

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
QUESTIONS ON NOTICE TO ATTORNEY-GENERAL'S DEPARTMENT

RESPONSE TO QUESTIONS ON NOTICE TO
BY SENATOR LUDWIG AND SENATOR PAYNE

Senator Ludwig asked the following questions:

Question 1

Liberty Victoria (submission No.1) has submitted that the current definition of 'financing of terrorism' in proposed section 5 of the bill is too broad and that the definition should be limited to conduct that amounts to an offence under Division 103 of the Criminal Code. What is the Department's response to this suggestion?

Response Q1: The AML/CTF Bill does not itself create financing of terrorism offences. This conduct is criminalised under other Commonwealth legislation, State and Territory legislation and by the laws of other countries. The AML/CTF Bill implements a regulatory system which will be used to investigate financing of terrorism offences both in Australia and in other countries.

By picking up financing of terrorism offences in Commonwealth law as well as corresponding offences in State, Territory or foreign law, the definition of the term 'financing of terrorism' in clause 5 of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (AML/CTF Bill) picks up the full range of conduct that is criminalised by other laws.

Question 2

Liberty Victoria submits that proposed section 235 should be amended to make it clear that it is not intended to override the operation of federal or state anti-discrimination legislation such as the *Racial Discrimination Act 1975*. What is the Department's response to this suggestion?

Response Q2: Clause 235 of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (AML/CTF Bill) does not operate to displace the *Racial Discrimination Act 1975* (RDA). A person can only rely on the indemnity provided by clause 235 of the AML/CTF Bill where they have acted in good faith. There is nothing in the AML/CTF Bill which permits or authorises compliance with the AML/CTF Bill to be met by actions which breach the RDA. The purpose of this clause is to protect those who are obliged by the AML/CTF Bill to deny the provision of services or disclose information to regulatory authorities to do so with confidence that that action alone will not found a basis for civil or criminal liability under other laws. The indemnity in clause 235 would not be available in circumstances where the reason for denial of service or disclosure was discriminatory or based on matters other than those properly encompassed by the object and operative provisions of the AML/CTF Bill.

Question 3

Of the 40 plus nine Financial Action Task Force recommendations, how many will be outstanding if the bill is passed? Which recommendations, if any, will remain outstanding?

Response Q3: If the AML/CTF Bill is passed there will be 2 outstanding FATF Recommendations which are either not addressed in the AML/CTF Bill or in other legislation. They are FATF Recommendations 12 and 16 which deal with designated non-financial businesses and professions. These will be addressed under the second tranche AML/CTF Bill. A table

Question 4.

Is it the intention to use proposed subsection 6(7) to expand or contract the definition of 'designated service'? What is the intention of this provision?

Response Q4: Sub-clause 6(7) allows for the amendment of an item in a table in clause 6 to cover the following circumstances:

- where new products of a similar kind to the existing designated services are created which would not be covered by existing items or definitions;
- where products or services are structured in such a way that they would not be covered by existing items in the tables; or
- where persons attempt to exploit an inadvertent loophole in existing items or definitions.

It is reasonable to expect that while every attempt has been made in the AML/CTF Bill to cover all of the services which could be used for the purposes of money laundering or terrorism financing, those determined to avoid the operation of the provisions may find new and unforeseen ways to structure activities so that they achieve the same outcomes as designated services but fall outside the definitions in clause 6. Sub-clause 6(7) will enable the Government to respond quickly to the emergence of such activities.

Regulations will be disallowable instruments and subject to the normal procedures under the *Legislative Instruments Act 2003*.

Question 5.

Is it intended to set a threshold in relation to designated services provided by casinos? At what point will there be a requirement to verify a customer's identity?

Response Q5: Consistent with the risk based approach, discussions are continuing between government and casinos as to the approach to customer identification. At this stage, it is intended that customers of casinos will not need to be identified unless they:

- purchase or redeem gaming chips of an amount of \$10,000 or more;
- make a cash bet of \$10,000 or more or receive winnings in cash of \$10,000 or more;
- are paid out winnings of \$10,000 or more for a game played on a gaming machine;
- open an account with the casino; or
- receive from casinos a designated service that is covered in table 1 of section 6.

Customers may also need to be identified in other circumstances, such as where a suspicious matter arises or where it becomes necessary for other customer due diligence purposes.

Question 6:

Does the term 'winnings' used in relation to the provision of gambling services (table 3 of proposed section 6) encompass 'losses' or funds returned to a gambler where, for example, a horse is scratched?

Response Q6: No. If this scenario emerges as an activity being used to disguise money laundering activities it can be addressed by way of amendment or a regulation under subclauses 6(5) or (7) AML/CTF Bill.

Question 7:

Can you clarify the intention of proposed subsections 84(5) and 85(6)? What are the requirements to obtain an Australian financial services licence? Is this approach of linking requirements to another licensing regime permissible under the FATF recommendations? Is there any intention to alter this provision in the second tranche of legislation?

Response Q7: (a) Division 3 of Part 7 of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (AML/CTF Bill) deals with obligations on reporting entities to maintain an anti-money Laundering and counter-terrorism financing program (AML/CTF program). There are three different types of AML/CTF programs: "standard", "joint" or "special".

Most reporting entities will have standard AML/CTF programs under clause 84. Reporting entities which belong to a "designated business group" (as defined in clause 5 of the AML/CTF Bill) can have a joint AML/CTF program under clause 85.

Clause 86 deals with those reporting entities which only provide designated services under item 54 of table 1. These are persons who in the capacity of an Australian Financial Services Licence (AFSL) holder make arrangements for a person to receive a designated service. Clause 86 requires that such reporting entities have a "special AML/CTF program". Special AML/CTF programs only need to set out applicable customer identification procedures and comply with such requirements, if any, as are specified in the AML/CTF Rules. AFSL holders have been made reporting entities under the AML/CTF Bill with limited obligations of customer identification, suspicious reporting and record keeping. The term 'AFSL' has the same meaning as in the chapter 7 of Corporations Act 2001.

Sub-clauses 84(5) and (6) provide that a reporting entity which only provides item 54 services cannot have a standard or joint AML/CTF program. These arrangements have been included in the AML/CTF Bill to recognise the special requirements of this industry sector.

b) The requirements for obtaining an Australian financial services licence are set out in chapter 7 of the *Corporations Act 2001* a copy of which is attached.

c) The FATF Recommendations do not include any restrictions on the way in which countries implement these obligations in domestic laws provided the operation has the effect or outcome set out in the FATF Recommendations.

d) The designated services covered by Item 54 of Table 1 are financial services. The AML/CTF Bill intends to make comprehensive provision for responding to money laundering and terrorism financing risks in the provision of financial services. Tranche 2 will deal with risks in non-financial business and professional sectors.

Question 8.

Can the Department provide a table indicating changes to the bill since the second exposure draft including:

- a) What provisions are unchanged?
- b) What provisions have changed and why?
- c) Who requested those changes?

Response Q8: The Committee has been provided with a copy of a 'mark-up' of the AML/CTF Bill comparing the introduced version with the revised exposure draft. The Committee has also been provided with a summary of the main differences between the revised exposure draft and the AML/CTF Bill as introduced.

Changes to the AML/CTF Bill were made as a result of comments made in the 76 submissions received on the exposure draft Bill and as a result of review by Commonwealth Government agencies of the exposure draft Bill. It is inappropriate to ascribe any change to the AML/CTF Bill to the request of any person or organisation. The AML/CTF Bill was released as an exposure draft for the purpose of enabling it to be scrutinised by those who will be affected by it to identify those parts which needed revision to ensure the coverage of the AML/CTF Bill was as intended and its operation was effective.

Question 9. Can the Department provide a list of other statutes the bill is linked to?

Response Q9: The AML/CTF Bill is not linked to other statutes. Consistent with common practice where the Bill relies on terms which are defined by other laws, it incorporates those definitions. Certain definitions in clause 5 refer to other statutes. Some notes following particular clauses in the Bill refer to other statutes to assist in its explanation. The AML/CTF (Transitional Provisions and Consequential Amendments) Bill 2006 amends a number of other statutes to ensure they can operate consistently with the AML/CTF Bill.

Senator Payne asked the following question:

Question 10:

It appears that proposed section 12 does not currently accommodate the relationship between some existing banks and their branches, and that this may, for example, expose those banks to breaches of the tipping off section (proposed section 123).

Does the Department agree with this interpretation of proposed section 12 and, if so, what action the Department is taking to address this?

Response Q10: Clause 12 recognises that some Authorised Deposit Taking Institutions (ADIs) are structured in a way other than the “normal” ADI/branch structure where the ADI and the branch are the same legal entity. These differently structured branches are in fact third party franchisees or alliance members (an example of such structure is community banks). This clause defines these to be “*owner-managed branches*” and makes it clear that in such structures, even if the designated service is provided by the owner-managed branch the designated service is taken to have been provided by the ADI. This means that the ADI will be the reporting entity.

Sub-clause 123(8) makes it clear that disclosure to these branches is not a breach of clause 123.