Are we crossing the line?

A public forum held in Darwin on Thursday 3 November 2005, with the Hon John von Doussa QC, President of the Human Rights and Equal Opportunity Commision.

I speak from a human rights perspective on the measures proposed in the COAG communiqué dated 27 September 2005.

By way of preamble, it is clear the current climate of terrorism obviously requires governments to put in place measures that can effectively deal with a serious terrorist threat or event as soon as it is detected. Parliament cannot wait until potential dangers eventuate. It is understandable – indeed it is necessary in advance - to put in place measures that can deal with the worst-case scenario that could arise.

The problem in doing so is to establish sufficient protections for the human rights and fundamental freedoms of everyone who may get caught up in the new powers, thereby ensuring that their use is a necessary and proportionate response to the situation that has led to the powers being exercised. It is very difficult to assess in advance how grave the situation might be, however, the safeguards must be able to deal justly with situations of varying magnitude and seriousness.

Measures have already been put in place in the ASIO package of legislation that give extensive new powers to our security apparatus. These powers include the power to obtain questioning warrants and detention warrants for the purpose of obtaining terrorist-related information.

This is the background against which COAG met in September. The communiqué anticipated further powers, inter alia, control orders and preventative detention orders, powers to stop, question and search persons and declared places in relation to terrorist acts, powers to obtain information and documents a new sedition offence, and enhanced optical surveillance and other measures for protection of mass passenger transport.

The communiqué anticipated the cooperation of the States and Territories with the Commonwealth in passing an interlocking raft of laws.

Some states have already passed legislation to implement the stop, question and search measures. They have done so as these aspects have been seen as largely uncontroversial - although there is one very concerning aspect of the laws that I shall return to. Generally the proposed measures were seen as appropriate and in proportion to the kinds of situations they are intended to control.

What remains unresolved is the passage of the Commonwealth's side of the package, and the complementary State and Territory legislation for preventative detention orders.

The regimes for preventative detention orders and control orders are different. The bill published on the Chief Minister's website proposes two types of preventative detention orders – an initial preventative detention order and a continued preventative detention order. The former can be granted by a senior member of the AFP on application by another AFP officer for detention not exceeding 24 hours. A continued preventative detention order may be made thereafter by a federal judge or federal magistrate, acting in his or her personal capacity, to allow a further period not exceeding 24 hours.

Under the communiqué, the states are to pass complementary legislation that will provide for preventative detention to be further extended to a total of 14 days.

To make or extend any order the issuing authority must be satisfied on the basis of information provided by the AFP that there are reasonable grounds to suspect that the person: will engage in a terrorist act, or possess something connected with the preparation for, or the engagement of a person in, a terrorist act, or has done or will do an act in preparation for, or in planning a terrorist act.

The issuing authority must also be satisfied that the order would substantially assist in preventing an imminent terrorist act occurring in the next 14 days. An order can also be made where a terrorist act has occurred within the last 28 days, and the order is necessary to preserve evidence.

Control orders, on the other hand, may be requested

by a senior member of the AFP, with the consent of the Commonwealth Attorney-General. Control orders may be granted by a court (the Federal Court, the Federal Magistrates' Court or the Family Court). If the court is satisfied on the balance of probabilities that: the making of the order would substantially assist in preventing a terrorist act; or the person has been trained by or provided training to a listed terrorist organization.

The court must also be satisfied that the control sought are reasonably necessary and reasonably and adapted for the purpose of protecting the public from a terrorist act.

Control orders may be made for a maximum period of 12 months, but successive orders may be made against the same person.

Control orders will restrict or prohibit the person's daily activities, including contact with other people by any means, directing where a person may or may not go, and requiring the person to wear a tracking device. A control order could require someone to remain at home.

All control orders are made ex parte, and in urgent cases may be requested by a fax, email or telephone. The person subject to the order is not informed of the proceedings until after the order is made and served. The person's lawyer may obtain a copy of the order but appears to have no right of access to the reasons for the order or to details of the information on which the order was based.

The bill proposes to exclude the operation of the Administrative Decisions (Judicial Review) Act 1977 (Cth) which would have the effect of denying a person the right to seek reasons for the decision.

The person subject to the order may apply to the court to have the order revoked, but carries the onus of proving the ground for revocation, namely that the court be satisfied that there would not be sufficient grounds on which to make the order at the time of considering the application.

It is common knowledge that a further draft bill superseding the one posted by the Chief Minister has been circulated to premiers and chief ministers. All that is publicly known is that the revised bill proposes that control orders will still be issued on an ex parte basis, but that there will be an inter partes confirmation hearing. It is not known whether the bill proposes any relaxation on the failure to require disclosure of reasons or factual material to the controlled person. In the case of preventative detention orders, changes are proposed to include retired judges and members of the AAT in the class of 'issuing authority' and possibly to the provisions that restrict who a detained person may contact.

The States and Territories are being asked to enact laws to enable preventative detention to occur between 3 and 14 days, as the Commonwealth Government recognized that detention beyond about 48 hours without charge or conviction would be punitive, and therefore a power only exercisable under Chapter III of the Constitution by the federal judiciary. To provide such a power to the Executive would breach the separation of powers, which is entrenched in the Constitution. Effectively the states were asked to do what the Commonwealth could not, seemingly on the assumption that their legislative powers were not subject to the Chapter III restriction.

To get State and Territory officers to exercise the detention power would also seem to bypass section 75 (v) of the Constitution, which allows the High Court to review the legality of decisions of officers of the Commonwealth.

HREOC pointed out at the time, that it should be a matter of concern to all citizens that the Commonwealth should be seeking to evade two of the very few protections of fundamental freedoms that are in our Constitution.

Australia is a party to the major international human rights conventions. It is bound by international law to ensure that those in its territory are protected by the fundamental rights and freedoms that are set out in those conventions, in particular the ICCPR. Foremost amongst those rights are the right to liberty, the right not to be subjected to arbitrary arrest or detention (art 9(1)), the right to be told reasons for arrest (art 9(2)) and the right of a detained person "to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"(art 9(4)).

These rights may be derogated from by a State party to deal with a situation of public emergency which threatens the security of the State, but only so long as the measures taken by law to do so are necessary and proportionate to meet the gravity of the threat.

I have already referred to a problem that arises when a law is proposed that impinges on these fundamental rights. It is not possible to tell in advance how serious the risk may be that the law is intended to deal with. And more importantly, from a human rights perspective, it is not so much the text of the law that is the problem, but how the powers which the laws create are exercised in a given case.

The human rights issues created by the proposed law is one that must arise every time the power is exercised. The central question is – How can an exercise of power be checked to ensure that the power was properly directed to the person detained or subjected to a control order? And where is the

means of ensuring that the order was proportionate and necessary to deal with a particular situation?

In short, the means of checking the exercise of the power does not exist. The executive power is not, in any realistic sense, subject to review on the merits.

I mentioned previously there was a very concerning aspect of the stop, question and search powers. It is the provision that decisions leading to the exercise of the powers is not reviewable and cannot be challenged on any grounds whatsoever in any legal proceedings.

It sounds over-dramatic to say that the proposed laws are of the kind that may identify a police state, but let us reflect for a moment on this proposition. The defining characteristic of a police state is that the police exercise power on behalf of the executive, and the conduct of the police cannot be effectively challenged through the justice system of the state. Regrettably, this is exactly what the laws which are currently under debate will achieve.

The Government's response to criticism of the wide-ranging powers given to them by the ASIO laws has been, in effect, to say: "Trust us. We are a responsible organization, and we would only ever use these heavy powers if they were really necessary. We must have these powers, and you can be assured we will not abuse them."

The difficulty with that approach, as experience has shown, not only in places like South Africa, but even here in Australia, is that reality turns out otherwise. The revelations of the Palmer Report demonstrate how abuses of power occur where there is no accessible and realistic way people can question what is happening to them. What happened to our trust in this situation? What happened to Cornelia Rau's trust or Vivian Solon's? Do they still trust our government?

It is HREOC's view that the proposed legislation will seriously fail the human rights test, as well as contravene the ICCPR, unless the laws allow access to the courts to subject exercises of the new powers to review on the factual as well as the legal merits.

The Government says that the proposed laws are not unprecedented and refers to the measures that have been taken in the United Kingdom. However, there is at least one stark difference – in the UK there is a Human Rights Act, and ultimate access to the European Court of Human Rights. In Australia, there is no Charter of Human Rights, and no machinery for checking how the powers have been exercised unless the new laws permit access to the courts. Access to the courts is not only required by the ICCPR, but is central to Australia's concepts of democracy and the rule of law.

The COAG Communiqué announced that preventative detention orders will be subject to judicial review. That statement conceals more than it reveals and is apt to give a very misleading impression. To the uninitiated, it suggests that a detained person has ready access to a court to have the appropriateness of the order reconsidered. That is not so. Judicial review is a technical term applied to an arid process of checking for technical legal errors in the steps that lead to the making of the order. It is not a process that allows an investigation of the facts.

Judicial review will not allow the detained person to find out any of the factual basis upon which the issuing authority was persuaded to entertain a reasonable suspicion, or to go into the facts. It would not permit the detained person, or anyone else on his behalf, to give evidence to correct factual mistakes that have, for example, wrongly identified him or her.

'Judicial review' is in fact a weasel word in this debate. It should be treated as a warning sign of looming injustice – not as a palliative to calm concerns.

To provide a realistic check and balance on orders the legislation needs to incorporate the following safeguards for preventative detention orders, and there needs to be similar rights for the control order regime: the detained person must have a right to apply to the recognized courts for meaningful review of the factual basis and legal process that has led to the preventative detention order. The courts must be empowered to consider and review the facts.

Any review process will be no more than token in value unless the reasons for the making of the order are, at least in broad outline, made known to the detained person. It is a fundamental requirement of natural justice, and of the judicial process, that a person accused be made aware of the allegation that must be answered.

A review process to be meaningful to those in detention, particularly if they are unfamiliar with the English language and court processes, must provide legal assistance to bring proceedings to the court; and

There must be a statutory obligation on the detaining authority to take positive steps to advise the detained person of these rights, and to facilitate contact with a legal adviser.

It might be said of these suggestions that they would not give immediate relief to someone who has been wrongly detained, and the period of detention would have expired before the court decided the matter. At present that may be possible, though courts do act quickly where personal liberty is in question. But there are two points to be added. First, at present

EXPRESSION OF INTEREST

FOR APPOINTMENT AS A LEGAL MEMBER to the COMMUNITY VISITORS PANEL under the MENTAL HEALTH AND RELATED SERVICES ACT NT 1998

DARWIN

The Community Visitor Program is an external and independent mechanism which aims to safeguard the rights, health and dignity of community members being treated under the Northern Territory Mental Health and Related Services Act 1998, whilst maintaining an independent community perspective.

A Community Visitors Panel consists of three (3) members: a medical practitioner, a legal practitioner and a member who represents the interests of organisations that represent consumers of mental health services (community member). There is one panel in the Top End and one in Central Australia.

Duties: The panel members are required as a group to visit the facility or agency in respect of which they have been appointed not less than once every six (6) months to monitor the adequacy of opportunities, treatment, services and information being provided to persons receiving treatment or care.

A legal practitioner with admission to practice as a barrister or solicitor in the Northern Territory Supreme Court and a minimum of five years experience is sought for the panel in Darwin. Persons who represent a range of Aboriginal and ethnic viewpoints are encouraged to join the program.

To obtain a recruitment package incorporating the selection criteria and further information on the Community Visitor Program, or to obtain further information, please contact Judy Clisby on 8999 1444.

Expressions of interest should be marked 'confidential' and forwarded to the Principal Community Visitor.

LMB 22 GPO, Darwin NT 0801 by 16 December 2005.

Are we crossing the line? cont...

the detention period is only 14 days, but already the UK is seeking to extend police powers to detain people suspected of terrorist crimes to 90 days, and the French authorities can detain for up to 3 years. It is important that the proper safeguards are put in place at the outset in case the executive power is later increased. Secondly, even if the wheels of justice turn slowly, so long as they can still turn, the conduct of the executive will be exposed to independent consideration. This is likely to have a restraining influence on any officer otherwise inclined to cut corners and exceed formal orders and legislative authority.

It might also be said that the facts of a case will be likely to be sensitive, and the intelligence of the nation cannot be compromised by disclosure to the court. At first sight this is an obvious argument but it does not withstand examination. The courts are well-used to dealing with sensitive information, and making orders that suppress evidence where its disclosure would be against the public interest. Moreover, the Parliament has recently passed the National Security (Criminal and Civil Proceedings) Act 2005 which sets up a comprehensive regime for dealing with security-sensitive evidence in both criminal and civil proceedings. Under that Act, a judge is empowered to edit or redact the evidence to protect secrecy, and in an extreme case to suppress the evidence altogether. While the Commission has expressed some concerns about that Act, it would enable the security issues to be addressed, and importantly, would leave it to the judge hearing the matter to work out how natural justice principles can be met, whilst at the same time protecting sensitive material.

I would like to end with a rhetorical question. If the security services can be guaranteed never to use these new powers mistakenly, and never to abuse them, where in a realistic sense is the danger to our nation and to our security in allowing their conduct to be subject to independent check? Surely to do so would in any event add to community confidence that our ideals of democratic principles and the rule of law are being maintained.