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Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE AND INDIGENOUS AFFAIRS

MEMBER FOR GINNINDERRA

Senator Nigel Scullion
Acting Chair
Senate Legal and Constitutional Legislation Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Scullion

Thank you for your letter of 4 November 2005 seeking a submission to the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the *Anti-Terrorism Bill (No 2) 2005*.

As you will be aware the Bill has been drafted by the Commonwealth Government following the special Council of Australian Governments meeting on counter-terrorism on 27 September 2005.

COAG Leaders agreed on 27 September that that there is a clear case for Australia's counter-terrorism laws to be strengthened including changes to the Commonwealth *Criminal Code* to make advocacy of terrorism an offence, to expand the definition of terrorist organisations, and to provide for counter-terrorism control orders and a preventative detention regime. COAG further agreed that any new counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate. We also agreed that COAG would review the new laws after five years and that they would sunset after 10 years.

The provisions of the Intergovernmental Agreement on Counter-Terrorism Laws (IGA) signed at the 25 June 2004 COAG meeting require the Commonwealth Government to seek the agreement of the States and Territories prior to the introduction into the Commonwealth Parliament of proposed amendments to the counter-terrorism provisions of the *Criminal Code*. Under the terms of the IGA the Commonwealth Government may not, except in circumstances of urgency, introduce any amendments without the agreement of a majority of States and Territories including at least four States.

While I have been and remain strongly supportive of the development and enactment of strengthened counter-terrorism laws, I was most concerned that the provisions of the Bill as originally drafted by the Commonwealth Government did not fully reflect the assurances the

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433

Prime Minister gave and the agreement reached at the 27 September COAG meeting. That agreement was based on assurances given by the Prime Minister that the proposed Commonwealth laws would:

- be based on clear evidence that they were needed in a democratic society and that the desired effect could not be achieved in less intrusive or onerous ways;
- be effective against terrorism;
- conform to the principle of proportionality;
- comply with all of Australia's obligations under international law – in particular its obligations as a signatory to the International Covenant on Civil and Political Rights;
- involve rigorous safeguards against abuse, including respecting the principle of non-discrimination;
- be subject to judicial review; and
- contain sunset clauses.

These assurances and agreements were of great importance given the unusual and severe nature of the proposed changes to the *Criminal Code*. As you are aware the Bill proposes a significant broadening of terrorist offences while the provisions for Control Orders and Preventative Detention Order may severely circumscribe the liberty of citizens and non-citizens. Preventative Detention Orders involve the imprisonment, albeit for a short period, of persons who will not necessarily be charged with any offence. Control orders may involve restrictions of liberty tantamount to house arrest or imprisonment.

In view of the significance of the proposed legislation and the need to encourage the broadest possible community discussion and awareness of the proposed laws, I decided on 14 October to make the draft Bill available on my website: www.chiefminister.act.gov.au.

In order to inform the ACT Government's consideration of the draft legislation, I commissioned and received advice on the proposed legislation from a range of legal and human rights experts. These experts include a group of prominent scholars, Andrew Byrnes, Professor of International Law at the University of New South Wales, Hilary Charlesworth, Professor of International Law and Human Rights at the Australian National University, and Gabrielle McKinnon from the Regulatory Institutions Network at the Australian National University; the ACT Director of Public Prosecutions, Richard Refshauge SC; and the ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs. I also received a very substantive opinion on the human rights aspects of the legislation prepared by Lex Lasry QC and Kate Eastman and important constitutional advice from Stephen Gageler SC.

All this advice was provided by the ACT Government to Commonwealth officials and is also available on my website.

Subsequently, following the circulation by the Commonwealth Government of a revised draft Bill, I received further human rights advice from Mr Lasry and Ms Eastman. I also received a joint memorandum of advice on the constitutional problems that arise from the draft revised Bill provided by the Solicitor-Generals of Victoria, Queensland, South Australia, Tasmania and the Northern Territory and the Chief Solicitor of the ACT. Senior Counsel for the ACT, Mr Gageler, also contributed significantly to this advice.

I would also draw your Committee's attention to other legal opinions and comments from relevant experts, notably the advice commissioned by the Australian Broadcasting Commission from Bret Walker SC and Peter Roney in relation to the proposed laws of sedition and to important comments made on 31 October 2005 by the Federal Human Rights and Equal Opportunity Commission President John Von Doussa QC.

On 1 November 2005 I wrote to the Prime Minister to express strong concern that the revised draft Bill did not meet the assurances I received from him at the 27 September COAG meeting. Among other things I also sought a specific assurance from the Prime Minister that the revised draft Bill was fully compliant with the International Covenant on Civil and Political Rights (ICCPR).

A copy of my letter to the Prime Minister on 1 November 2005 is at *Attachment A*.

Subsequently further consultations took place between the Prime Minister and State Premiers from which I and the Chief Minister of the Northern Territory were excluded. A further revised Bill was received by the ACT Government after close of business on 2 November. On 3 November the Prime Minister wrote to me seeking agreement to the introduction of this final version of the Bill to the Commonwealth Parliament later that same day.

In reply to the Prime Minister I noted that a number of changes had been made in relation to the process for merit review of Preventative Detention Orders and that the Bill also contained amendments agreed with Queensland in relation to the role of the Public Interest Monitor. I acknowledged that these and earlier changes significantly altered and improved the legislation and that the ACT Government was grateful for that movement on the part of the Commonwealth Government.

However, many of the concerns raised in my letter of 1 November remained unaddressed, including matters relating to the expansion of the definition of a terrorist organisation, provisions for Control Orders, the amendment of terrorist financing offences and the proposed changes to the law of sedition.

I also noted that the Prime Minister had failed to respond to my request for specific assurance that the legislation fully comply with the ICCPR.

In view of the importance and complexity of the human rights issues associated with the Bill, I referred the final text to my legal, human rights and constitutional advisers for further advice.

As a consequence, I was regrettably unable to give my agreement on 3 November to the text of the Bill that the Prime Minister had already decided would be introduced to the Commonwealth Parliament that afternoon.

A copy of my letter to the Prime Minister on 3 November 2005 is at *Attachment B*.

I have now had the opportunity to examine the text of the Bill as introduced into the Commonwealth Parliament on 3 November.

In order to assist your Committee in its review of the provisions of the Bill, I take this opportunity to highlight a number of outstanding human rights associated with this legislation.

Lack of a national bill of rights

- The lack of a national Bill of Rights means that the opportunity to test the reasonableness and necessity of new counter-terrorism laws against objective and internationally accepted human rights standards is seriously limited.

- The existence of bills of rights in other common law jurisdictions has ensured a rights-based evaluation of counter-terrorism measures, without undermining the effectiveness of those measures or endangering national security.

- It is not only possible but absolutely necessary to fully integrate human rights standards with counter-terrorism measures.

- The ACT Government will certainly adopt this approach in the development of Territory legislation to provide for Preventative Detention Orders for up to 14 days' detention.

- In the absence of a Bill of Rights, the Commonwealth Government should at least be required to provide detailed and authoritative advice certifying that the proposed legislation is fully compliant with Australia's international human rights obligations, especially the International Covenant on Civil and Political Rights.

Definition of terrorist organisation (Schedule 1)

- The definition of 'advocates' is too broad. In particular, the extension of the grounds of proscription to include vague criteria such as organisations that "praise terrorism" may have serious implications for free speech. The vagueness of the proposed new provisions could lead to abuse to curtail legitimate protest organisations.

- Criminalising non-violent organisations on the basis of their opinions is a disproportionate response to the threat of terrorism. It is contrary to representative democracy and the implied constitutional freedom of political association and communication.

- It is also likely to be counterproductive and may have a detrimental impact on the community unity and cooperation that is essential for dealing with terrorism.

- These proposed provisions should be subject to further review with a view to at least the inclusion of a requirement of intention to incite others to commit terrorist acts.

Financing Terrorism (Schedule 3)

- The proposed section 103.2 will create an offence of financing a terrorist act. A person could be liable to life imprisonment for indirectly making funds available to another person, or collecting funds for another person, if the first person is reckless as to whether the funds will be used for a terrorist act. The offence is too broad and lacks certainty.

Control orders and Preventative detention orders (Schedule 4)

- The person who is the subject of one of these orders and the person's lawyer continue to be restricted from accessing all relevant documents and having access to the material on which an order has been sought.

- Persons subject to these orders will have the ability to adduce evidence and the lawyers for these persons will have access to a summary of the grounds on which the orders were made, *but* there is still no requirement to give an adequate statement of reasons, which must include a summary of the facts and relevant considerations supporting the decision. Any provision for review is meaningless without these requirements.

- In this regard consideration needs to be given to the impact on the proposed new measures of the *National Security Information (Criminal Proceedings) Act 2004*. In essence, this legislation empowers the Commonwealth Attorney-General to certify that producing particular information (or a particular witness) in a civil or criminal proceeding is likely to prejudice Australia's national security interests (sections26 and 28). A certificate under section 26 is conclusive (section 27). A court receiving such a certificate has to hold a closed hearing to determine whether the information will be permitted in the proceeding. The affected litigant and their lawyers can be excluded from that hearing (section 29). The judge is directed to give greatest weight to the certificate of the Attorney-General (section 31(8)).

- Although originally directed at criminal trials, the *National Security Information Legislation Amendment Act 2005* extended these provisions to civil proceedings, which includes judicial review proceedings.

- It is a matter of concern that the ability to achieve effective judicial review of a preventive detention order or a control order will be drastically reduced if the government can avoid, by this legislation, having to disclose some or potentially all of the information it has used to obtain the order in the first place. In essence, this legislation provides a means of avoiding accountability when the vast new powers are being exercised.

- It should also be noted that there is no requirement for courts to publish reasons.

- The control orders, preventative detention orders and prohibited contact orders continue to be applicable to children between the age of 16 and 18 years of age.

Control orders

- There remains no statutory timeframe for interim control orders to be brought before a

- AAT review is not judicial oversight, which was the safeguard agreed at the 27 September COAG meeting.

- A person who is subject to a preventative detention order has no privacy of contact with legal representatives. Every communication must be able to be monitored. Monitoring of legal communications is an *exception* in the comparable United Kingdom regime.

- A person who is subject to a preventative detention order has limited contact with family members, lawyers and advisers. The bill does not allow sufficiently for information to be provided to family members. Under the United Kingdom's laws, a detainee has the right to inform a named person of the *fact and place* of their detention.

- The disclosure of a preventative detention order remains an offence. Such secrecy provisions do not exist in the comparable United Kingdom regime.

- The secret and arbitrary prohibited contact orders are retained.

- Continued detention orders may be made by persons exercising administrative rather than judicial powers.

- Uncertainties remain about the rights of individuals in legal proceedings and there is no guidance as to the types of legal challenges that may be made.

Sedition (Schedule 7)

- While an attempt to modernise the Commonwealth's anachronistic sedition laws is overdue, it is a matter of concern that the Bill proposes the removal of the requirement in the existing law of sedition that a person must intend violence to occur. The proposed defences to sedition in the Bill are quite inadequate and fail to protect the range of public communication that falls outside the limited constitutional protections for political and religious speech. In the absence of a national bill of rights the proposed new sedition offences will unjustifiably interfere with legitimate free speech.

These proposed sedition provisions should be removed from the Bill and this issue should be the subject of further public and parliamentary debate before further amendments are proposed.

Constitutional issues

Concerns remain that the involvement of the judiciary as issuing courts/authorities for control orders and preventative detention orders may be constitutionally invalid. I remain of the view that the Constitutional dilemmas relating to the provisions to Chapter 3 of the Constitution can be better addressed by a number of amendments to the Bill that would reduce the risk of a Constitutional challenge.

In this regard it should be noted that extending the range of persons who may issue continued preventative detention orders to overcome some of the constitutional vulnerabilities of the Bill may conflict with human rights standards relating to the right not to be arbitrarily detained. It is a fundamental principle of human rights law that administrative detention should not be used to avoid or undermine the right to a fair trial and access to the courts.

ACT legislation

Consistent with the COAG agreement, I remain committed to bringing forward Australian Capital Territory legislation to provide for Preventative Detention Orders for up to 14 days' detention. This legislation will comply with the provisions of the *ACT Human Rights Act 2004* and will be developed and introduced as soon as possible subject to appropriate constitutional and human rights advice.

I hope that the above comments are of assistance to your Committee.

Yours sincerely

Jon Stanhope MLA
Chief Minister

11 NOV 2005

Attachment M

Jon Stanhope MLA

CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE AND INDIGENOUS AFFAIRS
MEMBER FOR GINNINDERRA

The Hon John Howard MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

I refer to your letters of 9 October, 25 October and 27 October 2005 concerning the Commonwealth Government's draft Anti-Terrorism Bill 2005 (the Draft Bill).

The provisions of the Intergovernmental Agreement on Counter-Terrorism Laws (IGA) require you to seek the agreement of the ACT Government and other jurisdictions prior to the introduction into the Federal Parliament of proposed amendments to the counter-terrorism provisions of the Commonwealth *Criminal Code*.

I note that a revised Draft Bill was circulated to State and Territory officials on 28 October and that you are seeking written agreement from Premiers and Chief Ministers by 1 November 2005. This proposed timeframe for responses is quite unrealistic given the complexity and importance of the legislation and the fact that major constitutional and other issues remain unresolved.

While I remain strongly supportive of the development and enactment of strengthened counter-terrorism laws, I am most concerned that the provisions of the revised Draft Bill do not fully reflect the assurances you gave and the agreement reached at the Council of Australian Governments (COAG) meeting on 27 September 2005.

You will recall that we agreed at COAG that any new counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate. We also agreed that COAG would review the new laws after five years and that they would sunset after 10 years.

The COAG agreement was based on assurances given by you that the proposed Commonwealth laws will:

- be based on clear evidence that they were needed in a democratic society and that the desired effect could not be achieved in less intrusive or onerous ways;

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433

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- be effective against terrorism;
- conform to the principle of proportionality;
- comply with all of Australia's obligations under international law – in particular its obligations as a signatory to the International Covenant on Civil and Political Rights;
- involve rigorous safeguards against abuse, including respecting the principle of non-discrimination;
- be subject to judicial review; and
- contain sunset clauses.

These assurances and agreements were of great importance given the unusual and severe nature of the proposed legislation. As you are aware the draft Bill proposes a significant broadening of terrorist offences while the provisions for Control Orders and Preventative Detention Order may severely circumscribe the liberty of citizens and non-citizens. Preventative Detention Orders involve the imprisonment, albeit for a short period, of persons who will not necessarily be charged with any offence. Control orders may involve restrictions of liberty tantamount to house arrest or imprisonment.

As you will be aware I have commissioned and received advice on the proposed legislation from a range of legal and human rights experts. These experts include a group of prominent scholars, Andrew Byrnes, Professor of International Law at the University of New South Wales, Hilary Charlesworth, Professor of International Law and Human Rights at the Australian National University, and Gabrielle McKinnon from the Regulatory Institutions Network at the Australian National University; the ACT Director of Public Prosecutions, Richard Refshauge SC; and the ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs. I have also received a very substantive opinion on the human rights aspects of the legislation prepared by Lex Lasry QC and Kate Eastman and important constitutional advice has been received from Stephen Gageler SC.

All this advice has been provided to your officials.

I have now received further human rights advice on the revised Draft Bill from Mr Lasry and Ms Eastman. I have also today received a joint memorandum of advice on the constitutional problems that arise from the draft revised Bill provided by the Solicitor-Generals of Victoria, Queensland, South Australia, Tasmania and the Northern Territory and the Chief Solicitor of the ACT. Senior Counsel for the ACT, Mr Gageler, also contributed significantly to this advice.

I am also aware of other legal opinions and comments from relevant experts, including the advice commissioned by the Australian Broadcasting Commission from Bret Walker SC and Peter Roney in relation to the proposed laws of sedition and important comments made yesterday by the Federal Human Rights and Equal Opportunity Commission President John Von Doussa QC.

I note that the revised Draft Bill contains a number of changes made in response to some of the concerns expressed by State and Territory officials. These inter alia include amendment to the provisions dealing with the use of force and to include reference to the five year review of the laws to be undertaken by COAG.

However on the basis of all the opinions and analyses I have received, including those obtained in relation to the revised Draft Bill, I am persuaded that the proposed laws as presently drafted do not meet the assurances I received from you at the COAG meeting on 27 September 2005. This is most disappointing.

With regard to the outstanding constitutional issues I note the advice of Mr Gageler and the joint opinion of State and Territory Solicitor-Generals that the revised Draft Bill still gives rise to major constitutional dilemmas relating to the provisions of Chapter III of the Constitution. The State and Territory Solicitors-General have proposed a list of amendments to the Bill, each of which they see as necessary to reduce the risk, which they consider to be real, of a successful challenge to the constitutional validity of the Bill. I anticipate that the States and Territories will agree to provide this advice to your Government.

In view of the serious and complex issues raised in the advice provided by the Solicitors-General in relation to the revised Draft Bill, I believe that there should be further discussion between the Commonwealth and States and Territories on whether further amendments to the Bill will reduce the likelihood of constitutional challenge.

With regard to the human rights implications of the revised Draft Bill, all the advice I have received to date indicates that the proposed legislation would be disproportionate in its impact on fundamental human rights and civil liberties. It does not comply with Australia's obligations under international law – in particular our obligations as a signatory to the International Covenant on Civil and Political Rights (ICCPR). This is the unanimous opinion of the relevant advice I have received on this critical issue.

With regard to the proposed expansion of the definition of terrorist organizations, the definition of "advocates" contained in the revised Draft Bill is too broad. In particular, the extension of the grounds of proscription to include vague criteria such as "praise terrorism" may have serious implications for free speech. The vagueness of the proposed new provisions could certainly lead to abuse to curtail legitimate protest organisations. Criminalising non-violent organisations on the basis of their opinions is contrary to representative democracy and the freedom of political association and communication. These proposed provisions should be subject to further review with a view to at least the inclusion of a requirement of intention to incite others to commit terrorist acts.

With regard to the proposed modification of existing terrorism offences relating to training and other activities, I am concerned about the inclusion of provision for retrospective operation of new offences and seek your further advice on the specific justification for this measure.

With regard to the provisions dealing with Control Orders and Preventative Detention Orders, I remain most concerned that the proposed legislation should ensure effective judicial control of the detention and control orders, including the right of detainees to be informed of the reasons for their detention. The right to effectively challenge the lawfulness of detention before a court must be non-derogable.

I attach for you information and response further advice received yesterday from Mr Lasry and Ms Eastman on whether the revised Draft Bill is compatible with the international human rights standards enshrined in the ACT *Human Rights Act 2004*, particularly with respect to Control Orders and Preventative Detention Orders. (This advice supplements the earlier advice provided by Mr Lasry and Ms Eastman which is available on my website.)

As you will see, notwithstanding the changes that have been made to the Draft Bill, the following aspects of the Bill remain of serious concern:

- The lack of clarity in determining whether a control order should be made or varied. Particularly where the order is made *ex parte* and the court must take into account the person's circumstances (including the person's financial and personal circumstances): clause 104.3(2)).
- There is no requirement for the court to publish reasons for a control order, preventative detention order or prohibited contact order.
- The person who is the subject of one of these orders and the person's lawyer continue to be restricted from accessing all relevant documents and having access to the material on which an order has been sought: clause 104.8B(2)(b) and 104.12B(2)(b).
- The control orders, preventative detention orders and prohibited contact orders continue to be applicable to children between the age of 16 and 18 years of age: clauses 104.14, 105.5 and 105.36.
- The potential for indefinite successive control orders exists: clause 104.8E(2).
- There may be an extension of an initial preventative detention order which is made by the senior AFP officer: clause 105.10.
- Continued detention orders may be made by persons exercising administrative rather than judicial powers: clause 105.18(2).
- The indefinite nature of a continued preventative detention order exists: clauses 105.14(6) and 105.27(1). It should be made clear that the person must be released from preventative detention within 48 hours of first being taken into custody.
- The secret and arbitrary prohibited contact orders are retained in the Bill: clauses 105.15 and 105.16.
- The person who is subject to a preventative detention order has limited contact with family members, lawyers and advisers: clauses 105.31, 105.32 and 105.34. Any contact with a person will be monitored: clause 105.35.
- The Bill continues to make the disclosure of a preventative detention order an offence: clause 105.38.
- The uncertainties about the nature of the legal proceedings: clause 105.47.

In view of your specific assurance that the legislation would fully comply with the ICCPR, I would also be grateful if you could provide, and indeed make public, your specific advice to this effect or else provide reasons as to why you are unable to do so.

A failure or refusal to provide this advice as to compatibility with the ICCPR could only be interpreted as an acknowelgement that the legislation is indeed non-compliant with Australia's international human rights obligations.

As the revised Draft Bill presently stands, I am not satisfied that provisions for Control Orders and Preventative Detention Orders incorporate adequate safeguards against abuse and injustice. Were legislation to be enacted in such terms by the ACT Legislative Assembly, it would be quite at odds with the ACT *Human Rights Act*.

With regard to other significant issues raised in the proposed legislation, I note that the revised Draft Bill creates the offence of financing a terrorist act and that a person could be liable for making funds available to another person, or collecting funds on behalf of another person if the first person is reckless as to whether the funds will be used for a terrorist act. In

addition, the offence of sedition has been broadened so that a person commits an offence if that person engages in conduct to assist an organisation or country "at war" with the Commonwealth.

Although there is a defence to the sedition offence if the conduct is for humanitarian purposes, I remain concerned that those people providing aid to overseas countries and organisations in times of disaster are potentially subject to prosecution under the proposed laws. It is inconceivable that consideration could be given to prosecuting charities and individuals who have provided money goods and services to assist those affected by the recent tsunami, or the devastating earthquake in Pakistan.

As it stands today, the revised Draft Bill remains a deeply flawed document that if enacted by the Federal Parliament is likely to be subject to strong constitutional challenge and will involve a serious assault upon fundamental human rights, civil liberties and the rule of law with consequent potential for grave injustice.

Accordingly I urge you to reconsider the legislation to ensure that it conforms with the assurances you gave at the special COAG meeting, especially that the legislation would be compliant with the Australia's obligations under the International Covenant on Civil and Political Rights.

I further urge you to allow a rigorous process of debate and scrutiny within the Federal Parliament so that Australians can have a maximum opportunity to form their own view as to whether the Draft Bill is proportionate and consistent with the rights and liberties we all hold dear.

In conclusion, I also take this opportunity to remind you that in the event that you proceed with the introduction of the Bill into the Federal Parliament, the Intergovernmental Agreement on Counter-Terrorism Laws requires you to use your best endeavours to consult with the States and Territories in relation to any amendments that may be proposed. I would be grateful for your early assurance that these provisions of the Intergovernmental Agreement will be complied with.

I would be grateful for your response to the issues I have raised above. I will write to you again after I have received your response.

Yours sincerely

Jon Stanhope MLA
Chief Minister

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Anti-Terrorism Bill 2005 (Cth) and the Human Rights Act (2004) ACT

FURTHER MEMORANDUM OF ADVICE

To:
Peter Garrisson
Chief Solicitor
ACT Government Solicitor
tel: (02) 6207 0654
fax: (02) 6207 0630
Ref: 05-1-607435

Lex Lasry QC
Latham Chambers
MELBOURNE

and

Kate Eastman
St James Hall Chambers
SYDNEY

FURTHER MEMORANDUM OF ADVICE

Anti-Terrorism Bill 2005 (Cth) and the Human Rights Act (2004) ACT

1. We are asked whether the changes made in the latest version of the *Anti-Terrorism Bill 2005 (Cth)* (identified as B05PG201.v.63.doc 28/10/2005 9.53am) provided on 28 October 2005 change our earlier advice.

2. For the reasons outlined below, our conclusion remains the same. The *Anti-Terrorism Bill 2005 (Cth)* remains incompatible with the *Human Rights Act 2004* (ACT) particularly with respect to the preventative detention orders.

Changes to the Bill that enhance human rights protections

3. The following provisions of the Bill represent improved protections for human rights and are relevant to assessing whether the measures are proportionate for the purpose of section 28 of the *Human Rights Act*:

Control orders

3.1 The two-step process before a control order becomes final represents an important change in the protection of a person's human rights.

3.2 An interim control order will be made on an *ex parte* basis (clause 104.3). A court will have greater powers in relation to the type of restrictions which may be imposed (clause 104.3(3)) and is not bound by the terms of the order sought by the AFP. However, we should point out that in an application such as this where the orders are sought *ex parte* the information on which the order is sought should be on oath whether by reference to direct evidence or information and belief. That is not required by the Bill. Such a requirement would add some level of further protection against a misuse of the procedure.

3.3 The interim order must be served within 48 hours of the order. Service must be personal. The AFP officer who serves the order, must also serve a summary of the grounds on which the order is made. The AFP officer must ensure that the person served understands the effect of the

order, the period of the order if confirmed, the person's rights in relation to the order (clause 104.8A).

3.4 At a hearing to confirm the interim control order, the person may be represented. Evidence may be adduced by the person concerned. The court may order that the interim control order is confirmed, varied, revoked or declared void. We have assumed that all the relevant Court rules and the provisions of the *Evidence Act 1995* (Cth) would apply to any hearing of this nature and that to "adduce material" means that the information is to be put before the Court as evidence on oath with an entitlement to test it by some level of cross examination. We note that notwithstanding clause 104.8C(2) which enables the court to confirm the order without variation if the person fails to attend court, the court is not required to make a confirmed order. We also assume that the provisions in relation to default orders, such as Order 35, rule 7(2)(a) of the Federal Court Rules would apply to enable the Court to set aside an order that has been made in the absence of a party, whether or not the absent party is in default of appearance or otherwise in default and whether or not the absent party had notice of the motion for the order.

Preventative Detention orders

3.5 Clause 105.11(1) has been amended. It appears that a continued preventative detention order may only be made in relation to circumstances where there is an imminent terrorist act, rather than detaining a person to preserve evidence. The language of clause 105.11(1) is different to the former draft Bill but still not entirely clear.

3.6 Rights of a person under the age of 18 or who is incapable of managing their affairs are protected by express provision in the order in relation to being visited by a parent or guardian (clause 105.8(7) and 105.12(7)).

3.7 The use of force provision has been removed - ^105.23 of the previous draft has been removed. We note that there is currently no clause 105.23 in this Bill.

3.8 Lawyers may visit the person detained (clause 105.34(2)).

3.9 Both parents of a child who is detained may visit the child (clause 105.36(3)).

3.10 It will not be an offence for one parent to disclose to another parent that the child is being detained (clause 105.38(3)(ba)).

Further or new restrictions on human rights not in the previous Bill

4. The following provisions of the Bill represent further and new restrictions on human rights:

Control orders

4.1 Contravening a control order is an offence (clause 104.13). 'Control order' means interim control order or confirmed control order. No distinction is made between interim and confirmed orders for the purpose of the offence provision. We think the imposition of penalty up to 5-year imprisonment for a contravention of an interim control order is not proportionate.

4.2 There is no specific time limit for the interim order to be brought back to the Court to be confirmed (clause 104.4(e)).We think there should be an express provision limiting the life of an interim control order, so that the interim order lapses if there is no application for a confirmed control order within the time prescribed by the court. Further, that interim control orders be limited to a period no longer than 7 days and that any application for a confirmed control must be brought no later than 7 days after the interim order is made.

Preventative detention orders

4.3 Continued preventative detention orders may be made by a wider range of persons: clause 105.2. It is not apparent that a wide range of persons who may make the orders will serve to protect human rights. Some of these persons may be not be subject to judicial review as officers of the

Commonwealth for the purpose of section 39B(1) of the *Judiciary Act* 1903 (Cth). This change does not address the fundamental general principle that a person should only be detained following a hearing before a court. From a human rights perspective, administrative detention should not be used as device to avoid or undermine the right to a fair trial and access to the courts. The Bill impairs a person's right to a fair trial in accordance with the rights provided by section 21 of the *Human Rights Act.*

4.4 A person detained under a preventative detention order may be held at a prison or remand centre of a State or Territory (clause 105.27A). We note that there was no provision identifying the venue of detention in the previous Bill. We assumed this was deliberate to provide a range of places where a person may be detained, including home detention or another safe place, but not necessarily a correctional facility. While clause 105.27A does not mean that all persons subject to a preventative detention order will be detained in a prison or remand centre, it appears that many will be. This raises a number of issues:

(a) Section 19(2) of the *Human Rights Act* requires that accused persons must be segregated from convicted detainees. There is no provision in the Bill to guarantee that the person who is the subject of a preventative detention order will be segregated from the general prison population and also be treated in a manner appropriate to their status. In addition, remand facilities are notoriously over-crowded and conditions often unsatisfactory. There should be no prospect of a person held under this order risking long term incarceration in a remand prison.

(b) Section 20(1) of the *Human Rights* Act deals with the detention of a child and requires an 'accused' child to be segregated from adults. We note that the Bill does not include an specific provision to safeguard a child who may be detained in a prison or remand centre.

Continued incompatibility – aspects which have remained unchanged

5. We refer to our earlier advice in relation to the areas of inconsistency. In summary, the following aspects of the Bill remain of concern:

5.1 Retrospective operation of new offences: clause 106.3.

5.2 Lack of clarity in determining whether a control order should be made or varied. Particularly where the order is made *ex parte* and the court must take into account the person's circumstances (including the person's financial and personal circumstances): clause 104.3(2)).

5.3 There is no requirement for the court to publish reasons for a control order, preventative detention order or prohibited contact order.

5.4 The person who is the subject of one of these orders and the person's lawyer continue to be restricted from accessing all relevant documents and having access to the material on which an order has been sought: clause 104.8B(2)(b) and 104.12B(2)(b).

5.5 The control orders, preventative detention orders and prohibited contact orders continue to be applicable to children between the age of 16 and 18 years of age: clauses 104.14, 105.5 and 105.36.

5.6 The potential for indefinite successive control orders exists: clause 104.8E(2).

5.7 There may be an extension of an initial preventative detention order which is made by the senior AFP officer: clause 105.10.

5.8 Continued detention orders made be made by persons excising administrative rather than judicial powers: clause 105.18(2).

5.9 The indefinite nature of a continued preventative detention order exists: clauses 105.14(6) and 105.27(1). It should be made clear that the person must be released from preventative detention within 48 hours of first being taken into custody.

5.10 The secret and arbitrary prohibited contact orders are retained in the Bill: clauses 105.15 and 105.16.

5.11 The person who is subject to a preventative detention order has limited contact with family members, lawyers and advisers: clauses 105.31, 105.32 and 105.34. Any contact with a person will be monitored: clause 105.35.

5.12 The Bill continues to make the disclosure of a preventative detention order an offence: clause 105.38.

5.13 The uncertainties about the nature of the legal proceedings: clause 105.47.

5.14 The definition of sedition which includes urging violence in the community by reference to race, religion, nationality and political opinion has been retained.

Conclusion

6. Having regard to the test proposed by section 28 of the *Human Rights Act* and the changes which have been included in the current Bill, we remain of the view that the safeguards for human rights continue to be inadequate and for these reasons, the provisions of the Bill cannot apply consistently with the *Human Rights Act*.

7. Even with the proposed changes to the *Anti-Terrorism Bill* 2005 (Cth), if the Bill was ACT legislation, the Attorney-General could not present a statement under section 37(3) of the ACT *Human Rights Act* stating that the Bill is consistent with human rights.

Lex Lasry QC
Latham Chambers,
MELBOURNE

Jon Stanhope MLA

CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE AND INDIGENOUS AFFAIRS
MEMBER FOR GINNINDERRA

The Hon John Howard MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

I refer to your letter of today's date concerning the Commonwealth Government's Anti-Terrorism Bill 2005 (the Bill). I note that you have not responded to my letter of 1 November 2005 and that you now intend to introduce the Bill to the Commonwealth Parliament this afternoon. I note that the Bill was listed on the House of Representatives Notice Paper issued this morning.

At the outset I must express my strong concern and dissatisfaction at the exclusion of the Australian Capital Territory from the final round of discussions on the Bill between yourself and the State Premiers and the subsequent negotiations between Commonwealth and New South Wales officials.

Contrary to your assertion that State and Territory officials reviewed a further draft of the Bill last night, the revised text was only received by my Department after close of business last night, with no advance warning to my officials. The final text was received only this morning. This most unsatisfactory state of affairs has been quite at odds with the spirit of the Intergovernmental Agreement on Counter-Terrorism Laws and has made it impossible for me to give any detailed consideration to the Bill.

As I indicated in my letter of 1 November, I have been most concerned that the provisions of the Bill do not fully reflect the assurances you gave and the agreement reached at the Council of Australian Governments (COAG) meeting on 27 September 2005. In particular I have been concerned that the legislation will be disproportionate in its impact on fundamental human rights and civil liberties and that it may not comply with Australia's obligations under international law – especially our obligations as a signatory to the International Covenant on Civil and Political Rights.

I note that you now propose a number of changes in relation to the process for merit review of Preventative Detention Orders and that the Bill also contains amendments agreed with Queensland in relation to the role of the Public Interest Monitor. I wish to acknowledge that these and earlier changes significantly alter and significantly improve the legislation and the ACT is grateful for that movement on the part of the Commonwealth.

ACT LEGISLATIVE ASSEMBLY
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433

However, many of the concerns raised in my letter of 1 November remain unaddressed, including matters relating to the expansion of the definition of a terrorist organisation, provisions for Control Orders, the amendment of terrorist financing offences and the proposed changes to the law of sedition.

I am deeply concerned that the prevailing body of opinion, including advice received by the ACT, remains that there are grave doubts regarding the constitutionality of the Bill.

I also note that you have failed to respond to my request for your specific assurance that the legislation will fully comply with the ICCPR. Nor have you provided any reason why you are unable to do so.

In view of the importance and complexity of the human rights issues associated with your Bill, I have referred the revised text to my legal, human rights and constitutional advisers for further advice.

As a consequence, while I remain strongly supportive of the development and enactment of strengthened counter-terrorism laws, I am unable to give my agreement today to the text of the Bill that you have already decided to introduce to the Commonwealth Parliament this afternoon.

I remain convinced that with more time and greater good will all the outstanding issues could have been resolved so that both the spirit and letter of the COAG agreement could have been preserved. I deeply regret that there has been insufficient time to allow this to happen.

Consistent with the COAG agreement, I remain committed to bringing forward Australian Capital Territory legislation to provide for Preventative Detention Orders for up to 14 days' detention. This legislation will comply with the provisions of the *ACT Human Rights Act 2004* and will be developed and introduced as soon as possible subject to appropriate constitutional and human rights advice.

Yours sincerely

J Stanhope

Jon Stanhope MLA
Chief Minister

03 NOV 2005