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

RESPONSES TO QUESTION PLACED ON NOTICE BY SENATORS
FRIDAY, 18 NOVEMBER.

Control Orders – Schedule 4, Division 104

Question No.	Who asked	To whom asked	Question
1	STOTT DESPOJA	AGD	Regarding proposed s104.14(7)(a) (which confers upon the issuing Court the power to revoke an interim control order following a confirmation hearing): (a) why is the Court not empowered to revoke an interim control order if it is not satisfied of the matters referred to in proposed s104.4(1)(d)? (b) if s104.4(1)(d) was omitted in error from proposed s104.14(7)(a), what amendments will the Department be suggesting to the Government?

(a) Paragraph 104.4(1)(d) refers to whether the issuing court is satisfied that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. If the AFP requests four such obligations, prohibitions and restrictions, and the court decides that only three of those obligations, prohibitions and restrictions should be imposed, it is appropriate that the court be empowered to issue a control order with those three obligations, prohibitions and restrictions, but without the fourth obligation, prohibition or restriction that was requested. It would not be appropriate or in the interests of preventing terrorism if a court revoked a control order in circumstances where it considered that making the control order with three of the obligations, prohibitions and restrictions requested would, on the balance of probabilities, protect the public from a terrorist act.

(b) As mentioned in response to question 1(a) above, paragraph 104.4(1)(d) refers to whether the issuing court is satisfied that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. When issuing an interim control order, the issuing court may make an order that excludes some of the obligations, prohibitions and restrictions that were sought in the request. Paragraph 104.14(7)(a) refers to revoking an interim order in its entirety. As mentioned above, if the court considers some of the obligations, prohibitions and restrictions are necessary, it would not be appropriate to revoke the order in its entirety. Instead, the court would rely on paragraph 104.14(7)(b), which specifically refers to paragraph 104.4(1)(d), and would make an order that contains only those obligations, prohibitions and restrictions that the court regards as necessary.

2	STOTT DESPOJA	AGD	Is there any operational or other reason why an application for an interim control order should not be required to be made on an *inter-partes* basis, unless the AFP satisfies that Court that there are compelling reasons for seeking the order *ex-parte*?

It is appropriate, given the emergency and security nature of such orders, that they be made without notifying the person. An interim control order does not have effect until it is served on, and explained to, the person (section 104.12). A requirement to make such orders with the person present is likely to result in significant delays in such orders being made as the person would be able to delay the consideration of the court by potentially long periods, effectively defeating the purpose of the order.

Information available to the AFP may suggest that a control order is necessary to prevent a person from leaving the country, and further, that a court is likely to consider, on the balance of probabilities that imposing such a restriction is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. The person could fail to appear at a hearing to determine whether such a control order should be imposed. In fact, the person could significantly delay the consideration of the issue because the person proposes to leave the country in the short term. This would defeat the objects of the order and could result in the completion of a terrorist act, resulting in the death of many people.

3	STOTT DESPOJA	AGD	Has the Department considered whether additional safeguards are required where a person is the subject of successive control orders (see 104.16(2))? Should, for example, the possible hardship upon a person who is potentially subjected to more than one control order be a matter that the issuing Court is specifically required to consider under s104.4? If not, why not?

When considering whether to make a control order and determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances) (subsection 104.4(2)). The fact that a previous order had been in place in respect of the person would clearly be one such factor.

The risk in placing arbitrary restrictions on obtaining successive control orders is that the person could continue to be a terrorist threat. It is important to bear in mind that if a second or further control order is sought in respect of a person, all the criteria for making such an order must be established. This includes demonstrating to the court that each of the obligations, prohibitions and restrictions sought to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. If the AFP could establish that a particular prohibition continued to be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act after a period of more than 12 months had elapsed, it would be extremely unfortunate if the legislation did not allow for a further control order containing such a prohibition could be imposed.

45	Crossin	AGD	**Control Orders.** (a) If a person is on a very restrictive control order for a long period of time, what measures are in place to ensure that they can continue to support themselves or their families? (b) Will the government provide funding for a living allowance if the person is unable to continue employment? If so, how much? (c) Will a place of employment be able to dismiss a persons on a control order?

(a) When making a control order, subsection 104.4(2) requires the court, in determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).

(b) The Bill does not affect the existing provisions in relation to living allowances or other financial support provided by the Government.

(c) Issues about dismissal and unfair dismissal of an employee are a matter of employment law, and are not affected by the Bill.

Preventative Detention – Schedule 4, Division 105

6	STOTT DESPOJA	AGD	Under the Bill, a person detained under a PDO: □ cannot make an application for revocation of a PDO; and □ is not entitled to appear in any application for a continuing PDO or for revocation or extension of a PDO. They (or their lawyer or parent/guardian) are only entitled to make 'representations' to the 'Nominated senior AFP Officer' who is obliged to 'receive and consider' those representations (see proposed s105.19(7) and (8)). *Questions*: (a) What is the operational or other rationale for not conferring upon a detained person (or their lawyer, parent or guardian) the right to make a revocation application and appearance rights in any application for a continuing PDO or for revocation or extension of a PDO? (b) If it is the case that there is a concern that allowing a detained person to make revocation applications and giving them appearance rights could tie up AFP resources, has the Department considered whether those concerns could be ameliorated without depriving the detained people of those rights (for example, by conferring on the issuing authority express powers to control its own procedures and to dismiss or limit applications or submissions which are vexatious or frivolous)? (c) Is it the Department's view that, under the existing provisions of the Bill, an issuing authority could insist that a detained person and/or their lawyer should be allowed to appear at an application for a continuing PDO or for revocation or extension of a PDO? (d) If the answer to (c) is 'yes', is there any reason that the Bill could not, for the avoidance of any doubt, expressly confer such a power on the issuing authority? (e) Why does the Bill not impose upon the Nominated senior AFP Officer an obligation to place before the issuing authority (in any application for a continuing PDO or for revocation or extension of a PDO) any representations made by the detained person, their lawyer or their parent/guardian?

(a) The Department considered that allowing a detained person to make revocation applications and giving them appearance rights during the 48 hour period could tie up vital AFP resources during a time where a terrorist attack is imminent or has just occurred. However, the detained person is entitled to contact a lawyer (section 105.37), and a lawyer is entitled to obtain a copy of the preventative detention order and summary of grounds (section 105.32).

(b) The Department considered the options for review of a preventative detention order and considered that the following means of review were appropriate:

- Any preventative detention order, as well as the treatment of the person detained, would be subject to judicial review, could be subject to investigation by the Commonwealth Ombudsman (subsection 105.36(1): EM p. 60) and merits review by the Administrative Appeals Tribunal (section 105.51).
- In considering an extension of an initial preventative detention order, the issuing authority must consider afresh the making of the order and any relevant information (subsection 105.12(2)). State courts reviewing detention under a State regime may also review any detention of that person under the Commonwealth regime (section 105.52).
- Preventative detention would not apply to people under 16 years of age (section 105.5: EM p. 39); special rules would apply for people between the ages of 16 and 18 and people incapable of managing their own affairs (section 105.39: EM p. 61).

- A person detained would be given an opportunity to contact a lawyer (section 105.36: EM p 60) for these purposes as well as being entitled to contact a family member and employer solely for the purpose of letting them know they are safe but are not able to be contacted for the time being (section 105.35: EM p 59).

(c) The Bill does not preclude the issuing authority from seeking representations from the detained person or their representative.

(d) The Bill does not expressly provide for this, however in his second reading speech, the Attorney-General stated the intention of the Bill which is to allow further information to be put before the issuing authority at the time the preventative detention order is continued.

(e) The role of the nominated senior AFP member is to ensure that the obligations and requirements placed on the AFP by the Bill are met (the nominated senior AFP member must be someone who was not involved in the making of the application for the preventative detention order – see subsection 105.19(6)). The nominated senior AFP member is intended to be as independent from the process for applications for continued and extended orders as possible, and it would not be appropriate for that person to participate in such processes. However, one of the responsibilities of the nominated senior AFP member is to receive and consider any representations that are made by the detained person or their lawyer or a person who has contact with the detained person (subsection 105.19(7)). In meeting the nominated senior AFP member's obligations under subsection 105.19(7) to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order and ensure that the provisions of section 105.17 (which deals with revocation of preventative detention orders and prohibited contact orders) are complied with in relation to the preventative detention order, that nominated member would be required to ensure that any matters relevant to the extension or continuation of a preventative detention order were communicated (by the appropriate AFP member) to the issuing authority.

7	STOTT DESPOJA	AGD	Regarding the limitations on contact imposed by 105.35(1): it appears that the Department considers that the words at the end of the section commencing 'solely for the purposes…' are not the primary limitation upon what may be communicated by a detained person to the persons mentioned in sub-paragraphs (a)-(f). Rather, the Department appears to take the view that communication of at least some personal or business matters would be permitted provided that the detained person does not disclose the matters referred to in s105.35(2). If that is correct, would it not be more clearly consistent with the Department's intention if ss105.35(1) and (2) were amended and combined such that the provision read: (1) The person being detained is entitled to contact: (a) one of his or her family members; and (b) if he or she: (i) lives with another person and that other person is not a family member of the person being detained; or (ii) lives with other people and those other people are not family members of the person being detained; that other person or one of those other people; and (c) if he or she is employed—his or her employer; and (d) if he or she employs people in a business—one of the people he or she employs in that business; and (e) if he or she engages in a business together with another person or other people—that other person or one of those other people; and (f) if the police officer detaining the person being detained agrees to the person contacting another person—that person; by telephone, fax or email, provided the person does not disclose: (g) the fact that a preventative detention order has been made in relation to the person; or (h) the fact that the person is being detained; or (i) the period for which the person is being detained.

A formulation similar to that proposed was considered. However, it was thought that such a formulation failed to provide any guidance to the detainee in terms of what they could communicate. Accordingly, it was decided to authorise a particular type of communication in section 105.35 that would ensure a detained person did not consider he or she was entitled to discuss a broad range of matters with those persons contacted (which could effectively defeat the purpose of the detention), and criminalise the disclosure of a more restrictive category of communications in the offence provision in section 105.41.

In addition, the requirement to treat detained persons humanely and with respect in section 105.33 will ensure that necessary communications can occur – either between the detained person and another person directly, or between an appropriate AFP member and another person. The AFP are experienced in holding persons in custody and ensuring that, for example, children for whom a person in custody has care responsibility are provided for.

9	STOTT DESPOJA	AGD	I understand the Department is currently giving consideration to the possibility identified by Senator Brandis at proof Hansard p71 (where Senator Brandis asked the representatives of Amnesty: "Would it meet your concerns if that obligation were expanded so that, excepting for the provision of information likely to prejudice national security, there were an obligation to furnish to the person the subject of the control order the material on the basis that it was put before the court to obtain the order?"). In relation to that material and the material to be included in the 'summary of grounds' for the making of control orders and PDOs, is there any reason the person considering the issue of security sensitive information could not be required to undertake a similar approach to that set out in ss 31(7) and 38L(7) *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)? Also as regards the summary of grounds, does the Department see any practical difficulty in providing that the summary must include sufficient factual material to alert the subject of the order to the factual basis upon which the order was made? If so, please specifically identify those perceived difficulties.

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.

10	STOTT DESPOJA	AGD	Please consider the hypothetical posed by Senator Brandis at Proof Hansard p31. Does the Department accept that the person there referred to could have been: (a) detained and questioned under the *Australian Security Intelligence Organisation Act 1979* (Cth); and (b) arrested and detained by the AFP under section 23CA of the *Crimes Act 1914 (Cth)* ('Crimes Act') on 'reasonable suspicion' that they may: - possess a thing connected with the preparation for, engagement in or assistance in a 'terrorist act'; - have collected or made documents likely to facilitate terrorist acts; or - have undertaken other acts done in preparation for, or planning, terrorist acts. If not, please identify, with precision, the reasons those powers could not have been exercised in that fashion.

Senator Brandis posed the following hypothetical:

> *Let us say that ASIO, in the exercise of its electronic surveillance function, picked up a conversation from a person of interest over the telephone in which that person of interest said to, say, a close relative or a close friend—but only in the privacy of the conversation—'I have decided that I am going to commit a terrorist act,' and he made that confession with specificity, particularity and apparent seriousness. A declaration of intent to do something made unilaterally without more does not seem to me to be a criminal offence. It is not a conspiracy, it is not an attempt, it is not an incitement; it is merely a private declaration of intent to a non-participating party made privately. It seems to me, if that is right, that the police or the law enforcement authorities would have no basis at all on which to arrest that person merely on the strength of the declaration of intent alone. Yet, if it were a serious, particular and credible threat, surely that person should be taken off the streets. Would you accept that, in those circumstances, preventive detention or control orders—probably a preventive detention order in the case I have given you—would be justified?*

It is possible that the person referred to in the hypothetical situation could be subject to the ASIO questioning and detention regime. However, the ability and desirability of doing this would be subject to all the surrounding and related circumstances and operational implications and exigencies.

The ASIO questioning and detention regime was always intended to be a last resort mechanism. First, the tests for issuing an ASIO warrant would need to be satisfied. For a questioning warrant, the Attorney-General would need to be satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that relying on other methods of collecting that intelligence would be ineffective.

For a questioning *and detention* warrant, there must *also* be reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person may alert a person involved in a terrorism offence that the offence is being investigated, not appear for questioning, or destroy, damage or alter a record or thing the person may be requested to produce in accordance with the warrant.

If the person has previously been detained under an ASIO questioning warrant, the Attorney-General and issuing authority would also need to be satisfied that the requested warrant is justified by information additional to or materially different from the information known at the time of the request for the previous warrant.

The ASIO questioning and detention regime is directed at gathering intelligence about terrorism offences. A warrant authorises ASIO to question a person before a prescribed authority by requesting a person to give information, or produce records or things, that are or may be relevant to intelligence that is important in relation to a terrorism offence.

The regime operates under strict timeframes and legislative requirements set out in the ASIO Act, including the need to get approval for continuation of questioning (at regular intervals within the overall period allowed for questioning). In order to allow continuation of questioning, the prescribed authority would need to be satisfied that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and questioning of the person under the warrant is being conducted properly and without delay. Therefore, continued questioning or detention would not be permitted if ASIO has no further questions, or it is clear that the process is not or is not likely to assist the gathering of intelligence (if, for example, the person is simply refusing to answer any questions).

The ASIO regime is not about preventative detention – it has quite a different purpose. Even if the tests for issuing an ASIO warrant are satisfied, it may not be appropriate or in the best interests of national security for ASIO questioning or detention to occur (if, for example, this would adversely impact on other aspects of the security investigation).

Section 23CA provides that if a person has been *arrested* for a terrorism offence the person may be detained for the purpose of investigating whether the person committed the offence or whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed. The person can be detained initially for 4 hours unless this time is extended by a magistrate for up to an additional 20 hours.

In order to arrest the person for the offences of

- possess a thing connected with the preparation for, engagement in or assistance in a "terrorist act"
- have collected or made documents likely to facilitate terrorist acts, or
- have undertaken other acts done in preparation for, or planning, terrorist acts

the AFP would need to be satisfied on reasonable grounds that the person has committed or is committing the offence and proceedings by summons against the person would not achieve one or more of the following purposes:

(i) ensuring the appearance of the person before a court in respect of the offence;
(ii) preventing a repetition or continuation of the offence or the commission of another offence;

(iii) preventing the concealment, loss or destruction of evidence relating to the offence;
(iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
(v) preventing the fabrication of evidence in respect of the offence;
(vi) preserving the safety or welfare of the person

This is a higher test than the requirements for a preventative detention order which require the AFP member to have reasonable grounds to suspect that a person will engage in a terrorist act. In addition 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.

Just as the ASIO regime is not about preventative detention but about intelligence gathering, so the questioning regime associated with the police arrest powers is focussed on investigation purposes not on preventative detention.

Preventative detention and control order regimes offer alternative measures which may be more suited to achieving national security objectives in the particular circumstances of individual cases (and may also in some cases be less onerous for the person – which is consistent with the questioning and detention regime being a measure of last resort).

11	STOTT DESPOJA	AGD	Does the Department say the Bill protects detained persons from the derivative use of monitored privileged conversations between a detained person and their lawyer? If so, please identify the specific provisions that provide that protection?

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)).

12	STOTT DESPOJA	AGD	What is the operational or other rationale underlying the provisions allowing the AFP not to disclose a prohibited contact order to the detained person or their lawyer (see eg proposed s105.32(9)? Did the Department consider whether any relevant concerns could be ameliorated by, for example, allowing the issuing authority to determine whether such an order should not be disclosed in exceptional cases?

The rationale for not allowing a prohibited contact order to be disclosed to the detained person or their lawyer is to ensure that the "preventative" purpose of the order is not defeated by entitlements to contact others. If a person is made aware that another person is the subject of a prohibited contact order it would put the first person on notice that co-conspirators or others may be under investigation. It would be possible to forewarn these people through third parties to further the terrorist act in the person's absence, or destroy evidence of a terrorist act.

13	STOTT DESPOJA	AGD	What is the operational or other rationale underlying the restrictions on the categories of legal advice a person can receive while detained (see proposed 105.37(1))? Why, for example, should a person not be permitted to instruct their lawyer in relation to an ongoing urgent business matter involving legal issues?

The rationale for the type of legal advice that may be sought was to ensure that a person could instruct on matters which were due to be heard before a court whilst the person was in detention. Paragraph 105.37(1)(e) would include business matters which required the lawyer to appear for their detained client during the period in which the person is to be detained. It was considered that other matters which did not require a person to appear before a court, could be dealt with at the expiration of the 48 hour period.

14	STOTT DESPOJA	AGD	Does the Department accept that any child detained under a PDO must be separated from adult prisoners? If so, is there any reason that the Bill should not contain a specific obligation to that effect?

The Department does accept that any child detained under a PDO should be separated from adult prisoners. The separation of child prisoners from adult prisoners occurs in accordance with relevant guidelines. This is the case for children in custody for a criminal offence or for their own protection, and will continue to be the case when a child is in custody under a preventative detention order.

Including an obligation in the Bill to this effect would be inconsistent with existing legislation and could result in a contrary inference being drawn in relation to children in custody who are under arrest or in protective custody.

In addition, imposing such an obligation could create difficulties in extraordinary or urgent circumstances where it is not possible to detain the child separately.

Alternatively, there could be a situation where, for example, a child and a parent of the child were both taken into preventative detention, and it was considered appropriate for reasons related to the child's safety to place the two detained persons in the same place. An obligation in the legislation to separate those two persons would be problematic.

15	STOTT DESPOJA	AGD	Considering the importance of the principle behind the maintenance of legal professional privilege, instead of regarding lawyers as potential co-conspirators, why not implement sufficient security checks on detainees' legal representatives to allay concerns and perhaps just observe consultation with detained clients without monitoring of what is discussed?

A person will be detained in circumstances where there is an imminent terrorist attack or where one has occurred. Security checks are likely to delay a detained person from being granted access to a lawyer, particularly during the initial 24 hour period. Observing consultation would not achieve the objective of ensuring that information relating to existing or future terrorist events is not passed on to the lawyer.

33	Brown	AGD	*14 November 2005, Proof Transcript pp 12-13.* When Mr McDonald last appeared before the Committee, he responded to a question from Senator Kirk about whether the issue of control orders and preventative detention orders are understood by the Department to be the exercise of a judicial or non-judicial power. Mr McDonald answered that 'control orders could be regarded by the High Court as penal in nature' because they could include 'strong limitations on one's geographical movement and who you associate and communicate with'. How does preventative detention, which by definition, imposes the strongest possible limitations on one's geographic movement, with whom ones associates and communicates, given that a person is locked away, differ from control orders on that analysis? Can the Department offer another justification as to why granting a preventative detention order is more appropriately regarded as a non-judicial exercise of power?

The advice that the Department has received from Chief General Counsel is that the detention for 48 hours is not punitive where there is an imminent threat to the community or in the immediate aftermath of an attack and where detention of the person is judged necessary to prevent an attack or further attack. A maximum of 48 hours detention in these cases is not punitive and therefore does not require a judicial exercise of power.

34	Brown	AGD	*14 November 2005, Proof Transcript p 14.* Mr McDonald acknowledged that 'there has been next to no focus on the state legislation, yet the state legislation is what lets the person be held for 14 days [in preventative detention]. So it is very important to see how the whole thing fits together'. How will or might any Commonwealth review mechanism encompass the operation of equivalent or associated legislation at the State and Territory level?

Under the Commonwealth regime, there are a number of review mechanisms.

The person who was detained can apply to the Security Appeals Division of the Administrative Appeals Tribunal for review of a decision to make or extend or further extend a preventative detention order. The AAT has power to declare a decision to be void and determine that the Commonwealth should compensate the person. The AAT does not have jurisdiction over State and Territory administrative decisions and therefore any proceedings in relation to detention under the State regime would have to be pursued under State review mechanisms.

Under the Commonwealth regime there is also a built in merits review process when the police seek a continued preventative detention order in section 105.12(2) which means the court will consider the order afresh when considering whether to issue a continued preventative order. At that time the person detained or their legal representative can provide the police with additional information concerning the preventative detention order.

Consistent with other comparable regimes, including the ASIO questioning and detention regimes, the Bill provides that decisions relating to preventative detention orders are not subject to review under the *Administrative Decisions Judicial Review Act* (see Item 19 in Schedule 4). The person may however seek review of their detention through the original jurisdiction of the Federal Court and the High Court.

The Bill provides that State/Territory courts do not have jurisdiction while the person is being detained. This is necessary to prevent a State court that has no jurisdiction to issue a preventative detention order from staying such an order. However, once

released from Commonwealth detention, the Bill provides the State Courts with jurisdiction. This provision is important as it allows the State Courts in reviewing detention under a State regime, to review any associated Commonwealth detention and provide the same remedies as are available with respect to the detention of a person under a State regime (see section 105.52).

36	Brown	AGD	*14 November 2005, Proof Transcript pp 12 and 16.* Mr McDonald commented in relation to control orders that '[t]he concern … is that control orders could be regarded as the High Court as penal in nature' [p.12]. He went on to say in relation to proceedings in an issuing court to grant an interim control order that, '[t]his is a civil procedure' [p.16]. Mr McDonald also acknowledged that courts may take 'even more precaution than usual with [control orders] … given the gravity and scope of the order and circumstances' [p.16]. Given that there is a possibility that the issuing of a control order will properly be regarded as a penal measure because of the strong restrictions on individual movement, association and communication it may impose [pp. 12-13], would it be more appropriate to reframe the test as a criminal test to acknowledge the penal nature of the order sought? That is, would a 'beyond a reasonable doubt' test be more appropriate? If so, what makes preventative detention orders different in this regard?

A control order may be applied for where the AFP considers that there are reasonable grounds that such an order would substantially assist in preventing a terrorist act. In making an order the court must be satisfied on the balance of probabilities that the order would substantially assist in preventing a terrorist act and the orders imposed are necessary to protect members of the public from terrorist acts. The "beyond reasonable doubt" test is a higher standard which would only be appropriate if the person is to be convicted of an offence and sentenced. The consequence of a conviction could be imprisonment for a long period, the loss of assets through Proceeds of Crime proceedings, and a criminal record.

42	Crossin	AGD	Provisions of the Bill refer to **counselling and education services** (eg, new section 104.5(3)(l) and 104.5(4)). (a) What sort of training does this include? (b) Will or could it encompass apprenticeships or distance university? (c) Will there be specific education or training programs under the Bill /Act? (d) If there are specific training programs for persons under this scheme, please indicate what programs will be available? (e) Will the person undergoing the counselling or education be required to contribute any funding to their education under this program? If not, why not? (f) If they will be eligible for entrance into general education and training programs, please indicate what programs will they be eligible for entry into? Will the person undergoing the education be required to contribute any funding to their education under this program? If not, why not? (g) What is the projected cost of education services under these sections (for 05-06-07-08-09)

(a) The Bill provided for a person to participate in specified counselling or education, and does not limit the type of counselling or education. This will be determined according to the circumstances. It is important to note that subsection 104.5(6) provides that a person is required to participate in specified counselling or education only if the person agrees, at the time of the counselling or education, to participate in the counselling or education. Accordingly, a term in a control order that allows for a person to participate in counselling or education is

designed as something that will be of assistance to the person – not something that will be imposed against that person's wishes.

(b) As mentioned, the type of counselling or education is not specified. However, it would be necessary to show, in the example of an apprenticeship or university studies that participation in that program "is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act" (paragraph 104.4(1)(d)). It is difficult to imagine how such participation could meet that important criteria.

(c) The type of counselling or education is not specified in the Bill.

(d) The type of counselling or education is not specified in the Bill.

(e) The Bill does not make provision for payment of fees in relation to such counselling or education.

(f) The Bill does not make provision for such matters.

(g) Information about costs is not available as the counselling or education will be determined on a case by case basis.

43	Crossin	AGD	Regarding the counselling services: (a) Who will provide the counselling services? (b) Will the AFP or other agencies monitor what may be said in the course of counselling? (c) What is the projected cost of provision of counselling services under these sections (for 05-06-07-08-09)?

(a) The Bill does not specify who will provide the counselling (or education). This will be determined on a case by case basis.

(b) The Bill does not authorise monitoring of communications that occur in the context of any counselling or eduction that may occur as a result of a control order.

(c) Information about costs is not available as the counselling or education will be determined on a case by case basis.

46	Crossin	AGD	**Preventative Detention**. Regarding section 105.42, during a preventative detention, questioning of the person under that detention order is prohibited. Does this apply to examinations by the ACC or are the ACC free to examine a person under the detention order?

The purpose of section 105.42 is to ensure the a person's rights as outlined in Part IC of the Crimes Act still apply to a person who is in preventative detention.

Section 105.25 places an obligation on the AFP to release a detained person into the custody of ASIO if there is a warrant under section 34D of the *Australian Security Intelligence Organisation Act 1979* is in force in relation to the person. There are no other obligations in the Bill to release a detained person to be dealt with according to other legislative regimes. It may be that the AFP would release a particular detainee

to the ACC or to another agency for that agency's investigatory or regulatory purposes. That will depend on all the circumstances of the particular case.

50	Crossin	AGD	**Allowed Lawyers**. Regarding section 105.37(4): (a) How many lawyers have the appropriate security clearance at this level? (b) Is a list of lawyers with that security clearance available? (c) What is the process for awarding a lawyer with level of security clearance?

(a) The appropriate security clearance will depend on the nature of the case.

(b) For privacy and security reasons, it is not appropriate to publicly disclose who holds a security clearance.

(c) The security clearance process is conducted in accordance with the Australian Government Protective Security Manual. The same requirements apply for government officers and lawyers.

A number of Australian Government agencies, including the Attorney-General's Department, conduct security clearances.

People are assessed for their suitability to access classified information. The process involves a range of background checks and assessments. Different processes apply depending on the level of security clearance required.

61	Ludwig	AGD	The Casten Centre for Human Rights has suggested that preventative detention be dealt with purely as a State matter. This would avoid constitutional problems, allow judicial oversight by State Supreme Court Judges and allow for *inter partes* hearing and wider grounds of review of order. It may simplify the scheme and remove the complexity of different avenues of appeal for different types of orders. The *NSW Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005* relies on the Supreme Court to issue all preventative detention orders. It appears that, under that Bill, the police may apply for an urgent order which can be made *ex parte* is the circumstances warrant, but this is subject to further *inter partes* hearing at a date fixed by the Court. Similarly, the South Australian (Preventative Detention) Bill 2005 requires that orders be issued by the Supreme Court. However, a senior police officer may issue an order for 24 hours in an urgent case which must then automatically be review by the Court. Australian Federal Police officers can be appointed as or deemed to be State police officers for the purpose of exercising powers under State law. It is understood, for example, that the NSW Terrorism (Police Powers) Act already provides for the appointment of AFP officer to exercise powers under that Act. (a) Would it be simpler to leave preventative detention to the States and rely on State legislation? (b) Would reliance on the States provide a less complex and more efficient system than that set out in the Bill (which, for example, establishes a combination of police orders, *ex parte* administrative orders and further proceedings in the AAT or a federal court)? (c) What is the justification for not relying solely on associated State legislation in this area?

Given the national and international impact of terrorist attacks, it would be ineffective for the Australian Government to abandon its responsibility with this important counter-terrorism measure in the way suggested by the Casten Centre.

62	Ludwig	AGD	Judicial review under section 39B *Judiciary Act 1901* applies to Commonwealth officers only. Please confirm that retired judges appointed as issuing authorities for preventative detention orders will be 'Commonwealth officers' for the purpose of judicial review.

For the purposes of section 39B of the *Judiciary Act 1901*, appointment to a statutory office suffices. Under the Bill, persons are appointed as an issuing authority. Any person appointed as such is a Commonwealth officer, whether that person is retired or currently serving as a judge.

The Australian Government Solicitor confirms that retired judges are "Commonwealth officers" for the purposes of judicial review under the *Judiciary Act 1901*.

63	Ludwig	AGD	Please confirm what rules of evidence will apply to the issuing a preventative detention order. The Evidence Act applies to court proceedings, but the issuing of a preventative detention order is non-judicial process.

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.

Questions applicable to Control Orders and Preventative Detention

Requirement that issuing authority or issuing court consider whether the order represents the least restrictive means of achieving the relevant purpose, as an enlivening condition for the issuing of a control order or PDO

4	STOTT DESPOJA	AGD	It appears to be the Department's view that control orders and preventative detention orders (PDO) will not be sought where there are less invasive or restrictive means of achieving the relevant purpose (see eg Proof Hansard p19 Mr McDonald: "What I am getting at is that if the person possesses that thing and making this order would substantially assist in preventing the terrorist act occurring and it was reasonably necessary for those purposes—all those grounds—you would be able to get an order. However, if it was evidence in relation to a terrorist act, I think there would be more ways of getting it from a mere journalist"). If that is correct, is there any reason the Bill should not expressly require the issuing authority or issuing court to consider whether the order represents the least restrictive means of achieving the relevant purpose, as an enlivening condition for the issuing of a control order or PDO?

The insertion of a requirement into the legislation of the type suggested does not really sit well with the objects of Divisions 104 and 105. That is because the objects of those Divisions are the prevention of terrorist acts and the protection of the public from terrorism. The same can be said of powers of arrest and powers to conduct searches under other Commonwealth legislation. However, the important difference between the powers in Divisions 104 and 105 and existing Commonwealth law enforcement powers of arrest and search lies in what those powers authorise. Unlike powers associated with Commonwealth search warrants, neither preventative detention nor control orders are aimed at obtaining evidence. Nor do they provide powers for the seizure of such evidence.

Under preventative detention, an order may be obtained for the purpose of preserving evidence. This would allow the police, for example, to take a person into detention if they had information that indicated persons whose whereabouts were unknown had recently provided evidence to the detained person with an instruction that the detained person either destroy or hide that evidence. In such a scenario, the police would detain the person and shortly afterwards would execute a search warrant or use other evidence gathering powers in order to locate and secure the evidence. The only evidence that could be seized by police executing a preventative detention order is evidence that was in the possession of the person at the time the person was taken into detention. There is no power to search premises owned, occupied or otherwise associated with the person. in order to seize evidential material. If the police had specific information that the detained person was in possession of evidential material, it would be necessary to use other means of obtaining that substance, such as by obtaining a search warrant.

Under the control order regime, an order may be obtained that prevents the person from possessing or using, for example, a certain chemical known to be used by terrorists in making bombs. There is nothing in the Bill to permit the police to enter premises owned, occupied or otherwise associated with the person in order to seize evidential material. If the police had specific information that the controlled person was in possession of the substance, it would be necessary to use other means of obtaining that substance, such as by obtaining a search warrant.

Application to children

5	STOTT DESPOJA	AGD	Is there any operational or other reason why control orders and PDOs made in respect of children should not be made subject to the following additional conditions: (a) that the issuing authority or issuing court be required to consider the best interests of the child; and (b) in the case of PDOs and control orders authorising a form of detention, that the issuing authority or issuing court be required to have regard to the principle that the detention of children should only be used as a measure of last resort and for the shortest appropriate period of time.

The Bill already provides effectively for the matters requested:

(a) best interests of the child:

Control Orders: Subsection 104.4(2) provides that "In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances)." One such circumstance would be the age of the person. Note also that paragraph 104.2(3)(e) and section 104.3 operate to require the requesting officer to provide information the police have about the person's age to the issuing court.

Preventative Detention Orders: The threshold for applying for and for making a preventative detention order under section 105.4 are sufficiently high to ensure the best interests of a child are taken into consideration. However, if the issuing authority considers making the order would substantially assist in preventing a terrorist act occurring and the detention of the child is reasonably necessary for that purpose (subsection 105.4(4)), it would be dangerous not to detain the child, regardless of that 16 to 18 year old child's best interests.

(b) last resort/shortest possible duration:

Control Orders: Subsection 105.28(2) provides that "if … a person in relation to whom an interim control order is being made or confirmed is at least 16 but under 18, the period during which the confirmed control order is to be in force must not end more than 3 months after the day on which the interim control order is made by the court." Further, if a court makes an interim control order, paragraph 104.5(1)(f) provides that the order made by the court "must specify the period during which the confirmed control order is to be in force, which must not end more than 12 months after the day on which the interim control order is made". In other words, it is the issuing court that has the discretion as to the appropriate period for which the order will have effect.

Preventative Detention Orders: Subsection 105.4(4) requires the applicant and the issuing authority to turn their minds to the period for which it is necessary to detain a person, including a child. In particular, paragraph 105.4(4)(c) only permits a person to be detained under an order for a period that is reasonably necessary to substantially assist in preventing a terrorist act occurring.

Legal aid

8	STOTT DESPOJA	AGD	What arrangements have been made for the provision of legal aid to people subject to control orders or preventative detention orders? Please provide copies of any relevant guidelines or policy documents. Is there any practical problem involved in including an express right to legal aid in the Bill?

This matter is currently being considered by the Attorney-General.

State Legislation

22	Ludwig	AGD	Please provide copies of the available draft or current State legislation associated with the Bill and its proposed operation. Please also provide a preliminary view as to whether or not that associated State legislation is regarded as satisfactory or whether there are any matters that the Commonwealth would seek amendment or deletion or clarification. If so, please provide details.

Copies of the South Australian and New South Wales Bills were tabled by the Attorney-General's Department during the Committee's hearings last week. Victoria and Queensland Bills are now available and can be accessed on the internet at http://www.dms.dpc.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/fsMainW?OpenFrameset&Frame=Main&Src=http://www.dms.dpc.vic.gov.au/domino\Web_Notes\LDMS\PubPDocs.nsf/$$ViewTemplate%20for%20vwBillsByTitle?OpenForm and http://www.legislation.qld.gov.au/Bills/51PDF/2005/TerrorismPDB05.pdf, respectively.

The Department has conducted a preliminary examination of the State Bills and has concluded that the Bills are consistent with the terms of the COAG agreement of 27 September 2005.

Comparison to UK legislation

23	Ludwig	AGD	In respect of control orders and preventative detention orders – especially new section 104.2(2)(b) and 105.1(b) respectively – are these provisions similar to the UK legislation for making detention orders. In addition, are the summary grounds found in 104.12.(1)(a)(ii) similar to the UK legislation?

Section 104.2(2)(b) provides that a senior AFP member may only seek the Attorney-General's written consent to request an interim control order in relation to a person if the member suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.

The UK legislation does not specifically list training with a terrorist organisation as a grounds for issuing a control order. However, the UK legislation allows the Secretary of State to make a control order if he has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity and considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual (Subsection 2(1))

Involvement in terrorism-related activity is defined very broadly and includes any one or more of the following:

(a) the commission, preparation or instigation of acts of terrorism

(b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so
(c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so
(d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity

and for the purposes of this subsection it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally.

Providing terrorist training could fall under paragraphs (a) or (b) as "involvement in the commission, preparation or instigation of acts of terrorism" or involvement in "conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so".

Subsection 105.1(b) provides that the object of the Division (the Preventative Detention Division) is to allow a person to be taken into custody and detained for a short period of time in order to preserve evidence of, or relating to, a recent terrorist act.

Section 41 of the UK Terrorism Act allows the detention of a person who is reasonably suspected to be a terrorist. A "terrorist" is a person who has committed a terrorism offence or is or has been concerned in the commission, preparation or instigation of acts of terrorism. Terrorism means *the use or threat of action which involves serious violence against a person, serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public, or is designed to seriously interfere with or disrupt an electronic system*. The action must be done with the intention of influencing the government or intimidating the public and for the purpose of advancing a political, religious or ideological cause.

Section 104.12(1)(a)(ii) provides that as soon as practicable after an interim control order is made in relation to a person, and at least 48 hours before the day specified as mentioned in paragraph 104.5(1)(e), an AFP member must serve personally on the person a summary of the grounds on which the order is made.

There is no equivalent provision under the UK Control Order legislation to provide the person with a summary of grounds on which the order is made.

Connection to emergency type situation

30	Brown	AGD	*14 November 2005, Proof Transcript pp.3 and 15* Mr McDonald commented to the effect that powers under the Bill are connected to an emergency. What provisions in the Bill ensure that preventative detention and control orders will only be used in an emergency situation?

The high thresholds for making control orders and preventative detention orders, combined with the limited purposes for which they can be made, operate to ensure such orders can only be made in genuine emergency situations. Under paragraph 104.4(1)(d), a court can not issue a control order unless the court is satisfied on the balance of probabilities the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. Similarly, under paragraph 105.4(4)(b) an issuing authority can not issue

a preventative detention order unless the issuing authority is satisfied that making the order would substantially assist in preventing a terrorist act occurring.

Stop and search powers – Schedule 5

47	Crossin	AGD	**Prescribed security zones.** Will there be a publicly available list of the places that have been designated as prescribed security zones?

A declaration that a place is a "prescribed security zone" is only possible if the Minister considers that a declaration would assist in preventing a terrorist act occurring or in responding to a terrorist act that has occurred (subsection 3UJ(1)). Such a declaration can only have effect for a limited period, and ceases to have effect either when it is revoked by the Minister or at the end of 28 days after it is made, whichever occurs first (subsection 3UJ(3). The Minister is required to revoke a declaration if he or she is satisfied that there is no longer a terrorism threat that justifies the declaration being continued or the declaration is no longer required (subsection 3UJ(4). Accordingly, there would be no need to maintain a list of such places.

However, it is important that persons are advised that a declaration is in force. Accordingly, if a declaration of a Commonwealth place as a prescribed security zone is made or revoked, the Minister must arrange for a statement that identifies the prescribed security zone to be broadcast by a television or radio station so as to be capable of being received within the place, published in the *Gazette,* and published on the Internet (subsection 3UJ(5)). The statement must also include information to the effect that the declaration has been made or revoked as the case may be.

Sedition – Schedule 7

35	Brown	AGD	Please explain precisely how the sedition offences can be said to be drawn from the Gibbs Committee report?

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), is not included in 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 established 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."

These specific recommendations have been incorporated into the revised sedition provisions to be inserted into the Criminal Code.

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 makes the intention of these provisions more clear by making it an offence to urge the assistance of such bodies.

Finally, 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), and is consistent with the penalty in the equivalent new UK offence.

51	Crossin	AGD	**Sedition.** (a) What consultation was undertaken with media and privacy groups regarding the sedition provisions of the Bill? (b) What was the form of consultation? Were meetings held to discuss provisions? If so, when and who with? If not, why not? (c) What was communicated during these consultations? What issues did media and privacy groups raise? (d) What was the outcome of these consultations?

(a) As mentioned in response to question 23 above, there was no formal public exposure of the Bill. This is due of the considerable time constraints under which the Bill was developed. However, as mentioned every effort that was possible to be taken was taken to consult on the content of the Bill.

The Government consulted with Commonwealth and State agencies during the development of the Bill, including the Privacy area of the Attorney-General's Department, and the Privacy Commissioner was briefed about the Bill, including the sedition provisions. No media or privacy groups were formally consulted regarding the proposed amendments to the sedition provisions.

(b) Not applicable.

(c) Not applicable.

(d) Not applicable.

Optical surveillance – Schedule 8

52	Crossin	AGD	**Optical surveillance at airports and board aircraft** (a) Does the Minister have the Code for Optical Surveillance Devices in place at the moment? If not, when is the Minister expected to get the Code in place? (b) What consultations are going to be done with interested stakeholders regarding the Code? If none, why not? Which stakeholders have been asked to participate in consultations? (c) Will the Code be publicly available? If not, why not? (d) Is the Code currently available? If not, when will it become publicly available?

(a) There is currently no Code in place for the use of optical surveillance devices at airports. The Department of Transport and Regional Services will develop the Code once the necessary legislative amendment to the *Aviation Transport Security Act 2004* has been made.

(b) During the development stage of the Code, all interested stakeholders will be consulted, The Department of Transport and Regional Services is responsible for developing the Code and undertaking the consultation process.

(c) The Code will be subordinate legislation to the *Aviation Transport Security Act 2004* and will be made publicly available as part of the legislative process.

(d) The Code is not yet available as it is still in the development stage.

53	Crossin	AGD	(a) Are any additional optical surveillance devices planned for deployment under this code? If so, how many? What is the estimated cost of this? (b) Have any optical additional surveillance devices been procured? Have any been installed. If so, how many have been installed? If not, why not? (c) Will any additional staff be required to monitor the new optical surveillance devices? If so, what is the timeframe for employment of the additional staff? When will those staff be in place?

(a) The Code will not seek to mandate the use of optical surveillance devices at airports. Rather, where aviation industry participants choose to use CCTV, the use of this optical surveillance device will be regulated by the contents of the Code. The Code will authorise and regulate the use of optical surveillance in airports. It is therefore a matter for each aviation industry participant whether they choose to install further optical surveillance devices at airports in accordance with the Code.

(b) This is a matter for each aviation industry participant.

(c) This is a matter for each aviation industry participant.

Financing terrorism and money laundering – Schedules 3 and 9

16	Ludwig	AGD and/or AUSTRAC	Industry has raised various concerns with the proposed amendments contained in Schedule 9 of the Bill. It has been suggested that the simplest solution to these, and which would also involve minimal changes to the Bill, would be to increase the implementation time, by changing the date of commencement of the new sections 17FA and 17FB to "a date to be proclaimed". The date to be proclaimed should be the same as the date of commencement of related provisions in the new AML laws currently being drafted. Please advise whether this matter has been raised with the Department or the Minister and when. If so, please advise whether this would be a workable solution? If not, why not and when is the implementation date for the AML legislation? If yes, why was it seen necessary to include these provisions in Schedule 9 of the Bill?

The Attorney-General has received correspondence from the ABA that deals with the commencement period for Schedule 9 of the AT Bill and officers of the Department have had discussions with the ABA where this issue has also been raised. The letter to the AG was sent and the discussions were held after the posting of a draft of the AT Bill on the internet.

The reason for including Schedule 9 in the AT Bill rather than waiting for the commencement of the new AML/CTF legislation is that we must take these steps now to help prevent the Australian financial system being used for terrorist financing purposes and to safeguard our financial institutions from the possibility of them being barred from sending funds transfers to Europe and the US in the near future. The Department is of the view that a six month period from Royal Assent for the AT Bill amendments that will affect industry (those amendments dealing with international funds transfer instructions and the register of providers of remittance services) is sufficient for industry to prepare for those provisions to come into force.

A decision on the length of implementation period for the new AML/CTF legislation has not been made and will be the subject of discussions with industry during the coming consultation period.

17	Ludwig	AGD and/or AUSTRAC	Please advise why a RIS cannot / need not be undertaken if there was a substantive delay to commencement of the provisions?

Advice was provided by ORR on its RIS requirements for the Anti-Terrorism Bill and the Anti-Money Laundering and Counter-Terrorism Financing Bill (AML CTF Bill) concerning the impacts of the implementation of FATF's Special Recommendation VII in relation to wire transfers. ORR advised that the Government's RIS requirements would be satisfied by a RIS prepared in relation to the AML Bill. The information that would be necessary to meaningfully complete a RIS on wire transfers will become available during the public consultation period following release of the AML CTF Bill and would not have been available for insertion in a RIS on the AT Bill.

18	Ludwig	AGD and/or AUSTRAC	A RIS may not be necessary because of the proposed urgency of this Bill. However, given the present extended proclamation date, has consideration been given to requesting the Productivity Commission to conduct a RIS? If not, why not?

The period during which the proclamation of the wire transfer provisions in the AT Bill will be delayed will overlap with the proposed 4 month period of public consultation following the proposed public release in November 2005 of an exposure draft of the AML CTF Bill. Information that will become available during this consultation period will enable a RIS to be completed on the wire transfer aspects of the AML CTF exposure Bill. That RIS will cover the issues as would be covered by a RIS on the wire transfer aspects of the AT Bill. In these circumstances ORR advised that the Government's RIS requirements in relation to the wire transfers aspects of the AML CTF and AT Bill would be met by completion of a RIS on the wire transfer aspects of the AML CTF Bill.

19	Ludwig	AGD and/or AUSTRAC	When was the decision made to incorporate the terrorist financing legislation (schedule 9) into the Anti-Terrorism Bill (No.2) 2005?

The Government decided to make the amendments to the FTR Act in Schedule 9 of the AT Bill at the same time as the rest of the measures contained in the AT Bill as part of a package of proposed counter-terrorism measures.

20	Ludwig	AGD and/or AUSTRAC	Will the amendments in Schedule 9 of the Bill – and/or the legislation being amended by Schedule 9 – require additional amendment to be complaint with the FATF (40 plus 9) Recommendations? If so, when will these amendments be available?

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

21	Ludwig	AGD and/or AUSTRAC	Will the proposed AML legislation due to be released shortly amend Schedule 9 further? If so, which provisions?

The AML/CTF exposure Bill will not contain provisions amending the FTR Act, like Schedule 9 of the AT Bill. Rather, it will contain proposed legislation intended to replace much of the FTR Act. The AML/CTF exposure Bill will contain similar provisions to those in Schedule 9, and will create further related obligations where this is necessary to ensure greater compliance with relevant FATF Special Recommendations.

24	Ludwig	AGD and/or AUSTRAC	What is the urgency with Schedule 9 when the Bill provides that it has up to 12 months to commence and be implemented?

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.

25	Ludwig	AGD and/or AUSTRAC	Has the Banking and Financing Industry be consulted about the exact provisions contained in the Bill?

Although the banking and finance industry has not been consulted on the exact provisions in the AT Bill, the amendments 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.

26	Ludwig	AGD and/or AUSTRAC	What is the estimated cost impact of the proposed amendments to the FTR Act and the Criminal Code Act 1995?

The Department is of the view that the proposed amendments in Schedule 9 of the AT Bill will have a relatively small cost impact on industry in comparison to AML/CTF reform as a whole. Consultation on the AML/CTF exposure Bill will enable an assessment of the overall costs to industry of AML/CTF reform to occur.

27	Ludwig	AGD and/or AUSTRAC	Is it a requirement of FATF (40 plus 9 recommendations) that Schedule 3 have recklessness as the applicable standard instead of intention?

FATF does not require that the fault element of recklessness apply to terrorist financing offences. The requisite fault element under FATF is intention or knowledge. However, the use of the fault element of recklessness in the proposed new section 103.2 of the Criminal Code is in keeping with the existing offence in section 103.1 that was inserted in 2002 and covers much the same conduct.

28	Ludwig	AGD and/or AUSTRAC	Is it a requirement of FATF (40 plus 9 recommendations) that Schedule 3 have life imprisonment as the penalty provision applicable to both the intentional and reckless standard?

FATF does not specify appropriate penalties for offences. 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.

29	Ludwig	AGD and/or AUSTRAC	In drafting these provisions in Schedule 9, particularly in respect of the inclusion of customer information in outgoing international payment instructions: (a) Does the FATF Recommendations 40 plus 9 require the addition of account numbers to be put on the outgoing payment message? (b) Does providing the name, residential or business address and an identifying number provide sufficient information to meet the FATF 40 plus 9 recommendations? (c) Has the AGD undertaken any analysis or discussion with non-SWIFT proprietary funds transfer system operators? In addition, has an assessment been made as to the cost impact on non-SWIFT proprietary funds transfer system operators? If so, what is the result? If not, why not?

(a) FATF Special Recommendation VII on Terrorist Financing requires the inclusion of an account number with a funds transfer where an account exists.

(b) The provision of name, address and unique reference number will only satisfy FATF Special Recommendation VII on Terrorist Financing in some circumstances, that is, for funds transfers where no account exists. As referred to in response to (a) above, where an account exists, FATF Special Recommendation VII requires the account number to be included with the funds transfer.

(c) In drafting the international funds transfer instruction provisions of Schedule 9, the Department drew on extensive consultations with a broad range of financial institutions as part of the Government's Anti-Money Laundering Review. While it was anticipated that financial institutions would need to make changes to internal systems, including operators of proprietary funds transfer systems, the extent of such changes has been minimised by ensuring that the provisions of Schedule 9 are consistent with current international funds transfer instruction reporting requirements.

39	Crossin	AGD and/or AUSTRAC	Please indicate which special and general recommendations of **FATF** does the Bill meet? Of the measures that are met, which ones are completely met and which ones are partially met?

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.

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 >

40	Crossin	AGD and/or AUSTRAC	Was this legislation presented to **FATF** for a tick or perusal during their tour of Australia? If so, did FATF offer any commentary or suggestions regarding the Bill and, if so, what? If not, why not?

The legislation was not in existence when the FATF conducted its on-site visit in March 2005.

41	Crossin	AGD and/or AUSTRAC	What consultation was done with financial institutions and industry regarding the timeline for implementation of the proposed laws? (a) What was the form of consultation? Were meetings held to discuss the timelines for implementation? If so, when and who with? If not, why not? (b) What was communicated during these consultations? Did participants indicate agreement with the proposed timeline? If not, was an alternative view put forward? (c) What was the outcome of these consultations? Was the timeline altered as a result of consultation?
44	Crossin	AGD and/or AUSTRAC	**Schedule 3, Item 4.** (a) What consultation work was done with financial institutions regarding the development or implementation of this item? (b) What was the form of consultation? (c) Were any meetings held to discuss implementation? If so, please provide dates. If not, why not?
49	Crossin	AGD and/or AUSTRAC	**IFTIs and Banks.** (a) What consultation was done with financial industry regarding the provision of IFTI's to foreign banks? (b) What was the form of consultation? Were meetings held to discuss the timelines for implementation? If so, when and who with? If not, why not? (c) What was communicated during these consultations? What issues did industry raise? (d) What was the outcome of these consultations?
56	Crossin	AGD and/or AUSTRAC	What consultation was undertaken with financial institutions and industry regarding the customer information and funds transfer provisions of the Bill? (a) What was the form of consultation? Were meetings held to discuss provisions? If so, when and who with? If not, why not? (b) What was communicated during these consultations? What issues did industry raise? (c) What was the outcome of these consultations?
57	Crossin	AGD and/or AUSTRAC	Has consultation occurred specifically on the cost to banks and other financial institutions of implementation of the customer information and funds transfer provisions of the Bill? If so, (a) What was the form of consultation? (b) Were meetings held to discuss provisions? If so, when and who with? If not, why not? (c) What was communicated during these consultations? What issues did industry raise? (d) What was the outcome of these consultations? If not, does the Department / Government intend to conduct any consultations on this issue with banks and other financial institutions?

Response to questions 41, 44, 49, 56 and 57 follows:

Given the security classification of the AT Bill consultation on amendments affecting the financial sector was not possible. However extensive consultation took place with the financial sector on the nature of these amendments which were originally proposed for inclusion in an exposure draft of the Anti-Money Laundering and Counter Terrorism Financing Bill (AML CTF Bill). 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 40 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. At the round table meetings the Minister advised in general terms that the AT Bill would include amendments on wire transfers and that the outcomes of the round table meetings would be taken account of in preparation of the AT Bill. The proposed amendments on funds transfer in Schedule 9 in the AT Bill are consistent with the agreements reached with the financial sector on this issue.

54	Crossin	AGD and/or AUSTRAC	**Items 8-9 – Bearer negotiable instruments.** (a) Do bearer negotiable instruments include travellers' cheques, cheques, letters of credit, given that there is no lower bound? (b) What responsibility is there for travellers to declare single travellers cheques, and what information campaigns are going to be run to inform travellers of the new requirements?

(a) The term 'bearer negotiable instrument' is defined in Schedule 9 of the AT Bill to mean a document that is a bill of exchange, cheque, promissory note, traveller's cheque, money order, postal order or similar order or a negotiable instrument not included in the above list.

(b) Under the proposed provisions, a traveller will be required when requested by a customs or police officer, to declare whether the traveller has with them any bearer negotiable instruments, the amount payable under each bearer negotiable instrument and produce each bearer negotiable instrument. This contrasts with the existing obligation to declare cash of $10,000 or more brought into or taken out of Australia, which must be done in all cases and not just upon request. Appropriate information campaigns to inform travellers of the new obligations will be developed during the 12 month implementation period.

55	Crossin	AGD and/or AUSTRAC	**Customer Information and Funds Transfer Information** What requirements are there on a processing bank to confirm that the original bank has performed due diligence on the sender? Is the processing bank required to make requests of the original bank or report suspicious transactions?

The obligations with respect to international funds transfer instructions (IFTIs) in Schedule 9 have been drafted to build on the current IFTI reporting regime in the *Financial Transaction Reports Act 1988* (FTR Act) to ensure minimal impact on business pending further consultation.

Under the FTR Act, processing banks are not required to confirm that the original bank has performed due diligence on the sender. This will not change following

passage of the Anti-Terrorism Bill (No 2) 2005. Under the proposed provisions in Schedule 9, the processing bank will be required to obtain missing customer information from the original bank, but will not be required to verify the level of due diligence performed. Due diligence requirements will be addressed following more extensive consultation with industry as part of the Government's review of Australia's anti-money laundering and counter-terrorist financing system.

58	Crossin	AGD	Will any form of financial relief or cost offsetting be implemented to assist banks and the financial sector with implementation of these sections? If so, please provide details on the extent of the measures available. If not, why not?

The Government will deal with issues associated with implementing the broader legislative framework as part of an extensive consultation process on the AML CTF exposure draft Bill following its public release. Consultation will also enable full consideration of options for staggered implementation and introduction of AML CTF legislation. The consultation period following release of the AML CTF exposure draft Bill will overlap with the period during which commencement of the corresponding AT Bill provisions is delayed.

59	Crossin	AGD and/or AUSTRAC	Has the Department consulted specifically about the privacy concerns relating to the provision of name, address and account numbers that will be transferred in IFTI's? If so, (a) What was the form of consultation? Were meetings held to discuss provisions? If so, when and who with? If not, why not? (b) What was communicated during these consultations? What issues did industry raise? (c) What was the outcome of these consultations? If not, does the Department / Government intend to conduct any consultations on this issue with banks and other financial institutions?

Privacy issues were canvassed in general terms at the round table meetings with the financial sector (see answer to question 41) but it is expected that detailed discussion of this issue will take place during the consultation period following release of the AML CTF exposure draft Bill. We understand from AUSTRAC that some financial institutions already include account information in IFTI reports that they are already obliged to give to AUSTRAC under existing provisions of the *Financial Transaction Reports Act 1988* (FTR Act). If that information is included in the reports it is very likely that it is also being included in the IFTIs themselves.

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.

60	Crossin	AGD and/or AUSTRAC	**Hawalas and Hundis** Please advise: (a) How the proposed legislation will affect the informal underground banking system? (b) In what way is the proposed legislation targeted towards the underground banking system? (c) If it is not, is any additional legislation required to extend oversight of the Act to the informal underground banking system as well as traditional banking methods?

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 (except for financial institutions or real estate agents acting in the ordinary course of real estate business), 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 Hawaladars, 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.

Other Matters

Fault Elements

37	Brown	AGD	*14 November 2005, Proof Transcript pp 3 and 16* Mr McDonald talked about provisions in the Crimes Act and the Criminal Code by which an intention requirement was automatically imported into offences. Please clarify whether recklessness is the requisite intention for most offences under the Bill or is there an additional layer of intent or mens rea that the committee should understand?

Under Division 5 of the Criminal Code a "fault element" (or strict or absolute liability) attaches to each separate "physical element" of an offence in Commonwealth legislation, including those offences created by the Bill. If the legislation does not specify a fault element for a particular physical element, the Criminal Code provides that certain fault elements apply automatically. Which fault element applies is determined by the nature of the physical element concerned – that is, whether the physical element is "conduct", "a circumstance", or "a result".

The Criminal Code provides for four types of fault: intention, knowledge, recklessness and negligence. The meaning of each of these fault elements is provided in Division 5 of the Criminal Code.

Where the physical element is conduct, the fault element if no other is specified is "intention" (subsection 5.6(1)). Where the physical element is a circumstance or result, the fault element if no other is specified is "recklessness" (subsection 5.6(2)). It will generally be easier to identify the relevant fault elements applicable to an offence if the different physical elements are separated into paragraphs. Accordingly, where possible, the offences in the Bill have been drafted in the modern paragraphing style. In such cases, it is not necessary for the legislation to identify the applicable fault element as the default fault element provided by the Criminal Code applies. However, where grammatical considerations make this difficult, to make clear which fault elements apply, it is common practice to specify the portion of an offence to which a particular fault element applies.

The proposed offence in subsection 105.41(1) is a good example of this approach to separating elements of an offence. It provides as follows.

105.41 Disclosure offences

Person being detained

(1) A person (the ***subject***) commits an offence if:
  (a) the subject is being detained under a preventative detention order; and
  (b) the subject discloses to another person:
    (i) the fact that a preventative detention order has been made in relation to the subject; or
    (ii) the fact that the subject is being detained; or
    (iii) the period for which the subject is being detained; and
  (c) the disclosure occurs while the subject is being detained under the order; and
  (d) the disclosure is not one that the subject is entitled to make under section 105.36, 105.37 or 105.39.

Penalty: Imprisonment for 5 years.

Paragraphs (a), (c), and (d) describe circumstances that must be present for the offence to occur. The fault element of recklessness would apply to each of those elements. Paragraph (b) describes the conduct. That means the prosecution must prove beyond reasonable doubt that the person intentionally disclosed the information in either subparagraph 105.41(1)(b)(i), (ii) or (iii).

As with the existing offences in the Criminal Code, the offences in the Bill have been drafted with careful attention to these principles.

Need for the legislation

38	Brown	AGD	Please outline why existing legislation, and in particular, existing criminal law, needs to be expanded by way of preventative detention orders, control orders, extended police stop, search and seizure powers, and extended notice to produce and information gathering powers for the AFP?

These amendments are the result of a comprehensive review of existing federal legislation that criminalises terrorist activity and confers powers on law enforcement and intelligence agencies to effectively prevent and investigate terrorism that will improve the existing strong federal regime of offences and powers targeting terrorist acts and terrorist organisations. The measures complement existing law enforcement powers.

Existing Commonwealth criminal law provisions do not allow restrictions of the nature of control orders unless the person has been arrested and charged with an offence. This can occur where there is a reasonable belief that the person has committed an offence and a magistrate has accepted that there is justification for imposing bail conditions on the person. For protective measures, as is the case with apprehended violence orders, the control order procedure allows the imposition of restrictions on the basis of reasonable suspicion, which is a lower requirement of proof. This will enable closer monitoring and the minimisation of the risk of a terrorist attack.

Similarly, preventative detention can also be imposed on the basis of a lower standard of proof. Arrest and detention for questioning for the purposes of a criminal investigation is dependent on there being questions that can usefully be put to the person, and is only justifiable for a shorter period because the purposes is for the gathering of reliable evidence.

The new police stop, question and search powers are related to the investigation of terrorism offences and the prevention of terrorism. These provisions will complement existing stop and search powers, and will dovetail with equivalent State and Territory stop, question and search powers, but will provide a common approach for police operating in Commonwealth places throughout Australia.

The new notice to produce powers will permit police to request information from organisations for the purposes of investigating terrorism and other serious offences that the AFP is able to lawful obtain under the *Privacy Act 1988* for the investigation of offences, but that some organisations have, in the past, been reluctant to provide..

These powers enable the AFP to provide a reassurances to those the subject to a notice to produce that they are entitled to provide the documents.

Proscribed organisations

48	Crossin	AGD	**Proscribed organisations.** What is the current list of proscribed organisations?

- Abu Sayyaf Group - Listed 14 November 2002 and re-listed 5 November 2004
- Al Qa'ida - Listed 21 October 2002 and re-listed 1 September 2004
- al-Zaqawi Network - Listed 26 February 2005
- Ansar Al-Islam - Listed 27 March 2003 and re-listed 23 March 2005
- Armed Islamic Group - Listed 14 November 2002 and re-listed 5 November 2004
- Asbat al-Ansar - Listed 11 April 2003 and re-listed 11 April 2005
- Egyptian Islamic Jihad - Listed 11 April 2003 and re-listed 11 April 2005
- Hamas's Izz al-Din al-Qassam Brigades - Listed in Australia 9 November 2003, re-listed 5 June 2005
- Hizballah External Security Organisation - Listed 5 June 2003, re-listed 5 June 2005
- Islamic Army of Aden - Listed 11 April 2003 and re-listed 11 April 2005
- Islamic Movement of Uzbekistan - Listed 11 April 2003 and re-listed 11 April 2005
- Jaish-i-Mohammed - Listed 11 April 2003 and re-listed 11 April 2005
- Jamiat ul-Ansar (formerly known as Harakat Ul-Mujahideen) - Listed 14 November 2002 and re-listed 5 November 2004
- Jemaah Islamiyah - Listed 27 October 2002 and re-listed 1 September 2004
- Lashkar I Jhangvi - Listed 11 April 2003 and re-listed 11 April 2005
- Lashkar-e-Tayyiba - Listed 9 November 2003, re-listed 5 June 2005
- Palestinian Islamic Jihad - Listed 3 May 2004, re-listed 5 June 2005
- Salafist Group for Call and Combat - Listed 14 November 2002 and re-listed 5 November 2004

Consultation – Exposure Draft

31	Brown	AGD	*14 November 2005, Proof Transcript* p. 4. Mr Gray told the Committee that an anti-money laundering /counter terrorist financing bill would shortly be released as an *exposure* draft? Why wasn't the Bill now before the Committee released by the Commonwealth as an exposure draft for public comment and consultation?

Within understandable time constraints, recognising that it was highly desirable to have legislation in place before the summer holiday period and that the Bill had to be developed in consultation with each State and Territory, every effort that was possible to be taken was taken to consult on the content of the Bill. However, these time constraints did not allow for a formal public exposure draft of the Bill.

The Prime Minister's announcement about the proposals on 8 September 2005 included a summary of the main measures to be included in the legislation. Similarly, the COAG communiqué of 27 September 2005 contained quite a deal of detail, particularly in relation to control orders and preventative detention orders. The Prime Minister and the Attorney-General have been continuously engaged in the public debate about the proposals ever since they were first unveiled. In addition, every effort has been made to explain the proposals by the Attorney-General in response to the very large volume of correspondence that has been received about the proposed legislation since that announcement.

These steps together with the Senate Committee's consideration of the Bill constitute a significant opportunity for public debate on the content of the proposed laws. Indeed the coverage of the content of the proposed laws in the media has been such that consultation on this legislation probably exceeds that which has occurred with many criminal law and security measures in the past.

International Obligations

32	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.

This question was answered in the response to questions on notice from Monday 14 November 2005 – see **Attachment A**.