19 October 2005

Dear Chief Minister

Serious discrepancies between COAG agreement and draft anti-terrorism legislation

We write to express our deep concern about the *Anti-Terrorism Bill 2005* (Cth), and associated state and territory legislation. We have already written to you in the lead up to the Council of Australian Governments' meeting on 27 September 2005 ('COAG meeting') outlining our general concerns.

We write again to highlight serious discrepancies between the COAG Agreement on counter-terrorism measures ('COAG Agreement') and the draft anti-terrorism legislation that was posted on ACT Chief Minister Jon Stanhope's website (available at http://www.chiefminister.act.gov.au/docs/B05PG201_v281.pdf).

The Prime Minister John Howard has unequivocally stated that the 'legislation is going to reflect the agreement I made with the Premiers and Chief Ministers' (see http://www.pm.gov.au/news/interviews/Interview1631.html). The draft legislation, however, departs from the COAG Agreement in three important respects:

- the 10-year sunset clause provisions do not apply to all of the new measures;
- there is no provision for a review of the new measures five years after their enactment; and

- the normal avenues of judicial review are not available to key parts of the legislation, in particular, the provisions dealing with control orders and preventative detention orders.

In the attachment to this letter, we fully detail these departures.

Provision for a 10-year sunset clause, review after five years, and normal processes of judicial review lie at the heart of the COAG Agreement. Given the above departures, the draft legislation clearly does not implement the COAG Agreement.

These serious departures also highlight the need for proper public debate of the new measures. These are momentous changes to Australian laws. As we have explained in the report, *Laws for Insecurity? A Report on the Federal Government's Proposed Counter-Terrorism Measures* (available at http://www.amcran.org), these measures involve substantial departures from key principles of a liberal democracy and are possibly constitutionally invalid. As a minimum, proper public debate should involve:

- adequate time for public disclosure of, scrutiny of and debate of these measures;
- a review by parliamentary committees at both federal and state levels of the draft legislation that provides adequate time for effective public input through submissions and public hearings.

We also reiterate the key recommendation of the *Laws for Insecurity* report that the adoption of any new measures be deferred until the reviews of existing counter-terrorism measures under the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Intelligence Services Act 2001* (Cth) have been completed.

We note that the COAG Agreement states a joint commitment to 'evidence-based, intelligence-led and proportionate' measures. In the absence of public disclosure and scrutiny of the proposed measures, no Government can properly claim to have fulfilled that commitment to the Australian public.

We urge you to take into account our concerns when considering your Government's response to the draft legislation and to respond to our concerns publicly.

Yours sincerely

Robin Banks
Chief Executive Officer
Public Interest Advocacy Centre

Agnes Chong
Co-convenor, Law Reform and Policy Committee
Combined Community Legal Centres Group (NSW) Inc.

Patrick Emerton
Assistant Lecturer, Faculty of Law
Monash University

Waleed Kadous
Co-convenor
Australian Muslim Civil Rights Advocacy Network

Annie Pettitt
Co-convenor, National Human Rights Network
National Association of Community Legal Centres

Vicki Sentas
Spokesperson on Terrorism Laws
Federation of Community Legal Centres (Victoria)

Joo-Cheong Tham
Lecturer, Law Faculty
University of Melbourne

Brian Walters SC
President
Liberty Victoria

Cameron Murphy
President
NSW Council for Civil Liberties

CC: Attorney-General

ATTACHMENT

There are three key areas of concern we wish to highlight as follows:

A. the 10-year sunset clause provisions do not apply to all the new measures;

B. there is no provision for an independent review of the new measures five years after their enactment; and

C. the normal avenues of judicial review are not available for key parts of the Bill, in particular, the provisions dealing with control orders and preventative detention orders

A *The 10-year sunset clause provisions do not apply to all the new measures*

The COAG Agreement states 'the new laws…would sunset after 10 years'.[1] The provision for this 10-year sunset clause was clearly pivotal to the Federal Government obtaining the agreement of all the Premiers and Chief Ministers. Queensland Premier, Peter Beattie, for instance, stressed that 'the sunset clause of ten years is…very important'. In a similar vein, South Australian Premier, Mike Rann, said 'it's also important to…have a sunset provision in 10 years from now'. Tasmanian Premier, Paul Lennon, stressed that '(t)he ultimate check of course is the sunset clause after 10 years, quite appropriately, unanimously agreed'.[2]

The draft Anti-Terrorism Bill 2005 (Cth) ('Draft Bill') as posted on ACT Chief Minister, Jon Stanhope's website, does *not* provide that all the provisions of the Draft Bill expire after 10 years. It only does so in relation to *two out of 10 schedules*, namely, those dealing with control orders and preventative detention orders (Schedule 4) and the powers to stop, search and question persons in relation to terrorist acts (Schedule 5).[3]

There is no provision for a 10-year sunset clause in relation to other measures including:

---

[1] *Council of Australian Governments' Communiqué: Special Meeting on Counter-Terrorism 27 September 2005* (available at http://www.coag.gov.au/meetings/270905/index.htm) 3.

[2] *COAG Joint Press Conference, Parliament House, Canberra, 27 September 2005* (available at http://www.pm.gov.au/news/interviews/Interview1588.html).

[3] Draft Bill, proposed sections 104.16 (control orders) and 105.45 (preventative detention orders) of *Criminal Code Act 1995* (Cth); proposed section 3UK of *Crimes Act 1914* (Cth) (powers to stop, search and question etc).

- Schedule 1, which expands the power of Attorney-General to proscribe 'terrorist organisations' to include power to proscribe organisations that advocate a 'terrorist act' under the *Criminal Code*;
- Schedule 6, which confers power on the Australian Federal Police to compel the production of documents, etc., and force persons to answer questions in relation to various offences; and
- Schedule 10, which greatly increases the period for which various ASIO warrants can remain in force.

B *There is no provision for a review of the new measures five years after their enactment*

The COAG Agreement states that the '(l)eaders also agreed that COAG would review the new laws after five years'.[4] This agreement appears to have been central to the COAG Agreement. Queensland Premier, Peter Beattie, for example, said:

> The important thing to highlight is that normally I would never agree, or my State would never agree to such laws. If it wasn't for the threat of terrorism, we would never agree to such new laws as we have here. *That's why the review after five years is important.*[5]

The Draft Bill makes *no* provision for such review.

C *The normal avenues of judicial review are not available to key parts of the legislation, in particular, the provisions dealing with control orders and preventative detention orders*

The COAG Agreement states that the '(l)eaders agreed that any strengthened counter-terrorism law must...contain appropriate safeguards against abuse, such as...judicial review'.[6] As with the 10-year sunset clause and review after five years, the principle of judicial review was critical to the COAG Agreement. Victorian Premier, Steve Bracks, underlined the importance of this principle with his comments that:

---

[4] *Council of Australian Governments' Communiqué: Special Meeting on Counter-Terrorism 27 September 2005* (available at http://www.coag.gov.au/meetings/270905/index.htm) 3.

[5] *COAG Joint Press Conference, Parliament House, Canberra, 27 September 2005* (available at http://www.pm.gov.au/news/interviews/Interview1588.html) (emphasis added).

[6] *Council of Australian Governments' Communiqué: Special Meeting on Counter-Terrorism 27 September 2005* (available at http://www.coag.gov.au/meetings/270905/index.htm) 3.

> I'm very pleased in the framing of these new laws that individual liberties of Australians and Victorians have been protected. Judicial oversight has been a principle which has been supported by the Prime Minister, the Premiers and the Territory leaders, and there is *complete judicial oversight* over these new criminal sanctions which will be in place.

New South Wales Premier, Morris Iemma, reiterated this point when he said that 'we saw built into that package *judicial review* and the right to challenge the orders for individuals and the right to receive legal representation'.[7] The attachment to the COAG Agreement echoes these sentiments when it states that 'normal judicial review processes would apply to decisions to issue or revoke control orders'.[8]

In order to be an effective check against abuse, 'complete judicial oversight' referred to by Victorian Premier Steve Bracks should involve a process whereby police and security organisations need to demonstrate to an independent judicial officer the *factual* and *legal* grounds for the exercise of their powers. Put differently, complete judicial oversight should mean that a judicial officer determines *on the merits* whether police and security organisations should be granted powers.

Even on the narrow understanding that judicial review only involves review on questions of *legality,* it is clear that the Draft Bill does not provide for the ordinary avenues of judicial review in relation to control orders and preventative detention orders. The key avenue for judicial review in the sense at the federal level is provided by the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Draft Bill, however, specifically excludes from review under that Act decisions of the Federal Attorney-General in consenting to a request for a control order and all decisions relating to preventative detention orders.[9]

While these exclusions still allow for applications for judicial review at common law under section 75(v) of the *Constitution* and the *Judiciary Act 1903* (Cth), they severely limit the efficacy of judicial review as a check on abuse of power. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) was enacted to remedy the

---

[7] *COAG Joint Press Conference, Parliament House, Canberra, 27 September 2005* (available at http://www.pm.gov.au/news/interviews/Interview1588.html) (emphasis added).
[8] *Council of Australian Governments' Communiqué: Special Meeting on Counter-Terrorism 27 September 2005* (available at http://www.coag.gov.au/meetings/270905/index.htm) 8.
[9] Draft Bill, Schedule 4, Part 2, cl 20, proposed amendments to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

deficiencies of common law judicial review.[10] Importantly, it provides for an entitlement to reasons for decision.[11] This is to be contrasted with the position at common law, which is that there is generally no entitlement to reasons.[12]

In sum, the Draft Bill provides selective and very limited 'judicial review'. The promise of 'judicial review' at the COAG Meeting was a key safeguard that ensured the Premiers' and Chief Ministers' consent to the package. The Commonwealth has comprehensively failed to deliver effective judicial oversight on measures that remain, without proper judicial scrutiny, excessive instances of executive power. In order that the 'judicial review' promised by the Commonwealth be other than hollow, provision should be made for judges, exercising judicial power, to adjudicate on the basis of evidence, the applications by the Commonwealth for initial, extended and continued preventative detention orders, prohibited contact orders and control orders. This would be analogous to the power conferred upon Federal Court judges in their personal capacities as members of the Administrative Appeals Tribunal to reach the 'correct or preferable decision in each case on the material before it'.[13] Anything else risks reducing judicial oversight to a mere procedural formality and delivers no effective safeguard whatsoever.

[10] See generally Roger Douglas, *Douglas and Jones's Administrative Law* (4th ed, 2002) 57.
[11] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13.
[12] *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.
[13] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 642.