NSW GOVERNMENT

Premier of New South Wales

Reference: A1825134

Mr Michael Sukkar MP
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

18 OCT 2016

Dear Mr Sukkar

Thank you for your letter dated 22 September 2016 inviting NSW to make a submission to the Parliamentary Joint Committee on Intelligence and Security's inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 ('the HRTO Bill').

The NSW Government firmly supports the HRTO Bill. The ability to continue detention of high risk terrorist offenders who pose an unacceptable risk to the community at the conclusion of their custodial sentence will enhance community safety.

As noted in your letter, NSW along with all other States and Territories agreed to the text of the Bill proposed by the Commonwealth. As you are aware, officials from the Commonwealth and all jurisdictions continue to work through implementation issues related to the scheme.

In officer-level discussions with the Commonwealth, NSW has identified some issues that would enhance the effective implementation of the scheme, based on our operational experiences and administration of post-sentence detention schemes for high risk violent or sex offenders. These issues relate to the management of individuals subject to continuing detention orders, information sharing and timing of applications and interim detention orders. Further information is provided at Annexure A.

If you require clarification of any aspects of this letter, the appropriate contact is Mark Follett, Director, Justice and Community Safety Branch, Department of Premier and Cabinet. Mr Follett can be contacted on

Yours sincerely

MIKE BAIRD MP
Premier

CC: The Hon. Gabrielle Upton MP, Attorney General
The Hon. Troy Grant MP, Minister for Justice and Police
The Hon. David Elliott MP, Minister for Corrections

Annexure A

Management of individuals subject to continuing detention orders

Corrective Services NSW has established legislative frameworks and policies governing the treatment of offenders in correctional centres. This framework provides for prison visits, correspondence to and from prisoners, phone calls to and from prisoners, use of force, correctional centres offences (e.g. contraband) and other operational management issues. Currently, federal prisoners are managed the same as NSW inmates pursuant to section 19A of the *Crimes Act 1914* (Cth).

The legislative framework that applies to *convicted inmates* also applies to offenders detained under the NSW high risk offender scheme (section 4(3) *Crimes (Administration of Sentences) Act 1999* (NSW)). They are therefore subject to all of the standard regulation and rules for the inmate population and are housed in the same accommodation as the mainstream prison population.

It is unclear whether those detained under the proposed HRTO Bill would be expected to come within the established framework for managing inmates in NSW, or if a separate operating system would be required. NSW suggests consideration be given to whether the current drafting of the Bill provides for detainees under the scheme to fall within section 19A of the *Crimes Act 1914,* and if not, recommends amendments to provide for this.

Information sharing and admissibility of evidence

Corrective Services NSW currently manages the monitoring and application development process for the existing NSW high risk offenders post-sentence detention scheme. It is likely that Corrective Services NSW will play a key role in the application process for the high risk terrorist offenders scheme.

The HRTO Bill currently does not enable Corrective Services NSW to obtain, use, communicate or give in evidence information obtained under the *Telecommunications (Interception and Access) Act 1979* (Cth) and *Surveillance Devices Act 2004* (Cth). Amendments are required to ensure that Corrective Services NSW is able to access and use telecommunication product (most importantly, subscriber information and call charge records) used in consideration of orders, and the management of risk generally.

Further, there is no provision enabling the Commonwealth Attorney-General to obtain information (documents, reports, etc.) to inform whether or not to make an application *before* that application is made. Under the existing NSW post-sentence detention framework for high risk violent offenders and high risk sex offenders, section 25 of the *Crimes (High Risk Offenders) Act 2006* (NSW) enables the NSW Attorney General to require a person to provide any document, report or other information in that person's possession, or under that person's control, that relates to the behaviour, or physical or mental condition, of any offender. This information assists the NSW Attorney General to determine whether or not to make an application. To otherwise obtain that information without a provision similar to section 25 would be very difficult.

It is important that the court can consider all risk assessment reports prepared prior to the commencement of proceedings. The HRTO Bill does not include provisions governing admissibility of material shared between states and the Commonwealth for an application. Section 25(3) of *Crimes (High Risk Offenders) Act 2006* (NSW) allows for information provided to the NSW Attorney General on request to be admissible in proceedings under the Act. This makes police system reports, old expert reports, etc. automatically admissible (that

is, despite any law to the contrary). There is no equivalent in the HRTO Bill which may present a difficulty in obtaining adequate admissible evidence.

Interim detention orders and application timing

Given the anticipated complexity of applications under the Commonwealth scheme, the proposed timeframe for interim detention orders (three months) may be insufficient.

The present NSW post-sentence detention scheme has an equivalent three month timeframe for interim detention orders, however operational experience indicates this timeframe is difficult to meet. For example, often the information and documents required to inform an application including treatment completion reports, etc. are only available towards the end of an offender's time in custody.

It is anticipated the information gathering and application process for the Commonwealth scheme will be far more complex than that which currently applies under the NSW scheme. Under the NSW scheme the operation of a 'High Risk Offenders Assessment Committee' facilitates review of risk assessments, co-operation between and co-ordination of relevant agencies, information sharing between relevant agencies, and makes recommendations about the taking of action under the NSW Act. The absence of equivalent facilitative structures under the proposed scheme causes further concern the three month interim period may be insufficient.

NSW suggests consideration be given to the inclusion of a mechanism to extend an interim detention order for a short period in the legislation, to be used in the event that a continuing detention order is not granted. This will enable suitable post-order support arrangements to be made for the individual. For example, one option could be to adopt a provision similar to that at section 35(4) of the *Mental Health Act 2007* (NSW) where the commencement of an order is deferred for up to 14 days so appropriate post order arrangements can be made. A similar approach is at section 138 of the *Crimes (Administration of Sentences Act) 1999* (NSW) which enables a parole order to commence at the date on which the order is made or '…no later than 35 days after that date'.