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18 October 2005

Mr Jon Stanhope, MLA
Chief Minister and Attorney-General
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stanhope,

Human rights implications of the *Anti-Terrorism Bill* 2005

1. You have asked us to consider the human rights implications of aspects of the draft Commonwealth *Anti-Terrorism Bill* 2005 (the Bill). Given the short time frame, we have focused only on those provisions of the Bill that relate to preventative detention and control orders. This letter sets out our preliminary views.

2. We note from your press release of 27 September 2005, following the Council of Australian Governments meeting in relation to the proposed national counter-terrorism laws, that you had received guarantees from the Prime Minister that the new 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**;**
- **c**omply 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 ("ICCPR");
- involve rigorous safeguards against abuse, including respecting the principle of non-discrimination;
- be subject to judicial review; and
- contain sunset clauses.

3. From our review of the Bill, we do not consider that the preventative detention and control order provisions meet these guarantees, except for the final one. In particular, it appears that these provisions breach a number of Australia's obligations under the ICCPR, which of course are now protected in the ACT by the *Human Rights Act* 2004.

4. We have included as Appendix 1 a table that evaluate the extent to which the Prime Minister's human rights guarantees have been met in relation to the Bill. Our analysis of the specific provisions is set out in more detail below.

5. In summary, we consider that:

a. The preventative detention order regime breaches the human rights to be free from arbitrary detention and to due process and cannot be said to be subject to an effective procedure of judicial review that provides adequate safeguards against violations of the human rights of the persons affected.

b. The control order regime breaches the rights to be free from arbitrary detention, to a fair trial, to freedom of movement, to privacy and family life, and to the presumption of innocence.

GENERAL PRINCIPLES

6. We note that there is no reference in the Bill to the general principle that restrictions on rights be read in accordance with Australia's obligations under the ICCPR (and other human rights treaties), and that any restrictions on the exercise of ICCPR rights need to fall within the permissible restrictions set out in the ICCPR. If the Bill is intended to be consistent with human rights, this should be included as either an overriding principle or as an explicit factor that courts or issuing authorities or law enforcement agencies should be obliged to take into account in exercising powers and taking decisions under the legislation.

7. Under the ICCPR (and the ACT *Human Rights Act*) there is a clear onus to justify limitations on fundamental rights; the more important the rights and the greater the intrusions, the higher the burden on government of demonstrating that the limitations are justifiable. While there are various formulations of the appropriate test for justifiable limitations, human rights jurisprudence requires that the Commonwealth government must demonstrate that the proposed measures are:

- Adopted in pursuit of a legitimate objective (not in dispute here)
- Necessary for the achievement of that purpose, that is, they must
    - be rationally connected to the achievement of the objective
    - be proportionate
    - minimally impair fundamental rights
- Subject to adequate safeguards to avoid any abuse of the powers granted.

8. So far as the public discussion goes, the Commonwealth government has not as yet addressed a number of these matters in any detail. It has resorted to general assertions of the necessity for these laws (which in many respects are copies of the United Kingdom legislation), and of their consistency with human rights. While we understand that confidential briefings on some aspects of these questions have been given to the Premiers and Chief Ministers, it is not apparent that the breaches of human rights by the proposed laws can be justified by the current level of the terrorist threat in Australia. The Commonwealth Parliament is the appropriate place for these matters to be considered in detail, and proper time should be allocated for a focused and detailed consideration of these issues.

1.PREVENTATIVE DETENTION ORDERS

9. Preventative detention of people who have not committed any offence is a serious encroachment upon fundamental human rights, including the right to liberty and the presumption of innocence, principles both of Australian common law and international human rights law.

However, if such a regime is considered essential to combat terrorism, robust safeguards for the rights of those detained will be critical to ensure that the laws conform to the principle of proportionality and to avoid the legalisation of a system of arbitrary detention. Since in nearly all cases a detained person will not be able to challenge his or her detention and obtain a remedy from an external body before any period of preventative detention is over, the building-in of adequate safeguards *before* any detention order is made is of great importance.

We understand that you received particular assurances from the Prime Minister that the preventative detention order regime agreed to would, among other things:

- involve effective judicial oversight, including the right of detainees to know the reasons for their detention and the right to challenge its lawfulness before a court;
- uphold the principle that detention should be kept to the minimum period consistent with public safety and that the period would be determined by the courts, up to a maximum of 14 days;
- enshrine the right to humane treatment, preferably in accordance with published protocols and subject to independent monitoring; and
- protect the right of detainees to have access to an independent lawyer.

Such protections of the rights of detainees would certainly go some way towards compliance with human rights standards under the ICCPR. However, in our view, the regime established by the Bill does not comply with these assurances.

The international standard on detention

Article 9 of the ICCPR (the equivalent of s18 of the ACT *Human Rights Act*) states:

> 1. Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of the charges against him.

The United Nations Human Rights Committee, in its General Comment on article 9 has stated:[1]

> [I]f so-called preventive detention is used, for reasons of public security, it … must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted.

The Committee has interpreted the notion of arbitrariness in article 9 of the ICCPR as "not to be equated with 'against the law', but [it] must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability."[2]

The preventative detention order regime

The new Division 105 of the Commonwealth Criminal Code introduced by the Bill[3] sets out two types of preventative detention orders ("initial preventative detention orders" and "continuing preventative detention orders") that may be obtained by members of the Australian Federal Police ("AFP").

Initial preventative detention orders may be granted by a senior member of the AFP[4] and they may be extended or further extended[5] (the Bill sets a maximum period of 24 hours but we understand that the States and Territories have agreed to legislate to allow for a longer maximum period for initial detention). *Continued* preventative detention orders may be granted by a Federal Judge or Magistrate with respect to a person who is the subject of an initial preventative detention order[6] and may also be

[1] *General Comment No. 8*, para.4 (1982).

[2] *Van Alphen v The Netherlands*, Comm No 305/1988, para 6.3
[3] Schedule 4.
[4] s 104.8 and s101.1(1) as amended by cl 7 of Schedule 4.
[5] s105.10
[6] s105.12

extended and further extended[7] (the Bill sets a maximum period of 48 hours for such orders but we understand that the States and Territories have similarly agreed to legislate to allow for a longer maximum period of 14 days for continued detention).

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
- possesses 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.[8]

The issuing authority must also be satisfied that the order would substantially assist in preventing an imminent terrorist act occurring within 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.[9]

This regime breaches international human rights standards in the following ways:

a. Violation of the guarantee to be free from arbitrary detention (ICCPR, article 9)

It is apparent that, contrary to the Prime Minister's assurance, preventative detention orders are not subject to the safeguard that they must be made by the courts. In the case of initial preventative detention orders, the AFP is both the applicant for the orders and the issuing authority that grants or extends the orders.[10] Members of the AFP of the rank of superintendent and above may grant and extend orders up to a maximum total period of 24 hours.[11] As noted above, we understand that State and Territory legislation will extend this total period. There is potential for abuse where an application made by the AFP is also granted by a member of that agency as is the case with initial preventative detention orders. This brings a clear apprehension of bias which, coupled with other procedural unfairnesses and an inequality of arms, means that the procedure does not provide adequate safeguards and is therefore arbitrary.

Continuing preventative detention orders, and extensions of these orders, are made by a Federal Magistrate or Judge who is appointed by the Minister.[12] The function of making or extending these orders is conferred in a personal capacity, not as a court.[13] Accordingly, these applications will be considered by the Magistrate or Judge on an *ex parte* basis as an executive action, rather than in an *inter partes* hearing, at which there would be at least some possibility of the person affected being heard (although restrictions on the material available to the person or their legal adviser may render even an *inter partes* hearing unfair).

The only information available to the issuing authority in determining whether or not to make a preventative detention order is that provided by the AFP.[14] For an initial preventative detention order, the AFP member must adduce enough information to convince the issuing authority, another member of the AFP, that there are "reasonable grounds" to suspect that the person sought to be detained will engage in an imminent terrorist act or that they possess a thing connected with a proposed terrorist act or that they are involved in preparing or planning such an attack. In the case of an application for a continued preventative order, the AFP must make a similar case to the satisfaction of a Magistrate or Judge.

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[7] s105.14
[8] s105.4 (2)
[9] s105.4 (4)
[10] s100.1(1) as amended by clause 7 of Schedule 4.
[11] s105.10(5).
[12] s105.2.
[13] s105.18.
[14] s105.4;

In neither case can this information be tested through argument or by the provision of evidence to the contrary by the detained person. Although the detained person must be informed as soon as possible about the certain aspects of the preventative detention order,[15] there is no requirement that the AFP provide the person or their lawyer with details of why the order was made, or the information on which the AFP based the application. This makes any application to the Federal Court or complaint to the Ombudsman very difficult to pursue in any meaningful way.

In our view, the *ex parte* nature of the initial order, the failure to provide for any *inter partes* hearing (even after the order is made), and lack of a guarantee of access to the reasons for any order (thus making it difficult or impossible to challenge an order even after the event) mean that the proposed system would breach article 9 of the ICCPR, as authorising a system of arbitrary detention.

It is unclear why the decision to detain a person should not be given from the outset to the courts, as is contemplated by the control order provisions discussed below, rather than being authorised at a later stage, if at all, by a judge or magistrate in their personal capacity.

b. No sufficient right of access to the court or judicial review on the merits

Article 9(4) of the ICCPR provides that:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14 of the ICCPR also provides for the right of access to court in the determination of one's rights and obligations in a suit at law.

Although there is provision for a preventative detention order to be revoked by the issuing authority, this procedure can only be initiated by the AFP, and not by the person detained.[16] The Bill does not provide any other specific procedure to have the preventative detention order reviewed, and decisions under this Division are specifically excluded by clause 20 of the Bill from consideration under the *Administrative Decisions (Judicial Review) Act* 1977.

Accordingly it appears that the person detained is limited to making a complaint to the Ombudsman (who does not have power to set aside such an order) or seeking judicial review by the Federal Court on the grounds of error of law, rather than on a re-examination of the merits of the decision, or possibly a later action in tort for unlawful imprisonment. Detainees would have to bear the cost of such an application or action. In our view, this falls well short of effective judicial oversight of preventative detention orders, and arguably breaches the right of access to court under article 14(1) of the ICCPR.[17]

c. Use of lethal force

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[15] s105.28.
[16] s105.17
[17] The Human Rights Committee has commented:

> The Committee is … of the view that preventive detention is a restriction of liberty imposed as a response to the conduct of the individual concerned, that the decision as to continued detention must be considered as a determination falling within the meaning of article 14, paragraph 1, of the Covenant, and that proceedings to decide the continuation of detention must, therefore, comply with that provision. Therefore, the Committee recommends that the requirements of article 9, paragraph 2, of the Covenant be complied with in respect of all detainees. The question of continued detention should be determined by an independent and impartial tribunal constituted and operating in accordance with article 14, paragraph 1, of the Covenant.
> CCPR/C/79/Add. 81, para. 27 (1997) (concluding observations on India)

There are some useful safeguards in the Bill regarding the treatment of the detainees, such as the general provision on humane treatment under s105.30; the prohibition on interrogation under s105.39, and the criminalisation of breaches of these provisions under s105.2.

However the provisions in relation to use of force in s105.23 raise serious concerns. In particular, subsection 105.23(2) specifically contemplates the use of lethal force against a detainee where an AFP member believes on reasonable grounds that this is necessary to protect life or to prevent serious injury to another person. It appears that this section is an attempt to broaden the scope of self-defence under the common law, by removing the need for an immediate threat to life, and has echoes of the "shoot to kill" policy in the United Kingdom, which led to the fatal shooting by police of innocent commuter Jean Charles de Menezes in July 2005. In our view this provision goes beyond the proportionate common law protection for self-defence and is likely to breach article 6 of the ICCPR which protects the right to life.

d. Protection of children

Preventative detention orders may be made in respect of children who are 16 years old or older. While there are some allowances made for children to have greater contact with family while in detention under s105.35, and restrictions on the taking of DNA evidence under s105.40(4), it is not clear where children will be held in detention, and whether they will be placed with adult detainees which would breach article 10.2.b of the ICCPR

e. Infringement of the doctrine of separation of powers

The Bill provides that the maximum period of time a person can be detained by the AFP under a continued preventative detention order, including all possible extensions, is 48 hours. This is consistent with the Prime Minister's media release of 8 September 2005 which stated that the Government will move quickly to implement "a new preventative detention regime that allows detention for up to 48 hours in a terrorism situation."

However, the media release went on to state that:

> States and Territories will be asked to provide for longer detention periods, similar to those available in the UK which allow for up to 14 days detention, because there are constitutional restrictions on the capacity of the Australian Government to provide for this type of detention.

It appears that States and Territories will be asked to pass preventative detention legislation in the same terms which would extend the maximum period of detention to 14 days, with the explicit intent to circumvent the constitutional separation of powers between the executive and the judiciary which prevents the executive from imposing punitive sanctions without trial or conviction by the courts.

f. Restrictions on access to legal advice

The Bill allows a detained person to contact a lawyer,[18] subject to any prohibited contact order, but all communications with the lawyer will be monitored by the AFP.[19] This provision breaches the right to legal assistance in criminal matters set out in article 14(3) of the ICCPR. The lawyer is in turn prohibited from disclosing to any other person the fact that a preventative detention order has been made, unless it is in the context of court proceedings or a complaint to the Ombudsman.[20] While we note that the Bill purports not to affect the law relating to legal professional privilege,[21] it is hard to see how this general reference does anything to protect the confidentiality of lawyer-client communications while a person is being detained, given the monitoring proposed.

We also note that a prohibited contact order may be made in respect of the detainee's lawyer, where the issuing authority is satisfied simply that this "*would assist in achieving the objectives of the preventative detention order*." [22] In such cases the AFP must assist the person to choose another lawyer, and may prioritise security-cleared lawyers.[23]

2.CONTROL ORDERS

The regime for imposing control orders also imposes very significant restrictions on the liberty of those subject to the orders, and could in extreme cases amount to a form of home detention. Unlike preventative detention orders, which are of limited duration, control orders may be made for up to 12 months, and successive orders may be made against the same person. Depending on the particular restrictions imposed and the length of time for which they are imposed, control orders could significantly affect a range of internationally guaranteed fundamental rights and freedoms including the:

- Right to liberty and security of the person and the right to be free from arbitrary detention (ICCPR, article 9)
- Right to privacy and respect for family life (ICCPR, article 17)
- Freedom of association (ICCPR, article 22)
- Freedom of expression (ICCPR, article 19)
- Freedom of movement (ICCPR, article 12)
- Right to work (International Covenant on Economic, Social and Cultural Rights, article 7)
- Freedom of religion (ICCPR, article 18)
- Right to health (ICESCR, article 12)
- Right to a fair and public hearing in the determination of one's rights and obligations in a suit at law or in the determination of a criminal charge (ICCPR, article 14),

as well as other rights, depending on the facts of a particular case.

The control order regime

Control orders may be requested by senior members of the AFP, with the written consent of the Commonwealth Attorney-General.[24] Control orders may be granted by a court (the Federal Court, 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**

[18] s105.34.
[19] s105.35.
[20] s105.38.
[21] s 105.46
[22] s105.15
[23] s105.34(3)
[24] s104.1

- the person has been trained by or provided training to a listed terrorist organisation

The court must also be satisfied that the controls sought are reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.[25]

Control orders may be made for a maximum period of 12 months, but successive orders may be made against the same person.[26] They may restrict or prohibit the person going to specified places, leaving Australia, communicating with specified people, carrying out particular occupations, using the telephone or internet, and possessing or using otherwise legal articles or substances. Such orders may also require the person to remain at home or at specified premises, to wear a tracking device, to report regularly, to be photographed and fingerprinted to monitor compliance, and with consent, to participate in counselling or education.[27] Contravening a control order is an offence carrying a maximum penalty of five years' imprisonment.[28]

This regime breaches international human rights standards in the following ways:

a. No explicit consideration of the human rights of the person subject to the order

It is notable that the grounds on which a control order is made specifically refer to the protection of the public, but the court is not explicitly required to consider the nature and importance of the human rights of the person subject to the order, the exercise of which may be severely restricted by a control order.

b. Ex parte *nature of the procedure*

All control orders are made *ex parte*, and in urgent cases may be requested by fax, email or telephone. These *ex parte* orders are final orders, rather than interim orders, where there would be an automatic *inter partes* hearing to follow (if it is not practicable to have such a hearing initially). Thus, the person subject to the order is not informed of the proceedings until after the order is made and served upon him or her.[29] The person's lawyer may obtain a copy of the order, but is not explicitly given any right of access to the reasons for the order or to details or the substance of the information on which the order was based.[30]

While an *ex parte* hearing may be justifiable in cases in which there is some urgency or danger of a person absconding or destroying evidence, if notice of a hearing were given, it is not clear that it will be necessary in all cases.

The United Kingdom Parliament's Joint Committee on Human Rights, in its report on the *Prevention of Terrorism Bill* 2005 (which introduced control orders), stated:

> We accept that there should be the facility to make an ex parte application in an appropriate case, for example where there is a legitimate fear of disappearance or in other circumstances where the purpose of the application will be defeated if it is made on notice to the person concerned. In the absence of such concern, however, we see no reason why the hearing should not be inter partes.[31]

There appears to be no good reason why the court should not be given the discretion to order an *inter partes* hearing before granting an order, or to order an *inter partes* hearing within a specific short period after the *ex parte* order is granted.

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[25] s104.3
[26] s104.4(1)(d)), and s104.4(2)
[27] s104.4
[28] s104.13
[29] s104.9
[30] s 104.10
[31] United Kingdom Joint Committee on Human Rights, Tenth Report, 2 March 2005 at p4

While the person subject to the order may apply to the court to have the order revoked, the person bears the onus of proving the grounds for revocation.[32] Section 104.11 provides that the person affected must "give written notice of . . . the grounds on which the revocation is sought." This involves an inequality of arms which makes the procedure for seeking revocation a largely empty and unfair one, unless there is some guarantee that the person or his/her legal adviser is given sufficient information to enable the person to challenge the order. The court "may revoke the control order if, at the time of considering the application, it is satisfied that there would not be sufficient grounds on which to make the order." This effectively places the onus on the person subject to the order to satisfy the court that the order should not have been made.

Given the inequality of arms arising from the lack of access to information, the onus should not be on the person affected to show why the order should be revoked, especially if he or she is not given access to the relevant information. Rather, it would be more consistent with the protection of rights to *require* the court to revoke the order, unless it is satisfied by the AFP in a properly contested hearing that there *are* grounds to justify the continuing order.

Furthermore, given the costs involved in challenging a control order and the effect that the possibility of an adverse costs order is likely to have on the exercise of the right to seek revocation, the right of access to court under article 14(1) of the ICCPR arguably requires that persons seeking to challenge *ex parte* control orders should receive legal assistance funded by the Commonwealth. Even if a control order is upheld, all that is demonstrated is that there is a reasonable suspicion that certain facts existed. This is not even a showing on the balance of probabilities, let alone a demonstration on the criminal standard of proof beyond reasonable doubt that the person has engaged in any criminal conduct.

c. Attorney-General's involvement

The requirement that the Commonwealth Attorney-General consent before the AFP can request a control order is one safeguard within the control order regime. However, the provision does not require that the Attorney-General be satisfied of any particular grounds, or form an opinion about the need for the control order, which may reduce the effectiveness of this safeguard.[33] The Bill also provides that an urgent control order may be sought without the Attorney-General's consent[34] although such consent must be obtained within 4 hours of making the request.[35]

d. Civil rather than criminal standard of proof

The restrictions that may be imposed by control orders are more severe than the penalties that are imposed for many criminal offences. In extreme cases it would be possible for a court to order that a person remain in their home for a period of twelve months. On this basis, there is a strong argument that these proceedings should be characterised as criminal proceedings[36] and that the criminal standard of proof beyond reasonable doubt should be applied, rather than a civil standard of proof on the balance of probabilities. If this were the case, the other requirements for a fair trial in the determination of a criminal charge set out in article 14(3) of the ICCPR would also apply, as well as the general requirements of fairness and equality of arms.

e. Renewal of control orders

-The proposed s 104.4(2) allows for successive control orders to be made be made in relation to the same person. It is not clear whether they are indefinitely renewable, or whether there is some limit to the number of time a person may be subject to a control order (especially in relation to the same facts). The conditions for making a control order (s 104.3 (c) refers to "a terrorist act", but it is not clear whether a specific terrorist act is required; otherwise, it is quite open-ended).

[32] s104.11
[33] s104.1
[34] s104.5.
[35] s104.7.
[36] Engel v Netherlands (1976).

It may be appropriate to impose a higher standard for the renewal or further renewal of any control order. The more often an order is renewed, the more likely it would be viewed as a criminal charge or penalty under the ICCPR, requiring the full panoply of procedural rights applicable to a criminal charge. None of these are specifically provided for in the Bill.

Please let us know if you would like a more detailed response on any of these issues.

Yours sincerely

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Appendix 1 – Evaluation of the Prime Minister's General Guarantees about the Anti-Terrorism Laws

Guarantee	Met?	Issues
The 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;	Not clear	The laws were partly justified by issues raised in a security briefing to the COAG meeting. These matters have not been made public. We note that ASIO already has significant powers to detain people suspected of involvement in terrorist activity, for up to seven days. These powers have rarely been used, and it is not clear why longer periods are now required. Although there is a real threat posed by terrorism, the desired effect of protecting the public against terrorist attacks could be better achieved with greater safeguards for human rights.
The laws would be effective against terrorism	Not clear	Similar laws were in place in the UK prior to the London bombings but did not enable these terrorist acts to be prevented. There is a real possibility that such draconian laws may be counterproductive and lead to radicalisation of communities who are targeted by police.
The laws conform to the principle of proportionality	No	The laws seriously limit a number of fundamental human rights, and are not subject to an effective procedure of judicial review that provides adequate safeguards against violations of the human rights of the persons affected.
The laws 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 ('ICCPR')	No	The laws do not comply with a number of ICCPR rights including the right to liberty, the right not to be arbitrarily detained, the right to access a court and the right to a fair trial.
The laws involve rigorous safeguards against abuse, including respecting the principle of non-discrimination	No	The safeguards are inadequate. Initial preventative detention orders (PDOs) can be both requested and granted by the AFP. Proceedings for control orders are held *ex parte* and people affected are not entitled to access the information on which decisions are made. Although there are no explicitly discriminatory provisions, it is likely that the Muslim community will be disproportionately affected by these laws
The laws would be subject to judicial review	No	PDOs are made without any involvement of the courts and are excluded from merits review. Control orders are made *ex parte*, and the person subject to the order bears the onus of proof in any proceedings for revocation of

		the order.
The laws would contain sunset clauses	Yes	The laws do contain ten year sunset clauses; however this period is too long to be a real safeguard or review mechanism for these laws and thus is a disproportionate measure.