.

A proceeding for the confirmation of such an order would not be regarded as an interlocutory proceeding. However, there are a number of exceptions to the hearsay rule in Divisions 1 to 3 of Part 3.2 of the Evidence Act that could apply, and could resulting in hearsay being accepted in such a proceeding. The exceptions in Division 1 relate to evidence relevant for a non-hearsay purpose, the exceptions in Division 2 relate to "first hand" hearsay, and the exceptions in Division 3 relate to other matters, including business records and telecommunications.

Preventative Detention – Schedule 4, Division 105

4	Senator BRANDIS	Mr McDonald	20	Senator BRANDIS—Then you might care to consider and come back to us on notice as to why you consider you have to comply with the rules of evidence in relation to applications which are not applications to a court. Mr McDonald—We will do that. I do point out section 105.11(4).

Applications for continued preventative detention orders are made to issuing authorities. Applications must be sworn or affirmed by the AFP member applying (subsection 105.11(4)).

An issuing authority can be a judge or former judge, a Federal Magistrate, or a President or Deputy President of the Administrative Appeals Tribunal (see proposed section 105.2 of the Bill). Under the Bill, the issuing authority exercises the function to make decisions in a personal capacity, and not as a member of the court or tribunal to which the person is or was attached (see proposed section 105.18 of the Bill).

Accordingly, applications for preventative detention orders, including applications for extensions as well as applications for prohibited contact orders, are not proceedings before a court. Therefore, the provisions of the Evidence Act will not apply to the material that is included in an application.

There are other application processes under Commonwealth law that have similar characteristics to applications for preventative detention orders. For example, applications for extensions to detention for questioning under Part IC of the *Crimes Act 1914* (Crimes Act), search warrants under various pieces of Commonwealth legislation (including the Crimes Act) and forensic procedures under Part ID of the Crimes Act all have similar characteristics. The courts have considered the issue of the nature of information that is provided to decision makers in those application processes. Some of the similarities include that:

- applications are made by AFP members,
- applications are made to issuing authorities (including magistrates, justices of the peace, and senior officers within the relevant agency),
- issuing authorities act in a personal capacity when making decisions, and
- the application is required to be supported by information on oath or information that is sworn or affirmed.

Applications for extensions to detention for questioning, search warrants and forensic procedures are not criminal proceedings. Accordingly, the courts have held that the material placed before the issuing authority need not be based on evidence that is in an admissible form. That is, the courts have held that all the material that supports the application can properly be placed before the issuing authority – not just the material that would be admissible under the Evidence Act (see *L v Lyons (2002) 137 ACrimR 93*). That is because to require that only admissible material be placed before the issuing authority would serve no purpose, as the result would be that an application could only be made if the applicant already had evidence to support a conviction.

The courts have also held that the relevant test in determining whether or not to issue the warrant or order sought is whether a reasonable person would place sufficient weight on the information provided to form the suspicion or belief necessary to

ground the search warrant (see *Malayta (1996) ACrimR 492).* It is likely that such an approach will also be accepted by reviewing courts when considering applications for preventative detention orders.

The Bill makes provision for a person who is or has been the subject of a preventative detention order to seek a remedy from the Federal Court in relation to the order or the person's treatment under the order (see proposed section 105.51 of the Bill). The Evidence Act would apply to such proceedings.

8	Senator Crossin	AGD		The criminal law already has offences for conduct such as training with a terrorist organisation and acts preparatory to an act of terrorism. Why aren't these types of existing criminal offences sufficient?

Australia has in place various powers of detention. This includes detention for intelligence and security questioning purposes (up to 7 days) and detention related to questioning someone about an offence, also referred to as arrest. Existing powers for terrorism offences, including powers in relation to the offences for training with a terrorist organisation and acts preparatory to an act of terrorism, permit police to detain a person for up to 24 hours for the purpose of questioning or investigation. However, these powers are limited by the purpose – to ask questions to gather intelligence that may be relevant to a terrorism offence.

The Government is concerned that there could be instances where there is intelligence that a person will be involved in an imminent terrorist attack but the criteria for detention under existing legislation are not satisfied or there is little tat can be asked in the questioning context. The threshold for arrest is much higher in that it requires a reasonable belief that a person has committed an offence. Arrest can only be used to hold a person so long as the person can be legitimately questioned. Once questioning is embarked upon, if police do not believe that they can charge a person for an offence, which will then need to be proved beyond reasonable doubt, the person must be released. This type of situation could occur a few hours before an attack and would not afford the protection afforded by preventative detention.

9	Senator Crossin	AGD		There is no right to silence under ASIO's questioning regime, which provides that information obtained under an ASIO warrant cannot be used in a criminal proceeding. How will the preventative detention order regime fit with the ASIO compulsory questioning regime?

The Bill expressly indicates that the AFP cannot question a person while the person is in detention under a detention order other than to confirm a person's identity and ensure the safety and well-being of the person being detained (section 105.42). The provision also prevents questioning by other police and ASIO. This is necessary to ensure safeguards relating to the manner in which a suspect for an offence is to be questioned by a police officer in other legislation, such as Part IC of the Crimes Act, are not avoided or defeated because the person is the subject of a preventative detention order.

The Bill allows a person who is in preventative detention to be released from preventative detention in order to be questioned under an ASIO questioning warrant. If a person is released so that the person may be questioned or detained under the

ASIO warrant the period for which the preventative detention order remains in force in relation to the person is not extended.

A person may be questioned under the ASIO questioning warrant and then be returned to preventative detention. However if police want to question they will need to arrest and then meet the requirements and safeguards under Part 1C of the Crimes Act. The rationale for this process is twofold. First, the threshold necessary to detain a person for questioning is much higher than under preventative detention and requires an officer to hold a reasonable belief that a person has committed an offence. Second, detention in itself is a factor that can impact on the reliability of answers to questions. Given the purpose of the preventative detention regime is to prevent a terrorist attack and to preserve evidence, and the police and ASIO questioning time was recently modified to extend questioning for terrorism investigations, it follows that the existing procedures for questioning should be used. Those procedures contain safeguards in relation to the questioning of persons, including persons who are under arrest or are protected suspects.

10	Crossin	AGD		The courts would be used to dealing with urgent interim orders on a regular basis – why is it necessary to allow police to issue an initial preventative detention order without judicial authorisation?

Preventative detention applies where there is the prospect of an imminent terrorist attack or where a terrorist attack has already occurred. It is appropriate for the police to be able to detain a person for 24 hours in these emergency type situations. Any prospect of delay by requiring key police personnel to suspend their work to participate in litigation may diminish efforts to prevent an initial attack or further terrorist attacks.

11	Senator Crossin	AGD		I understand that the UK requires judicial authorization for detention orders that go beyond 48 hours. The detainee is also notified and may be represented at the hearing. Why haven't you followed this approach? How will the Australian system operate when the States can extend detention to 14 days?

The Bill does not allow detention to be extended beyond 48 hours. Judicial authorisation occurs after 24 hours in order for the detention to be extended to 48 hours. The States and Territories may extend detention to 14 days. To date only South Australia and New South Wales have introduced legislation. Both the South Australian and New South Wales Bills would allow police to issue an order which must be confirmed by the Supreme Court as soon as practicable. The State Bills make provision to reduce the maximum amount of detention by any period spent in detention under the Commonwealth laws (see subsection 26K(2) of the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 (NSW).

12	Senator Crossin	AGD		The Bill now allows merit review of detention orders by the Security Appeals Division of the AAT – why is access to the Tribunal denied until after the order has expired?

Review after the expiration of the detention order reflects the relatively short period of detention of 48 hours permitted under a Commonwealth detention order. The Government considers that any review process during this time could divert police resources from investigating and preventing terrorist attacks given the preventative

detention order can only be sought there is the prospect of an imminent terrorist attack or where a terrorist attack has already occurred.

13	Senator Crossin	AGD		I understand that the Bill provides that regulations can or will modify the procedures that will apply in review proceedings before the Security Appeals Division. Why is this being done by regulation when it could substantially impact on the rights of the parties?

New subsection 105.51(9) refers to modifications specified in the regulations. This is to ensure minor amendments that are considered necessary for the review process, such as minor adjustments to the normal processes of the Security Division can be made. Regulations would cover procedural matters as a currently covered by the *Administrative Appeals Tribunal Regulations 1976*.

14	Senator Crossin	AGD		I understand that detainees have no right to be provided with a statement of reasons for the decision to issue the order detaining them. However, the Bill now provides for a 'summary of grounds' to be given to the detainee. ➢ How can this Committee be sure the summary of grounds will be sufficiently detailed so that access to review by a court or the Tribunal will not be frustrated?

The content of the summary is not proscribed except that if the disclosure of the information is likely to prejudice national security it is not required to be included in the summary (section 105.32). The summary of grounds is designed to ensure the detained person is provided with a reason for the detention. This is analogous to arrest, where the law requires police to advise the person of the reason for the arrest in broad terms, but does not require police to provide full details about, for example, confidential sources of information. This is also the case in relation to search warrants, where police are required to provide the person with a copy of the search warrant that outlines the premises to be searched and the items being searched for, but does not require full disclosure of information such as confidential sources of information. The rationale for not requiring police to provide all such information is that to do so could place informants at risk, and could jeopardise the continuation of investigations.

The provision of a summary of grounds is not intended to operate as a substitute for the normal processes of discovery, in which a party to a proceeding is entitled to obtain much of the material relied upon by the other party. Of course such processes protect some material from disclosure, including material that is, for example, the subject of a legal professional privilege claim or withheld on the grounds of public interest immunity.

A requirement in the Bill that the summary of grounds should include all material except that which is protected by NSI is likely to have a chilling effect. That is, individuals who might otherwise come forward an offer the law enforcement and intelligence services information about a suspected terrorist might be extremely reluctant to do so if the law allows that terrorist suspect to obtain information about the confidential source that provided the information.

The Court in making a continued preventative detention order would have before it the full reasons for the initial preventative detention order.

15	Senator Crossin	AGD		Why have minors (16 -18 yrs) been included in the Bill's preventative detention regime? Will a minor be able to be released from preventative detention for questioning by ASIO?

This is consistent with the ASIO questioning regime in which it is acknowledged that it may be necessary to detain people between the ages of 16 and 18 in some circumstances. A 16-18 year old held in preventative detention will be able to be released for questioning by ASIO as the ASIO questioning warrant regime applies to this age group.

For example, international experience confirms that persons under the age of 18 are actively involved in terrorist activity including suicide bombings, and it is conceivable that persons under the age of 18 may be involved with or associating with terrorists. However, the legislation recognises the importance of protecting the rights of young people. It does not apply to persons under the age of 16. In addition, the legislation provides for additional safeguards for young people. The Bill entitles a person in detention who is under the age of 18 years or who is incapable of managing their own affairs to have a parent or guardian or other suitable person visit the person each day or part-day the person is in preventative detention. The Bill also provides that the person who makes the order can authorize additional contact. In addition, the Bill provides that the police responsible for detaining the person can permit additional contact (paragraph 105.35(1)(f)).

16	Senator Crossin	AGD		The blanket provision to monitor communication takes no account of circumstances. Confidential lawyer client communications, for example, is a fundamental principle to ensure free and frank disclosure and advice. Yet the Bill restricts what the lawyer can advise and provides that any discussion with a lawyer shall be monitored. This appears to be an extreme step – why is it necessary? ➢ Will it prevent lawyers advising their client not to make any admissions? ➢ What will be the procedure if a person in detention wishes to make a statement or admission? Will they be cautioned beforehand and be provided with access to a lawyer?

A person detained may have a discussion with a lawyer about his or her rights in relation to the preventative detention order or the treatment of the person in connection with the order. This includes instructing the lawyer in federal court proceedings seeking a remedy connected with the order or the treatment, or in complaint proceedings through the Commonwealth Ombudsman connected with the order or the treatment of the person in connection with the person's detention under the order. The person may also instruct the lawyer to appear for him or her in relation to any other court proceedings for which an appearance or hearing is to take place during the period in which the person is to be detained.

Contact with a lawyer is monitored to ensure that the person does not communicate information which could be used to further a terrorist enterprise. It is an offence for a police officer or interpreter to pass on any information that was lawfully disclosed between the lawyer and the detainee (subsection 105.41(7)).

The contact will not prevent lawyers from advising their clients about their legal rights including in relation to admissions. If a person in detention wishes to make an admission, there is provision in the legislation for the person to be released from detention and to be questioned under Part 1C of the *Crimes Act 1914*. The safeguards under Part1C will ensure that a person's right to communicate with a legal practitioner, friend or relative (section 23G) and an interpreter (section 23N) and an admissibility safeguard by predicating the admissibility of an admission or confession on the tape recording of any such admission or confession made by a suspect during questioning (section 23V), and a suspect's right to a copy of recorded interviews (section 23U).

Sedition – Schedule 7

3	Senator BOB BROWN	Mr McDonald	16	Senator BOB BROWN—Because time is very short, I will just move onto the sedition component. Is it true that these laws are the opposite of what was recommended by Justice Gibbs, who said to get rid of the sedition laws and replace them with certain other laws? Mr McDonald—No. He recommended that there be sedition laws. I have his recommendations here. You can have them, if you like. Senator BOB BROWN—Okay.

Hard copies of pages 301 to 307 and pages 19 to 22 are at **Attachment C.**.

6	Senator BRANDIS	Mr McDonald	21	Senator BRANDIS—On notice, can you set out for me, please, the areas where these offences might apply beyond the existing criminal law of incitement to violence? I am unpersuaded that that is so. Mr McDonald—Yes, I think we would be able to do that.

Incitement to commit an offence is an offence in its own right under section 11.4 of the Criminal Code. In order to prove an offence of incitement the prosecution will need to prove:

1. that the offender intended to urge another person to commit an offence; and
2. that the offender intended that the crime incited be committed.

This second limb requires the prosecution to prove the fault elements of the offence incited. The urging is intentional because "urging" the use of force or violence is a conduct element of the offence. Subsection 5.6 of the Criminal Code provides that if the law creating the offence does not specify a fault element, for a physical element that consists only of conduct, intention is the fault element for that physical element. For example the offence of harming a Commonwealth public official (section 147.1 of the Criminal Code) provides that a person (the ***first person***) is guilty of an offence if:

(a) the first person engages in conduct; and
(b) the first person's conduct causes harm to a public official; and
(c) the first person intends that his or her conduct cause harm to the official; and
(d) the harm is caused without the consent of the official; and
(e) the first person engages in his or her conduct because of:
  (i) the official's status as a public official; or
  (ii) any conduct engaged in by the official in the official's capacity as a public official; and
(ea) the public official is a Commonwealth public official;

Therefore the prosecution would need to prove the fault elements of the above offence; that is that the offender intended that other person engage in conduct and intended that the conduct cause harm to the official.

In the context of terrorism, proving that a person who urges or encourages the commission of a terrorism offence is guilty of the offence of 'incitement' under the Criminal Code would require proof that the person intended that the offence incited be committed. That would require proof of a connection to a 'terrorist act'.

A significant difference of the proposed new sedition offence, as opposed to relying on incitement under s11.4 of the Criminal Code, is that the requirement to prove a connection to a terrorist act or a particular terrorist organisation is removed. The rationale is that while it may not be possible to show that a person intends that the relevant offence be committed, to communicate such ideas is dangerous as it can be taken up by the naïve and impressionable to cause harm to the community.

A person who engages in a 'seditious enterprise' with the intention of causing violence, or creating public disorder or a public disturbance, or who writes, prints, utters or publishes any seditious words with the intention of causing violence or creating public disorder or a public disturbance, is guilty of the offence of sedition under existing offence in the Crimes Act. However, the existing offences contain complicated fault elements and defences, that the Gibbs Committee recommended should be simplified. Further they do not focus on key terrorism themes such as urging violence by one racial group against another. The existing law focuses on the language of class.

It is important to note that the incitement offence in section 11.4 of the Criminal Code uses the word "urge". This language was recommended as a plain English way of capturing the essence of the offence, by the Commonwealth, State and Territory officers on the Model Criminal Code Officers Committee (page 93, Chapter 2, December 1992).

The use of the word urge modifies the common law which traditionally imposed liability for incitement where a person "counsel, commands or advises" the commission of an offence. Some courts have interpreted "incites" as only requiring that a person causes rather than advocates the offence. The use of the word "urge" is designed to avoid this ambiguity.

For similar reasons and for internal consistency, the proposed new sedition offences refer to "urging" rather than inciting. The sedition offences are concerned with urging:

1. the overthrow of the Government by violence;
2. violent interference with elections;
3. violence against other groups in the community threatening the peace and good Government of Australia;
4. the assistance of an enemy engaged in armed hostilities with the Australian Defence Force.

Like the incitement offences the prosecution must prove that the person intended to urge the conduct. As mentioned above, "urging" is intentional because it is a conduct element of the offence. However, unlike the incitement offences sedition does not require the prosecution to prove that the person intended the crime urged be committed. The prosecution must prove that the person was reckless as to whether the thing against which the person urged the use of force or violence against was, for example, a group distinguished by race, religion, nationality or political opinion. Proof of recklessness requires the prosecution to prove beyond reasonable doubt that the person was aware of a substantial risk that the circumstance exists (that the group against which the person urged the use of force or violence was a group so

distinguished), and that having regard to that circumstance, it was unjustifiable for the person to take the risk.

22	Senator Crossin	AGD		During his second reading speech, the Attorney-General has committed to conduct a review of the sedition offences in the Bill. Why should these provisions be passed now if there is a need to review them?

The Attorney-General recognises that the time to discuss the sedition offence and related issues such as Part IIA of the Crimes Act has been limited. Allowing for further consideration of the issues later does not mean the offence is not needed or suitable to enact now.

23	Senator Crossin	AGD		The Explanatory Memorandum states that the amendments relating to sedition are 'consistent with the general policy of moving serious offences to the new Criminal Code when they are updated.' If so, why aren't other related offence provisions in the Crimes Act (eg unlawful associations – s.30A, or treachery – s.24AA) also being updated and moved into the Criminal Code?

The amendments to the Crimes Act sedition laws developed out of concerns in the community about people who urge violence, including terrorism. Accordingly, this was regarded as an appropriate legislative vehicle for the modernising and movement of the sedition provisions. As further appropriate legislation vehicles become available, and within resource constraints, other serious Crimes Act offences are progressively being updated and moved to the Criminal Code. So far the Criminal Code contains 400 pages of new offences. The vast majority of offences have been updated but the process will continue when legislative priorities allow progress.

24	Senator Crossin	AGD		The EM also states that the sedition offences have been updated in line with a number of recommendations of the 1991 Gibbs Report (EM, p. 88). However: ➢ Commentators (eg Gilbert & Tobin) have argued that the Bill only selectively implements the Gibbs Report. What is your response? ➢ Why has it taken 14 years to implement this aspect of the Gibbs Report? ➢ The Gibbs Report recommended that section 30A of the Crimes Act, relating to 'unlawful associations', be repealed, but this Bill maintains and updates that provision (item 4). Why? What is the need for this provision?

The Bill implements those aspects of the Gibbs Report that are relevant to the prevention of terrorism. The Bill has been developed to deal with terrorism and is not a suitable vehicle for broader law reform initiatives.

The delays in implementing aspects of the Gibbs Report are the result of there being other priorities. These have included the treason and terrorism offences, theft and fraud, serious drug offences, sexual servitude and people trafficking, and computer offences.

The Gibbs Report noted at page 334 that "the provisions regarding unlawful associations had been little used since their introduction in 1926". The Government has not fully considered the need for the retention of section 30A of the Crimes Act, and notes that retaining the provision in the Crimes Act has not resulted in adverse consequences for individuals or associations since the Gibbs Report was published.

25	Senator Crossin	AGD		Some submissions have expressed concern that the sedition offences may breach the implied constitutional freedom of political communication (eg Fairfax, sub 88, pp 10-11). What is your response?

The Government has obtained the advice of the Australian Government Solicitor on this and other aspects of the Bill. The Government is satisfied that the amended provisions do not breach the implied constitutional freedom of political communication.

26	Senator Crossin	AGD		Some submissions (eg Chris Connolly, sub 56, pp 3,14) raised concerns that, unlike existing sedition offences in the Crimes Act, two of the proposed sedition offences (relating to assisting the enemy) do not require any link to force or violence, but simply support of 'any kind' for the enemy. What is your response?

The new sedition offences in 80.2(7) and (8) were clearly contemplated by the existing sedition offence in section 24A of the Crimes Act was intended to capture assisting enemies or those engaged in combat against the Defence Force. That is because subsection 24F(1) created an exception to the sedition offences while subsection 24F(2) created an exception to that exception that refers to assisting enemies or those engaged in combat against the Defence Force.

Under subsection 24F(2), it is not a defence to the existing sedition offence if the conduct is engaged in

(b) with intent to assist an enemy:
(i) at war with the Commonwealth; and
(ii) specified by proclamation made for the purpose of paragraph 80.1(1)(e) of the *Criminal Code* to be an enemy at war with the Commonwealth;
(ba) with intent to assist:
(i) another country; or
(ii) an organisation (within the meaning of section 100.1 of the *Criminal Code*);
that is engaged in armed hostilities against the Australian Defence Force;
(c) with intent to assist a proclaimed enemy, as defined by subsection 24AA(4) of this Act, of a proclaimed country as so defined;

The drafting of the new sedition offences clarifies the object of the provisions.

27	Senator Crossin	AGD		Some commentators have described the law of sedition as 'archaic' and that it is not an appropriate offence in a modern democracy (eg Gilbert & Tobin). They argue that other countries, such as the UK, Canada & New Zealand, have moved away from crimes of sedition. What is your response?

The Gibbs Report noted that the approach in "sections 24A to 24F is unsatisfactory in that the definition of "seditious intention" is expressed in archaic terms" (page 306). Accordingly, the definition of "seditious intention", although retained for the purposes of the association offence in section 30A of the Crimes Act (which the Bill does not amend), has been deleted from the proposed Criminal Code sedition offence.

The Gibbs Report noted that the provisions "need to be rewritten to accord with a modern democratic society" (page 306). Accordingly, the amendment of the sedition offences, using modern drafting language is considered appropriate.

The Gibbs Report went on to note at page 306 that

> "Clearly, it should be an offence to incite the overthrow of supplanting by force or violence of the Constitution or the 4establsihed Government of the Commonwealth or the lawful authority of that Government … Indeed, the offence should, in the opinion of the Review Committee, extend to the associated matter of inciting the use of force or violence with a view to interfering with the lawful processes for Parliamentary elections, the essence of democratic society. A narrower version of paragraph 24A(g) must also be considered for inclusion. This would be groups in the community, whether distinguished by nationality, race or religion, against other such groups or members thereof."

While some have commented on a trend in some other countries away from "sedition" offences, this appears to be an observation in relation to the naming of such offences, rather than an observation that the substance of such offences are being removed from the Statute books.

For example, in the UK the proposed 'encouragement and inducement' and 'dissemination of terrorist publications' offences address sedition. The 6 October 2005 report of the Independent Reviewer of the changes to the laws against terrorism in the UK, Lord Carlile of Berriew QC, concluded at page 8:

> "In my view this proposal in its revised form is a proportionate response to the real and present danger of young radically minded people being persuaded towards terrorism by apparently authoritative tracts wrapped in religious or quasi-religious context. The balance between the greater public good and the limitation on the freedom to publish is no more offended by this proposal than it would be by, say, an instruction manual for credit card fraud were such to be published. I believe that it is Human Rights Act compatible."

Sections 59 - 61 of Canadian Criminal Code provide for sedition offences. There is a good faith defence and the maximum penalty is 14 years imprisonment.

Section 3 of Article III of the Constitution of the USA defines treason as including adhering to the enemies of the USA, giving them aid and comfort. Section 2381 of the

US Criminal Code provides for a death penalty maximum, 5 years minimum sentence. Section 2384 provides for the offence of seditious conspiracy which may include some elements of sedition (maximum penalty 20 years) and section 2385 the offence of advocating the overthrow of the Government is an offence with similar elements to aspects of the sedition offence in Australia.

Claims made to the Committee that sedition is no longer an offence in other western democracies appear to be incorrect.

28	Senator Crossin	AGD		Why is it necessary to increase the penalty for sedition from 3 years to 7 years imprisonment?

The Australian Government regards the conduct that is captured by the amended sedition offences as sufficiently serious as to warrant an increase in the penalty from 3 years to 7 years imprisonment. This is also consistent with the recommendations of the Gibbs Committee that "the more specific nature of the proposed offence calls for a maximum penalty of seven years' imprisonment" (page 307). The same penalty is proposed in the UK for the 'encouragement" offence, and was endorsed by Lord Carlile in his report of 6 October 2005.

Examples of other Commonwealth offences that carry penalties of up to 7 years imprisonment include the offences relating to Official secrets (Crimes Act, section 79), threatening to cause harm to a Commonwealth public official (Criminal Code, section 147.2), and threatening witnesses or interpreters (Criminal Code, section 268.107).

29	Senator Crossin	AGD		Is parliamentary privilege protected under the proposed sedition laws? If so, how or why?

The proposed sedition laws do not affect the operation of parliamentary privilege or any other privilege.

Financing terrorism and money laundering – Schedules 3 and 9

30	Senator Crossin	AGD and AUSTRAC		Schedule 9 of the Bill amends the Financial Transaction Reports Act to impose new reporting requirements on financial institutions and others. Has industry been consulted? Why are these amendments being made now? What have they not been left to be included in the broader review of Australia's money laundering laws?

The proposed amendments do not impose new reporting requirements on financial institutions. The only new reporting requirements will apply to individuals who carry bearer negotiable instruments into or out of Australia and are asked to make a report by a Customs or police officer. The amendments in Schedule 9 of the AT Bill should not take industry by surprise, as industry has been closely consulted on AML/CTF reform, and the FATF Forty Recommendations and Special Recommendations on Terrorist Financing since the Government announced its intention to implement the FATF Recommendations in December 2003. Consultation has taken a number of forms, including the release of industry-specific discussion papers, several meetings of a Ministerial Advisory Group and Systems Working Group, and ongoing discussion between industry representatives and the Department. More recently a number of round-table forums were held with the financial sector, co-chaired by the Minister for Justice and Customs and the ABA, resulting in agreement on many specific issues, including funds transfers. The proposed amendments on funds transfers are consistent with the agreements reached on this issue, but will bring the legislative changes forward.

The amendments in Schedule 9 have been in included in the AT Bill, because the changes can be implemented without further delay and there is likely to be a considerable period between now and when the new AML/CTF legislation is likely to come into force. Although the Department envisages introduction of the new legislation around the middle of next year, there is likely to be a considerable transition period to allow industry implementation of the new requirements. Given the necessity of putting in place measures to help prevent terrorist financing as soon as possible, the amendments in Schedule 9 were identified as such measures that could be effectively implemented by industry and the Government relatively quickly.

31	Senator Crossin	AGD and AUSTRAC		Has industry raised any concerns with the Attorney-General about the impact of the proposed amendments to the Financial Transaction Reports Act? What were they? What was the Government's response to those concerns? Have they been addressed in the Bill and, if so, how?

The Australian Bankers' Association (ABA) wrote to the Attorney-General on 28 October 2005 to outline issues associated with the proposed amendments to the *Financial Transaction Reports Act 1988* (FTR Act). These issues and the Government's response are summarised below.

(i) The requirements of the AT Bill should match the requirements in the pending anti-money laundering and counter-terrorism financing legislation (AML/CTF exposure Bill) as to scope and timing.

The amendments to the FTR Act implement important elements of the relevant FATF Nine Special Recommendations on Terrorist Financing and

are designed to better protect the Australian community from possible terrorist financing risks. The AML/CTF exposure Bill has a broader scope and will deal with the full suite of recommended anti-money laundering and counter-terrorism financing obligations. The Government will deal with any technical issues associated with implementing the broader legislative framework as part of an extensive consultation process on the exposure Bill following its public release. Consultation will also enable full consideration of options for staggered implementation and introduction.

(ii) *The scope of the offence in Schedule 3 of the AT Bill of financing a terrorist is too wide and vague, in particular the fault element of recklessness. The maximum penalty of life imprisonment is too harsh.*

Recklessness as it applies to a result, as in proposed subsection 103.2(1), is defined in subsection 5.4(2) of the *Criminal Code*. This provision provides that a person is reckless with respect to a result if they are aware of a *substantial risk* that the result will occur, and having regard to the circumstances known to them it is unjustifiable to take that risk. The proposed offence will not apply to a person who provides or collects funds believing those funds will be used for an innocuous purpose, or even if they believe there is a small risk of the funds being used for terrorist purposes.

The maximum penalty of life imprisonment is considered appropriate to the gravity of the act of financing a terrorist offence. The maximum penalty is the same as that for the existing offence in section 103.1 of the Criminal Code of financing terrorism, which has been in the Criminal Code since the original terrorism offences were inserted in 2002. This offence covers essentially the same conduct and also carries a fault element of recklessness.

(iii) *What is the liability of a financial institution if a person is apprehended leaving Australia with a bearer negotiable instrument issued by that institution?*

A financial institution is not liable for the conduct of one of its customers in contravention of the proposed provisions dealing with reporting of bearer negotiable instruments.

(iv) *The proposed amendments on including customer information with international funds transfer instructions (IFTIs) will create difficulties for financial institutions that handle IFTIs, because of the requirement to include an account number with IFTIs.*

The proposed amendments requiring customer information to be included with IFTIs are consistent with current industry practice on the collection of customer information for inclusion in IFTI reports to AUSTRAC. There may be the need for some minor procedural adjustments.

The SWIFT standards currently allow for customer information, including account numbers, to be included with funds transfer instructions. Where it is not clear which account of a customer, if any, is linked to an IFTI, the provision of any of the customer's account numbers will suffice, as the

purpose of the requirement is to ensure a customer can be easily traced if necessary. If a customer does not have an account, as defined under the FTR Act, with the financial institution it will be sufficient to include the identification code assigned to the instruction (for example the transaction reference number) with the IFTI.

(v) *Will financial institutions be able to rely on information they receive from smaller institutions for the purposes of including customer information with IFTIS under the proposed amendments?*

In the same way that financial institutions currently rely on information they receive from smaller institutions that pass on IFTIs to them when making IFTI reports to AUSTRAC, financial institutions will be able to rely on this information for the purposes of including customer information with IFTIs under the proposed AT Bill amendments.

(vi) *What would the institution's responsibility be if the customer objects to providing customer information or having it sent to the destination? Should the institution refuse or freeze funds?*

A financial institution that sends an IFTI that does not contain customer information would be committing an offence under the proposed amendments. A financial institution would be expected to refuse to send an IFTI if the requesting customer refused to provide necessary customer information. However, there is no requirement that the financial institution freeze the customer's funds.

(vii) *Sending customer information overseas may expose the customer to the risk of identity fraud.*

The inclusion of customer information with wire transfers is a requirement of FATF under Special Recommendation VII on Terrorist Financing. Financial institutions from most EU countries are expected to be required to include this type of information in wire transfers by January 2007, and these institutions will be expecting institutions with which they have correspondent banking relationships to also comply. Financial institutions from the US are already required to include customer information with wire transfers. Measures necessary to reduce the risk of terrorist financing do create some privacy issues. Means of best addressing these issues will be examined closely as part of the consultation process on the AML/CTF exposure Bill.

(viii) *When is the requirement to request that customer information be included with future IFTIs triggered?*

The requirement to request that an overseas institution include customer information with future IFTIs will be triggered by a direction from the Director of AUSTRAC. The financial institution will not be expected to monitor all IFTIs received for those that do not contain customer information. AUSTRAC will perform this role by monitoring the IFTI reports it receives under existing provisions of the FTR Act.

(ix) *What is intended by proposed subsection 17FB(5)?*

This provision is merely intended to make it clear that, in the situation where an incoming IFTI contains insufficient or no customer information, Australian financial institutions have no obligation to refuse to make available the funds from that transfer to the intended recipient.

32	Senator Crossin	AGD and AUSTRAC		There appears to be widespread concern about the new offence of financing a terrorist (in new subsection 103.2). It allows a person to be imprisoned for life if the person *indirectly* makes funds available to another person, or *indirectly* collects funds for another, and the person is *reckless* as to whether the other person will use the funds for terrorism. Some argue that this will extend criminal liability too far and makes it impossible for ordinary Australians to know the scope of their legal liabilities with any certainty. What is your response? Do you share this concern? If not, why not?

The Department considers the effect of the proposed amendments have been misconstrued. The greatest protection under the offence in proposed new section 103.2 of the Criminal Code is the fact that the requisite fault element or state of mind is recklessness.

Recklessness as it applies to a result, as in proposed subsection 103.2(1) is defined in subsection 5.4(2) of the *Criminal Code*. This provision provides that a person is reckless with respect to a result if they are aware of a *substantial risk* that the result will occur, and having regard to the circumstances known to them it is unjustifiable to take that risk. This means that a person would have to be aware of a substantial risk that the funds will be used by the receiver of the funds to facilitate or engage in a terrorist act, and being aware of that risk continued to provide funds or collect funds (whether directly or indirectly) for that person.

The fact that the funds may be made available to the person indirectly or are indirectly collected for that person is irrelevant, unless the person engages in such conduct with the requisite state of mind. For the ordinary person who, for example, gives funds to a person believing that person is legitimately collecting money for charity or who collects funds believing that they are doing that for a legitimate charity, they will not commit an offence, irrespective of where those funds are eventually used.

The offence in proposed new section 103.2 of the Criminal Code covers much the same conduct as is currently covered by existing section 103.1. The same fault element of recklessness applies and the penalty for this offence is also life imprisonment.

33	Senator Ludwig	AGD and AUSTRAC		Can you outline which provisions in the Bill deal with which FATF recommendations or other UN resolutions (eg, such as the 40 AML recommendations from 1990 and the 9 special recommendations)?

Schedule 3 of the AT Bill – FATF Special Recommendations II, III, IV and V on Terrorist Financing, which deal with the criminalisation of the financing of terrorism, freezing and confiscation of terrorist assets, suspicious transaction reporting and international cooperation, respectively.

Items 1, 2, 6, 8, 9, 14, 15 and 18 to 24 of Schedule 9 of the AT Bill – FATF Special Recommendation IX on Terrorist Financing, which deals with the scrutiny of cross-border transportation of currency and bearer negotiable instruments.

Items 5 and 11 of Schedule 9 of the AT Bill – FATF Special Recommendation VI on Terrorist Financing, which deals with licensing or registration of money/value transfer service providers.

Items 10, 12, 13, 16 and 17 of Schedule 9 of the AT Bill – FATF Special Recommendation VII on Terrorist Financing, which deals with the inclusion of originator information with funds transfers.

Items 3, 4 and 7 of Schedule 9 to the AT Bill make minor technical and clarifying amendments to the FTR Act.

34	Senator Ludwig	AGD and AUSTRAC		The FATF Report on Australia's compliance noted that AUSTRAC would require much in the way of new resources to properly implement the guidelines. Can you outline what new resources, if any, will be made available to AUSTRAC?

Additional resources for AUSTRAC for the implementation of AML/CTF reform measures are currently the subject of budget processes. The level of additional resources required by AUSTRAC will be affected by outcomes from the consultation process on the AML/CTF exposure Bill.

35	Senator Ludwig	AGD and AUSTRAC		In respect of the bearer negotiable instruments in schedule 9, do negotiable instruments include travellers cheques? If yes, given there is no lower boundary, what obligations attach to travellers to declare even small amounts of travellers cheques? - What information campaigns will have to be done to ensure the travelling public are aware of their responsibilities? - What actions will the banks and issuers of travellers cheques have on them to inform the travelling public about the provisions? - What costs will this have on business?

The provisions dealing with bearer negotiable instruments in Schedule 9 of the AT Bill cover travellers cheques. Travellers will be required to disclose whether they have any travellers cheques, regardless of value, *if asked to do so by a Customs or police officer* when leaving or arriving in Australia. This system will not impact upon all travellers carrying travellers cheques. Unlike the existing system for carrying $10,000 or more in cash into or out of Australia, travellers will not be required to tick a box on their passenger declaration card if they are carrying travellers cheques. Rather, Customs officers will select certain travellers based on risk assessment or about whom they may have received relevant intelligence. Only those passengers will be required to respond to questions about whether they are carrying bearer negotiable instruments.

It is likely that the Australian Customs Service will carry out an information campaign about the new requirements to ensure travellers are aware of their responsibilities in relation to questioning about bearer negotiable instruments. The details of such a campaign are yet to be developed.

Banks and issuers of travellers cheques will have no obligations to inform travellers about the new requirements under the bearer negotiable instruments provisions of Schedule 9 of the AT Bill, so will not bear any costs in relation to implementing these provisions.

36	Senator Ludwig	AGD and AUSTRAC		What is intended by the new section 17FB(5) – a cash dealer 'may make available' the funds?

This provision is merely intended to make it clear that, in the situation where an incoming IFTI contains insufficient or no customer information, Australian cash dealers have no obligation to refuse to make available the funds from that transfer to the intended recipient.

37	Senator Ludwig	AGD and AUSTRAC		When will these provisions in Schedule 9 be implemented?

AUSTRAC and, in relation to the proposed bearer negotiable instruments provisions, the Australian Customs Service will begin to enforce the proposed amendments to the FTR Act from the time they commence. The Department envisages that those amendments dealing with the inclusion of customer information with IFTIs and the register of remittance service providers would commence six months from Royal Assent. So it will be expected that affected businesses will have implemented the necessary changes by this time. The amendments dealing with cross-border transportation of bearer negotiable instruments are likely to commence 12 months from Royal Assent. The 12 months lead time will enable the Australian Customs Service to train its officers, and develop procedures and forms.

38	Senator Ludwig	AGD and AUSTRAC		Is it the intention to make some assessment of the costs to industry in implementing these provisions?

An assessment of the overall cost to industry of AML/CTF reform will be carried out as part of consultation on the AML/CTF exposure. The proposed amendments in Schedule 9 of the AT Bill that will most affect industry – those dealing with IFTIs and the register of remittance service providers – are going to have to be implemented at some stage, as they are FATF requirements.

US AML/CTF legislation already requires the inclusion of customer information with funds transfers and most EU countries will have similar provisions by January 2007. For Australian financial institutions to be able to send funds transfer instructions to correspondent banks in these countries they will soon have to include customer information, regardless of what Australian law provides.

AUSTRAC currently maintains a list of remittance service providers. The amendments creating a register simply formalise this arrangement. The Department does not envisage that industry will bear any significant costs in complying with the registration requirements.

39	Senator Ludwig	AGD and AUSTRAC		If these provisions are not part of COAG, why are they being dealt with now?

Unlike the proposed amendments contained in other schedules of the AT Bill, those in Schedule 9 do not rely on a referral of powers from the States. It was therefore

unnecessary that these amendments be discussed with State and Territory leaders at COAG.

40	Senator Ludwig	AGD and AUSTRAC		Why wouldn't these provisions in Schedule 9 be dealt with in the exposure draft bill dealing with anti-money-laundering, which is soon to be released?

Similar provisions to those contained in Schedule 9 of the AT Bill will be in the AML/CTF exposure Bill, as the FTR Act will eventually be replaced by the new AML/CTF legislation. However, given that there is still a considerable period between now and when the new AML/CTF legislation is likely to come into force, it is important that we take these steps now to help prevent the Australian financial system being used for terrorist financing purposes and to ensure our financial institutions are not barred from sending funds transfers to Europe and the US.

41	Senator Ludwig	AGD and AUSTRAC		Is it the intention to proclaim Schedule 9 at an earlier time than the AML legislation?

The Department expects that the amendments in Schedule 9 of the AT Bill will, on the whole, commence before the new AML/CTF legislation.

42	Senator Ludwig	AGD and AUSTRAC		Is it correct that the provisions in Schedule 3 and 9 have been excised from the AML legislation and brought forward now? If so, why these provisions?

The amendments in Schedule 3 of the AT Bill are not taken from the AML/CTF exposure Bill. The amendments in Schedule 9 of the AT Bill are very similar to provisions in the AML/CTF exposure Bill, although in some cases narrower in scope, due to the need to fit within the FTR Act framework and the focus on those FATF requirements that are relatively easy to implement.

The amendments in Schedule 9 have been in included in the AT Bill, because there is likely to be a considerable period between now and when the new AML/CTF legislation is likely to come into force. Although the Department envisages introduction of the new legislation around the middle of next year, there is likely to be a considerable transition period to allow industry implementation of the new requirements.

Given the necessity of putting in place measures to help prevent terrorist financing as soon as possible, the amendments in Schedule 9 were identified as such measures that could be effectively implemented by industry and the Government relatively quickly.

43	Senator Ludwig	AGD and AUSTRAC		If these provisions are modelled on the AML legislation or are drawn from them, do they meet all the CTF special recommendations of FATF?

The proposed amendments in Schedule 9 of the AT Bill will not on their own meet all the requirements of relevant FATF Special Recommendations. As outlined above, these amendments were identified as ones that could be effectively implemented relatively easily. The AML/CTF exposure Bill will contain similar provisions to those in Schedule 9, and will create further obligations where this is necessary to ensure greater compliance with relevant FATF Special Recommendations.

44	Senator Ludwig	AGD and AUSTRAC		What FATF recommendations are not met (eg, such as the 40 AML recommendations from 1990 and the 9 special recommendations) to the level of being regarded by FATF as compliant?

The amendments in the AT Bill will not change Australia's level of compliance with any of the FATF 40 Recommendations adopted by FATF in June 2003. After the commencement of the AT Bill, Australia will be 'Compliant', using the FATF terminology, with FATF Special Recommendations II, III, V and IX.

The Financial Action Task Force (FATF's) Mutual Evaluation Report on Australia dated 14 October 2005 provides an assessment of Australia's implementation of the FATF 40 + 9 Recommendations based on Australia's current AML/CTF system as at 1 September 2005. The Report is available at < http://www.fatf-gafi.org/document/32/0,2340,en_32250379_32236982_35128416_1_1_1_1,00.html >

45	Senator Ludwig	AGD and AUSTRAC		Are any additional resources being provided to AUSTRAC to register providers of remittance services?

Additional resources for AUSTRAC for the implementation of AML/CTF reform measures, including those concerning the register of remittance providers, are currently the subject of budget processes.

46	Senator Ludwig	AGD and AUSTRAC		How will these provisions address the underground banking system (eg, Hawalas)? How is it targeted as the underground banking system?

The new provisions will not be directed solely at the underground banking system. They will require AUSTRAC to maintain a register of remittance service providers which will cover all remittance service providers, including what is generally described as the underground banking system

Item 11 of Schedule 9 of the AT Bill will require remittance service providers to provide their name and business details to AUSTRAC. These details will be placed on a register to be maintained by AUSTRAC. A person is a remittance service provider covered by the provisions in item 11 if they are not a financial institution or a real estate agent acting in the ordinary course of real estate business, and they:

- carry on a business of remitting or transferring currency or prescribed commercial instruments, or making electronic funds transfers, into or out of Australia on behalf of other persons, or arranging for such remittance or transfer (subparagraph (k)(ib) of the definition of cash dealer in subsection 3(1) of the *FTR Act*)
- carry on a business in Australia of arranging, on behalf of other persons, funds to be made available outside Australia to those persons or others (subparagraph (l)(i) of the definition of cash dealer in subsection 3(1) of the *FTR Act*), or
- carry on a business in Australia of, on behalf of other persons outside Australia, arranging for funds to be made available, in Australia, to those persons or others (subparagraph (l)(ii) of the definition of cash dealer in subsection 3(1) of the *FTR Act*).

Those who provide remittance services through 'underground banking systems', such as Hawala, will be covered in particular by the second and third dot points above and will be required to register. Currently, AUSTRAC maintains an informal list of alternative remittance providers, such as Hawaladas, and the proposed registration system will formalise this arrangement.

As alternative remittance providers are currently required to report IFTIs to AUSTRAC, they will also be required to include customer information with IFTIs under item 10 of Schedule 9.

47	Senator Ludwig	AGD and AUSTRAC		If it is not targeted at the areas referred to in question 46, is legislation being developed to address these areas? If so, can you provide details?

Not applicable.

48	Senator Ludwig	AGD and AUSTRAC		Can you advise whether ORR was specifically advised that schedule 9 was drawn from the AML legislation? If not, why not?

ORR was advised that the funds transfers provisions of Schedule 9 of the AT Bill reflected provisions in the AML/CTF exposure Bill.

49	Senator Ludwig	AGD and AUSTRAC		Can you provide the advice from ORR that a RIS was not necessary or required?

Advice was provided by ORR on its RIS requirements for the AT Bill and the new AML/CTF legislation concerning the impacts of the implementation of FATF's Special Recommendation VII in relation to wire transfers. ORR confirmed that the Government's RIS requirements would be satisfied by a RIS prepared in relation to the new AML/CTF legislation. It is not possible to provide that advice to the Committee.

Sunset Clause

20	Senator Crossin	AGD		Why should Australia adopt a 10 year sunset on an emergency measure rather than, for example, 3 years?

A 10 year sunset clause currently applies to control orders, preventative detention and to stop, search and question powers (see sections 104.32, 105.53 and 3UK. A 10 year sunset was agreed by leaders at COAG.

The experience with the ASIO legislation demonstrated that a shorter sunset period of 3 years made it difficult to properly assess the operation of the legislation, particularly as some aspects of the legislation (detention powers under the ASIO Act) have still not been utilised.

It is likely that a shorter period might also make it difficult to assess the operation and utility of this new legislation as it is anticipated that the new powers will be used infrequently.

The Bill also provides for a review by COAG after 5 years. That review is likely to inform the Australian Government in terms on any amendments to the legislation that are desirable or necessary. In addition, should the environment in which Australian law enforcement and intelligence services are operating change significantly during the period, it would be open to the Government to repeal or otherwise amend other aspects of the legislation at any time (subject of course to obtaining the agreement of the States under the reference of power).