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Security and Critical
Infrastructure Division

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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005 – Attorney-General's Department Submission No. 3

Officers from the Attorney-General's Department appeared before the Committee on Monday 14 and Friday 18 November 2005. During the course of questioning on 18 November, Senators asked officers to take further questions on notice.

To assist the Committee in its inquiry into the Bill, the Attorney-General's Department provides the attached responses in relation to the further questions on notice.

The action officers for this matter are Karen Bishop who can be contacted on 02 6250 6926 and Kirsten Kobus who can be contacted on 02 6250 5433.

Yours sincerely

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Questions taken on notice
18 Nov 2005

Senate Legal and Constitutional Legislation Committee
Anti-Terrorism Bill (No 2) 2005

QoN No.	Senator	Witness	Hansard Page	Question
1	Stott-Despoja	McDonald	3	**Senator STOTT DESPOJA**—Mr McDonald, I am trying to work out if you owe me a document. Looking at the *Hansard* from Monday—the exchange we had in relation to these matters and the advice from the Office of International Law—I am wondering if you are going to give us any written advice. **Mr McDonald**—That is entirely up to you. If you want to work from what I have just given you, that is fine. If you would like us to reduce our position on this into writing, we can do that too in our supplementary submission. **Senator STOTT DESPOJA**—I am not talking so much about advice that you can give the committee—and I note in your opening comments on Monday that you undertook to do that, and to all intents and purposes you have done that now—but wondering if there is any chance that this committee can see the advice from the Office of International Law that was provided to government in ensuring that we complied with the international conventions. **Mr McDonald**—I see. Do you mean something that was akin to the constitutional law advice? **Senator STOTT DESPOJA**—Yes. **Mr McDonald**—I think the policy on that is much the same as with the constitutional law advice. However, you will find, as did the PJC on ASIO, ASIS and DSD when we did our written submission to them, that we have provided pretty comprehensive assistance to you in terms of touching on the issues. **Senator STOTT DESPOJA**—Unfortunately, you will not be providing that advice to me because there are no cross-party members represented on that Parliamentary Joint Committee, but I want to know what that advice is. Is it secret? **Mr McDonald**—What I am getting at is that I will provide to this committee some written material which should assist you. It will not consist of a copy of the advice provided to government, but it will be some written material which can assist you and which reflects some of the sorts of things that I was talking about just a few minutes ago.

Please see response to Human Rights Obligations at pages 1 to 6 of Attachment A to Attorney-General's Department Submission Number 2 of 22 November 2005.

2	**Nettle**	**McDonald**	**6**	**Senator NETTLE**—Has the government received advice that the definition the government uses for 'national security' complies with the terminology that the ICCPR uses? **Mr McDonald**—From the context of my discussions with the Office of International Law, the answer is yes. However, what I will do in our written submission is give you an exact answer. **Senator NETTLE**—Can I check: an exact answer to which question? **Mr McDonald**—Your question was: does the government's definition of 'national security' line up with the references to security or threat to the nation? **Senator NETTLE**—'An emergency which threatens the life of the nation'. **Mr McDonald**—Based on the context of my discussions with the Office of International Law, I think the answer to that is absolutely yes. But I have not specifically asked them that question, so what I will do is to provide you with an exact answer.

A number of rights under the International Covenant on Civil and Political Rights may be restricted on the basis of national security. The Government is satisfied that, to the extent that any rights are restricted by the Bill, their restriction is justified on the basis of national security and, accordingly, is permitted under the ICCPR. The terminology "emergency which threatens the life of the nation" is contained in article 4 of the ICCPR, which allows States to derogate from their ICCPR obligations in certain circumstances. The Government has not derogated from its ICCPR obligations. It is not necessary for there to exist an "emergency which threatens the life of the nation" in order to justify the restriction of certain ICCPR rights on the basis of national security. The United Nations Human Rights Committee has stated that: "Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant".

3	**Nettle**	**McDonald**	**6**	**Senator NETTLE**—Have the government notified the United Nations that they intend to derogate from the ICCPR? The terminology we are talking about is the justification you can provide for derogation from our responsibilities. Have the government notified the UN that that Australia intends to derogate from the ICCPR? **Mr McDonald**—My understanding is that we do not need to. I can talk to the Office of International Law about whether there is anything I need to know about there, but I think the answer is pretty clearly the view that we do not need to. **Senator NETTLE**—I asked the question to begin with about whether or not the government's definition of 'national security' lined up because I listened to your opening statement and you seemed to be using the term 'national security' to justify what is in the bill. That is why— **Mr McDonald**—I am very happy to do that. **Senator NETTLE**—I ask that point. It would be helpful to the committee to get an answer about whether or not the government has notified the UN that they intend to derogate from the ICCPR on the basis of the definition that you have about what an emergency threatening the life of the nation is in Australia. **Mr McDonald**—What I am saying there is that I think we are talking about the same thing and therefore there is nothing for us to be derogating from the ICCPR about. But, as with all things, I will be very careful and ensure that you have a comprehensive written response on that point. But my understanding is that, when we are talking about national security, we are talking about the same thing.

The Government is not derogating from any obligations under the ICCPR and so has not notified the United Nations to that effect. The distinction between the restriction of rights on the basis of national security and the derogation from obligations in time of public emergency that threatens the life of the nation is explained more fully in the answer to question 2.

4	**Crossin**	**McDonald**	**10**	**Senator CROSSIN**—On 14 October Jon Stanhope posted on his web site a draft bill he had been sent. What version of the bill did he post on his web site? Was it about version 21 or 22? **Mr McDonald**—It was interesting. The Prime Minister wrote to them around 7 October with a draft of the bill— **Senator CROSSIN**—Do you know what number version that was? **Mr McDonald**—I cannot remember what number. I might just say that a lot of silliness— **Senator CROSSIN**—Can you take that on notice for me? **Mr McDonald**—I can take that on notice, but it is not really that important. If you change one word in the bill, it becomes another version. **Senator CROSSIN**—It is important for me. I am trying to track something here. So can you tell me what version of the bill was sent to the states and territories when they first got it? I am assuming it was either immediately before or the day of 14 October. **Mr McDonald**—No, it was about a week earlier. He had it for over a week before he did that. **Senator CROSSIN**—I would be interested to know what version it was— **Mr McDonald**—In fact, the version— **Senator CROSSIN**—or what number the version was that you sent him. **Mr McDonald**—Yes, okay. It is pretty easy though—it has a little number on the bottom of it.

The version that was placed on the website by Jon Stanhope was version 28 of 7 October 2005. This version was sent to States and Territories on 7 October 2005.

5	**Brandis**	**McDonald**	**22**	**Senator BRANDIS**—Can you reassure me, Mr McDonald, that there is a consequential amendment to the existing section 100.1(3)(a) which excludes advocacy from what may be capable of being a terrorist act, so as to accommodate the substantive change proposed by item 9? **Mr McDonald**—You are referring to how you cannot show— **Senator BRANDIS**—The definition of a terrorist act means it has to be within (2) but outside (3), but (3) includes 'advocacy'. So that scheme is not going to work with the proposed new amendment unless there is a consequential amendment— **Mr McDonald**—I see what you are getting at. **Senator BRANDIS**—to section 100.1(3)(a) of the Criminal Code. Is that done by this bill? **Mr McDonald**—The amendment that you suggested may require consequentials, so— **Senator BRANDIS**—No, but that is not arising out of my proposed amendment; this is arising out of a whole scheme of item 9 in schedule 1, the proposed definition of 'advocates'. Do you see what I mean? You cannot commit a terrorist act unless you do one of the things in subsection (2), as long as they are not also one of the things in subsection (3). And one of the things in subsection (3) which eliminates it being classified as a terrorist act is advocacy. So is there a consequential amendment? **Mr McDonald**—No. **Senator BRANDIS**—Well, there should be. **Mr McDonald**—The exemption of advocacy there only relates to non-violent advocacy. What we are talking about here is terrorist acts. All that does is take out the non-violent stuff. We had this discussion before. **Senator BRANDIS**—I don't think that is right, Mr McDonald. **CHAIR**—Mr McDonald, Senator Brandis has an extant concern on this matter. Would you mind taking that on notice and coming back to the committee on it? **Mr McDonald**—Yes. **CHAIR**—Thank you. **Senator BRANDIS**—If it is not a controversial issue, I would have thought that, out of abundant caution, 100.1(3)(a) should be amended with words like 'provided that it is not otherwise governed by the new clause'. **CHAIR**—Or, if not, would you come back to us with why not? **Mr McDonald**—Okay.

The definition of "terrorist act" at section 100.1 of the Criminal Code, excludes the non-violent actions of advocacy, protest, dissent or industrial action from being a terrorist act. In order for advocacy to be excluded it must not be intended:

(i) to cause serious harm that is physical harm to a person; or
(ii) to cause a person's death; or
(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

That definition is relevant to the offences that include, as an element, a "terrorist act".

Proposed item 9 introduces a definition of "advocates" for the purposes of Division 102 which relates to terrorist organisations. An organisation may be listed as a terrorist organisation if it advocates the doing of a terrorist act. In this sense, advocating relates to the violent aspects of the definition of terrorist act. If the advocacy is not intended to cause harm, death, endanger life of create a serious risk to public health and safety then it will not be advocating a terrorist act.

The definition of "advocates" is limited in its application to the process of listing terrorist organisations. It is not relevant to the definition of "terrorist act" for the purposes of the offences in the Criminal Code, and accordingly, it is not necessary to amend paragraph 100.1.(3)(a).

6	**Ludwig**	**McDonald/Gray**	**26**	**Senator LUDWIG**—There is one matter. I am still following up on that issue about penalties. If you go to the explanatory memoranda, it says: The offence in section 102.6 of the *Criminal Code*, dealing with providing funds … or receiving funds from … or on behalf of a terrorist organisation, clearly comes within the ordinary meaning of 'financing of terrorism offence'. That is where it is from. It continues: Section 102.6 should have originally been included in this definition and this amendment corrects this oversight. When you look at 102.6(1) and 102.6(2), they deal with penalties of 25 years and a maximum penalty of 15 years. And yet 103.2 in the explanatory memoranda provides for life; it seems to be the justification for why you have got life. This has obviously been raised in submissions as well, but it is inconsistent with that earlier provision, which seems to split the difference between intention and recklessness. It also provides, in the case of intention, 25 years rather than life, while 103.1 has life but it then splits it with recklessness of 15 years. It seems to be that for the financing of terrorism there are penalties ranging from 15 years for recklessness, life for recklessness and similarly 25 years or life for intention, depending on the standard. They might all be different. To save time I am happy for you to take it on notice, but can you at least provide a simple justification for why there is a requirement to have those different penalties provided to those standards? Maybe you were not seeking coherency? **Mr Gray**—I am not sure that it would be possible to provide an answer to that. Life imprisonment under 103.1 is where the money is going directly to a terrorist act, and 102.6 has an organisation interposed, so you could justify a difference in penalty level. But the second part of your question is: why are there differential penalties under 102.6 and not under 103.1? I cannot see any logical reason why there would be that difference. **Mr McDonald**—With organisational offences, clearly the awareness of the organisation comes into it a bit. That is actually quite a big factor, which is probably why historically it has become a bigger focus in the context of the organisation. **Mr Gray**—I am sure that is the reason. **Mr McDonald**—They have been there for a while anyway. **Mr Gray**—I am sure that is why imprisonment for life appears in 103.1, but I really could not offer an answer off the top of my head as to why there is not the differential in 103.1. **CHAIR**—Would you like that to be taken on notice, Senator Ludwig? **Senator LUDWIG**—I did suggest they could take it on notice. **Mr Gray**—I am not sure we will find the answer. **CHAIR**—Would you do that, because it is best to try and explore it properly by taking it on notice and responding to the committee one way or the other.

Existing section 103.1 of the Criminal Code, with which proposed section 103.2 is consistent in terms of the applicable fault element and penalty, and section 102.6 were inserted by separate Acts.

In each of the offences in subsections 102.6(1) and 106.2(2) and in subsections 103.1(1) and 103.2(1), the prosecution is required to prove **intention** in relation to the relevant conduct. That means the prosecution must prove beyond reasonable doubt that the person **intentionally** made funds available or collected funds.

The offences is subsections 102.6(1) and 106.2(2) deal with funding in relation to **terrorist organisations**, while the offences in subsections 103.1(2) and 103.2(1) deal with funding a **terrorist act**. Because of the higher culpability of funding a **terrorist act** itself as opposed to a **terrorist organisation,** as well as the sensitivities associated with offences that are related to terrorist organisations as opposed to terrorist acts, it is appropriate that a higher penalty of **life imprisonment** attach to the offences in subsections 103.1(2) and 103.2(1) than to the offences in subsections 102.6(1) and 106.2(2).

In the offences in subsection 102.6(1), the prosecution must prove that the person **knows** the relevant organisation is a terrorist organisation, while in subsection 102.6(2), the prosecution must prove the slightly lower standard that the person was **reckless** as to the fact that the relevant organisation is a terrorist organisation. The higher penalty in subsection 102.6(1) (25 years imprisonment) reflects the higher fault threshold than applies to the offences in subsection 102.6(2) (which carries a penalty of 15 years imprisonment). Because of the sensitivities associated with funding terrorist organisations, it is more critical that a higher level of fault is proved to justify the penalties. In the offences in subsections 103.1(2) and 103.2(1), the prosecution must prove that the person was **reckless** as to the fact that the funds would be **used to facilitate or engage in a terrorist act**. Life imprisonment is justified on the basis of the culpability associated with funding terrorist acts, and it is not considered necessary to prove that the person **knew** the funds would be used in relation to the terrorist act, provided the person **was aware of a substantial risk,** and having regard to the circumstances, **it was unjustifiable for the person to take that risk** (section 5.4 of the Criminal Code).

7	**Brandis Ludwig**	**McDonald**	**31**	**Senator BRANDIS** Secondly, in relation to the provision concerning control orders that the person subject to the order is to be furnished with a statement of grounds—and you will recall we discussed this earlier in another place as well—it would not do violence to the scheme of the bill, would it, to also have the person furnished with the material on the basis on which the order was made—in other words, the evidentiary material—so long as the appropriate excisions in relation to national security matters were made? I do not understand it to be controversial with anyone respectable that those excisions should be made. We could do that, couldn't we? **Mr McDonald**—Can I take that on notice? I would need to confer with people. **Senator BRANDIS**—Thank you. In doing so, would you particularly have regard to what I thought was Mr Walker's helpful suggestion that the criteria listed in the AD(JR) Act in relation to AAT decisions might be imported into the bill? **Mr McDonald**—I will review that. **Senator LUDWIG**—On that point, does that include reasons or details of the substance of the information? Or, if you say no to Senator Brandis in that sense, can you look at the iterations of that below that? **Mr McDonald—**I think you are starting to drag us into an AD(JR) type thing. But let me take all of that on notice and I will have a look at it. I found that part of Mr Walker's presentation very interesting.
8	**Brandis**	**McDonald**	**31**	**Senator BRANDIS** Thirdly, in relation to preventative detention orders, help me if I am wrong about this, but I do not think the bill has a similar requirement that the grounds—and, by extension, a statement of non security-sensitive evidentiary material—is required to be given in relation to preventative detention orders. Am I wrong about that? If I am, can you point me to where we say that? **Mr McDonald—**It is proposed section 105.3(2). There is a mention of the NSI there. **Senator BRANDIS**—Okay. **Mr McDonald—**You have seen too many different drafts! **Senator BRANDIS**—I know. I dream about this bill. Can the same consideration be made of the statement of the non security-sensitive evidentiary material in relation to preventative detention orders as well as control orders? **Mr McDonald**—I will take that on notice as well.
9	**Ludwig**	**McDonald**	**32**	**Senator LUDWIG—**I think that area is section 105.28(2)(a) where, under the preventative detention order, there is a summary of grounds that have to be provided. I am interested in the same issue that Senator Brandis raised. I want to know, if you were not going to accept Senator Brandis's suggestion, whether or not it could include the reasons or not simply the facts themselves. **Mr McDonald—**Let me take that on board. I think I said earlier with regard to the other one that— **Senator LUDWIG—**I take it that your answer is the same—that is, that you will have a look at it. **Mr McDonald—**Yes.

Mr Walker suggested that the AD(JR) Act requirements for a statement of reasons be provided in this Bill. Section 13 of the AD(JR) Act provides that a decision maker may be requested furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. The summary of grounds is designed to ensure the detained person is provided with a reason for the detention. The ADJR Act also envisages situations where providing reasons would not be appropriate and decisions under several pieces of legislation are excluded at Schedule 2 of that Act. For reasons of national or operational security which could place informants at risk, and could jeopardise the continuation of investigations, it would not be appropriate to require a full statement of reasons in relation to control orders and preventative detention orders.

In relation to providing the basis on which the order was made to the person detained or the subject of a control order, please see response to question 14 at page 15 of Attachment A and response to question 9 at page 7 of Attachment B to Attorney-General's Department Submission Number 2 of 22 November 2005.

10	**Payne**	**McDonald**	**33**	**CHAIR**—In relation to some aspects of preventative detention, in proposed item 105.12, subclause (2), the issuing authority can consider afresh the merits of making the order and so on, but as I understand it the bill does not have any capacity for the detained person or that person's lawyer to provide any information for the authority to consider at that point in time. I think they can make representations or provide further information to the nominated AFP member who is overseeing the order, but the AFP member is then under no obligation to present that information to the issuing authority. **Mr McDonald**—This question was asked by one of the states, and we intended to put something in the second reading speech to make it clear that there is no restriction on that. I am not 100 per cent sure. I will have to check the second reading speech just to be careful about that. However, there are obligations on the police to present any material that is put forward. **CHAIR**—Where is that obligation? In 105.19(8) (d), (e) and (f), the AFP member can receive representations, but there does not seem to be a subsequent obligation on the AFP member to pass those representations on, particularly in relation to 105.12. **Mr McDonald**—I am just looking at 105.11, which is where I expect to find this. I will go through it. The application— **CHAIR**—Do you want to take it on notice? **Mr McDonald**—I will take it on notice. There is all sorts of material there. There is an obligation on the AFP in here, as I recall, to put up stuff that is not only in favour of their case but also against their case. We will take it on notice, but it is there, I can assure you.

In the second reading speech, which is an explanatory statement for the purposes of section 15AB of the *Acts Interpretation Act*, the Attorney-General reinforced the point that the intention of the Bill is to allow further information to be put before the issuing authority at the time the preventative detention order is continued.

Section 105.17 obliges the police detaining the person to apply for revocation of the order if satisfied that the grounds cease to exist. The same is also true of prohibited contact orders. A preventative detention order includes interim and continuing orders (see item 18 of Schedule 4).

Section 105.4(7) provides that an issuing authority may refuse to make an order unless the AFP provides further information that is requested. This can be used if the issuing officer is made aware of information raised by the person's legal representative. The legal representative is entitled to have contact with the person under section 105.37.

11	**Crossin**	**McDonald**	**34**	**Senator CROSSIN**—You have clarified for me the term 'as soon as practical', but there are just a couple of things that I want to address. Regarding the control orders in the bill, the issuing authority does not seem to have the power to amend the summary of grounds that is provided to the detainee. Should they have that power? **Mr McDonald**—I heard that suggestion. I think there could be some sense in clarifying that. I thought that was something that could be— **Senator CROSSIN**—Otherwise, if they do not have that power, I assume that the preventive detention order would be quashed. You would have to start again if you do not have the power to amend it. **Mr McDonald**—I heard that comment and it sounded like a good idea. It is something that I would like to take away and think about. I will get back to you quickly. It sounded like a good idea, because it is a bit unclear. The summary was something that was negotiated late in the piece. **Senator CROSSIN**—The other thing I wanted to ask about is that there is an implied common law obligation for the issuing authority to give the subject an opportunity to be heard before making the decision. Is that correct? **Mr McDonald**—That is the creation of statute. **Senator CROSSIN**—I wonder whether it should really be expressed in the bill in more straightforward terms. **Mr McDonald**—Let me think about that one, too. It is getting late in the day and I am taking more and more on notice.

The Bill does not provide for an issuing authority to settle the summary of grounds for control orders. In the case of an interim control order, the summary of grounds must be served on the person as soon as practicable and at least 48 hours before the date set for confirmation of that interim order by the Court (section 104.12). Likewise, the person who issues the preventative detention order does not settle the summary (section 105.32).

12	**Brandis**	**McDonald**	**38**	**Senator BRANDIS**—Give me an example of conduct which the new sedition laws would catch which would not be caught by either or more of the existing sedition laws, the existing treason laws, the existing law of incitement of violence and the new proposed law in relation to praising terrorism. **Mr McDonald**—First of all, on the new provisions about praise— **Senator BRANDIS**—No. Give me an example of conduct that would not be caught. **CHAIR**—Let Mr McDonald get to the point. **Mr McDonald**—First of all, the praise stuff is completely out of the picture because that is about organisational conduct. **Senator BRANDIS**—Let me expand my question to include if the praise were not limited to organisations but extended to individuals, which was Senator Mason's suggestion. Give me an example of some conduct that would be caught by the new sedition laws but would not be caught by any of the other laws, including praise laws— **CHAIR**—Okay, he has got the drift. **Mr McDonald**—It is something along the lines that all people of a particular racial group should be kicked out of Australia—something like that. **Senator BRANDIS**—The Racial Discrimination Act would catch that, I suppose. **Mr McDonald**—I love these hypotheticals. **Senator BRANDIS**—It is not a hypothetical; in fact, it is the opposite. You are being asked for a specific example of conduct. I understand that it is not you, but the government is saying, 'We need these laws to deal with certain conduct.' That is fair enough. That argument cannot logically be made unless it is a given that the existing laws or other proposed laws elsewhere in the bill do not deal with that conduct. **Mr McDonald**—How about I deal with it in this way: I will prepare some examples for you. **Senator BRANDIS**—That would be good. **Mr McDonald**—I will not comment any more, but I will certainly be reviewing some of the matters that I have looked at before. **CHAIR**—The committee is really seeking some clarity on those elements which Senator Brandis and Senator Mason set out. I think it is fair to say we do not think we have received it and come to that point yet.

Please see the covering letter to Attorney-General's Department Submission Number 2 of 22 November 2005.

13	**Brandis**	**McDonald**	**41**	**Senator BRANDIS**—Mr McDonald, I am not persuaded that schedule 7 is necessary, so what I am about to say is because I have reserved my position in relation to that. Let us say the bill were to be enacted with schedule 7. I take you to page 30 of the Human Rights and Equal Opportunity Commission's principal submission. At the foot of page 30 is recommendation 21, which offers some proposed further amendments to strengthen the defences to the proposed expanded offence of sedition, including expanding the defence in relation to encouragement of the discussion on matters of public interest, which is in recommendation 21(a), and broadening the defence in relation to performance, exhibition and artistic work, which is in recommendation 21(b). You might want to take this on notice: were those proposals to be adopted and the defences expanded along those lines, would it do violence to the legislative scheme? It does not seem to me as though it would, but it might settle the concerns of a lot of people. **Mr McDonald**—We will take that on notice. Providing that this attempt to encourage discussion on matters of public interest does not get stretched out to enabling people to think they can— **Senator BRANDIS**—Well— **Mr McDonald**—Providing 80.3(2) is left in place, which provides that the court take into account— **Senator BRANDIS**—Nobody is suggesting that it not be left in place, so that is a given. **Mr McDonald**—Let us take it on board. Personally I think that the artistic work one is unnecessary. These are things that— **Senator BRANDIS**—You take that on notice—the question being: would it do violence—

Please see pages 3 to 4 of the covering letter for the Attorney-General's Department Submission Number 2 of 22 November 2005.

14	**Nettle**	**McDonald**	**43**	**Senator NETTLE**—We had an example yesterday about the comments made by ACTU Secretary Greg Combet that he would not pay a $33,000 for asking people to be treated fairly and will be asking other union leaders to do the same. The suggestion from the witness yesterday was that that may fall within the seditious intention part of this legislation by urging a person: ... to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth; **Mr McDonald**—First of all, the seditious intention definition relates to declaring organisations to be unlawful associations. There are some offences that apply to unlawful associations. An organisation declared to be an unlawful association has to be approved by the Federal Court. There is no declared unlawful association that I am aware of and I do not think it has been used for a long time; I am not even aware of when it has been used. I will take your question on notice, but that provision is a provision which, if you removed schedule 7, would continue to be on the statute book. Removing this from the bill would mean that the existing provision would stay there because it would not be repealed. If someone could, in theory, be caught under part 2A under this or what was there before, it would be much the same result, that is all I can say. All this stuff about this definition re-enlivening this law is total bunkum. It is what they talk about in New South Wales because they have all these old offences in their Crimes Act. On one count we did there was something like 150 theft and fraud offences in the New South Wales legislation. So they often talk about dead law in New South Wales because they have so much of it. The reality is that anyone can be prosecuted under one of these old laws. That is why they need clean up their Crimes Act and do what we have done progressively with ours. **Senator NETTLE**—I would appreciate it if you could take that on notice. It did not relate to bits being removed or not being removed; it related to whether or not it was covered. **Mr McDonald**—I probably should have said that it is not really our role in Attorney-General's to comment on specific cases. My answer might be, 'I can't really comment on a specific case.' **CHAIR**—But if you would just explore that.

Please see page 4 of the covering letter for the Attorney-General's Department Submission Number 2 of 22 November 2005.

15	**Nettle**	**McDonald**	**44**	**Senator NETTLE**—Verso Books in Britain have just announced that they will publish the collected writings and statements of Osama bin Laden and that they will be distributed in bookstores in Australia by Macmillan in December. The AFP said yesterday that sedition laws were in place to stop writings that promote violent jihad. Is that an example of something that would fall under the sedition laws? **Mr McDonald**—The existing ones or the new ones? **Senator NETTLE**—Either. **Mr McDonald**—I think the answer has to be the same: I would have to look at the facts. It is not really my role to say whether or not people are committing offences under the existing law. But what I will try and do is to give you a helpful answer. I cannot go around and say that people have committed offences. It is really for the police to decide whether they should be charged, and then it is for the DPP and so on. So I have to be a little bit careful about that. I will try and give you a helpful answer. **CHAIR**—Thanks. We cannot ask any more than that.

Mr Lawler of the AFP stated that "*The committee would recall media coverage this year of publications inciting violence for sale in Australia which highlighted that there is currently no clear offence to deal with this situation. The proposal in the Bill for modernising the sedition offences is intended to address this type of situation."*

The Attorney-General's Department submission Number 2 address in detail the sedition provisions. Whether a person is prosecuted or convicted with a Commonwealth offence is always a matter for the Commonwealth Director of Public Prosecutions and the courts to decide

16	**Nettle**	**McDonald**	**44**	**Senator NETTLE**—Yes. I do not understand exactly how it is being used in the United Kingdom, but my understanding is that they are using terrorism powers to stop and search. It appears that, as with the section in here, there are offences that follow on from that. Those terrorism powers in the UK are being used to stop and search protesters. **Mr McDonald**—I see. **Senator NETTLE**—My question is about whether that is also provided for in this legislation. **Mr McDonald**—Just protests? **Senator NETTLE**—Yes. That is what they are stopping and searching in the UK under terrorism powers. **CHAIR**—Would you like to take that on notice, Mr McDonald? **Mr McDonald**—I do not think that is covered by this. I will absolutely double-check for you, but I do not think it is covered by this. **Senator NETTLE**—Maybe I can ask the same question in relation to schedule 6, with the powers to detain. That is even more explicit in saying that it is the power to obtain documents that relate to serious offences.

Schedule 5 provides the AFP with powers to stop, question and search people who are in a Commonwealth place, if the officer suspects on reasonable grounds that the person has just committed, might be committing or might be about to commit a terrorist act, or if the person is in a "prescribed security zone". The Minister may declare, in writing, a specified Commonwealth place to be a prescribed security zone if the Minister considers that such a declaration would substantially assist in either preventing a terrorist act occurring or responding to a terrorist act which has occurred.

This means that these powers are connected to terrorist acts. There is a specific exception in the definition of terrorist act which excludes protests from the meaning of "terrorist act".

Schedule 6 provides the AFP with powers to request information or documents about terrorist acts from operators of aircraft or ships and to obtain documents relating to serious terrorism and serious non-terrorism offences. In relation to serious non-terrorism offences an AFP officer has to apply to a Federal Magistrate for a notice if the officer considers on reasonable grounds that the person has documents that are relevant to and will assist the investigation of a serious offence. If the Magistrate is satisfied on the balance of probabilities that a person has documents that are relevant to and will assist the investigation of a serious offence, the Magistrate may issue a written notice to the person to produce documents.

Only documents that relate to determining one or more of the following matters can be obtained:

The following documents may be obtained in relation to terrorism or serious non-terrorism offences.

1. whether an account is held by a specified person with a specified financial institution, and details relating to the account and of any related accounts;

2. whether a specified person is a signatory to an account with a specified financial institute, and details relating to the account and of any related accounts;
3. whether a transaction has been conducted by a specified financial institution on behalf of a specified person and details relating to the transaction (including details relating to other parties to the transaction);
4. whether a specified person travelled or will travel between specified dates or locations and details relating to the travel (including details relating to other persons travelling with the specified person);
5. whether assets have been transferred to or from a specified person between specified dates, and details relating to the transfers (including details relating to the names of any other person to or from whom the assets were transferred);
   whether an account is held by a specified person in respect of a specified utility (such as gas, water or electricity) and details relating to the account (including the names of any other persons who also hold the account);
6. who holds an account in respect of a specified utility (such as gas, water or electricity) at a specified place, and details relating to the account;
7. whether a telephone account is held by a specified person and details relating to the account, including details of calls made to or from the relevant phone number, the times at which the calls were made or received, the duration of such calls or the telephone numbers to and from which such calls were made and received;
8. who holds a specified telephone account and details relating to that account (including specific details mentioned in paragraph (h) above);
9. whether a specified person resides at a specified place; and
10. who resides at a specified place.