



New South Wales Government

Department of Premier and Cabinet

M101757

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hallahan

I write to provide a submission regarding the Senate Committee on Legal and Constitutional Affairs current inquiry on the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* on behalf of the police portfolio in NSW, which includes the NSW Police Force and the Law Enforcement Policy Branch of the NSW Department of Premier and Cabinet.

The Bill provides important additional tools to assist law enforcement bodies in investigating organised crime and bringing organised criminals to justice.

There are some suggested amendments which the NSW Police Force advises me would enhance the Bill and improve its smooth functioning. I have set these out in more detail within the attached submission.

I thank the committee for the opportunity to make this submission and look forward to the Committee's favourable consideration of its recommendations.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Les Tree'.

Les Tree
Deputy Director-General
Law Enforcement and Security Coordination
NSW Department of Premier and Cabinet

**COMMONWEALTH SENATE COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS – INQUIRY ON THE CRIMES LEGISLATION
AMENDMENT (SERIOUS AND ORGANISED CRIME) BILL 2009**

Controlled operations – authorising officers

Section 15GF defines the meaning of authorising officer. The current meaning does not allow an officer of a state police force to authorise a controlled operation.

Many state police force investigations such as those involving counter terrorism and drugs would have both State and Federal aspects, and require state police officers to do various things requiring a Commonwealth controlled operation. The practicality of obtaining a Commonwealth controlled operation is often very time consuming and difficult for state police.

It is recommended that a suitable state police officer, such as the Commissioner of a state police force, be included as an authorising officer for Commonwealth controlled operations.

Controlled operations – retrospective authority

The NSW *Law Enforcement (Controlled Operations) Act 1997* allows for the application of retrospective authority where a participant in a controlled operation engages in unlawful conduct (other than unlawful conduct that is a controlled activity), within 24 hours of the conduct.

This provision acknowledges that controlled operations can place police officers in dangerous situations where, despite good planning, circumstances can change rapidly. Allowing police to adapt controlled operations within defined limits (for example, purchasing a different type of illicit drug when the one originally discussed is no longer offered) allows police to operate effectively, efficiently and with a greater degree of safety in potentially dangerous situations.

It is recommended that a similar provision be included within the Bill.

Telecommunications Interceptions

I note that the proposed amendments aim to allow the issue of telephone interception warrants for the investigation of criminal organisations association offences as defined within the *Crimes (Criminal Organisations Control) Act* of NSW (the COCC Act), with the proviso however, that the association is reasonably suspected of being undertaken in relation to the commission of a prescribed offence.

While this change is welcome, the Act does not provide police with the power to use telecommunications interceptions for the full range of offences and proceedings within new organised crime legislation.

Unfortunately, police will still be unable to use lawfully obtained telecommunications interception product in:

- applications for criminal organisation declarations;
- applications for control orders; or,
- the prosecution of association offences that do not relate in some way to a prescribed offence.

As part of the application process for criminal organisations declarations, police are required to provide evidence to an authorised justice of the Supreme Court to show that members of an organisation associate for the purpose of organising and carrying out serious crimes. If a declaration is obtained, similar evidence must then be produced to an authorised justice of the Supreme Court to obtain a control order (which prevents a member of a declared criminal organisation from associating with other members).

It is not being suggested that police be allowed to obtain warrants to collect evidence for criminal organisations declarations. However, it is likely that there will be some evidence that police wish to present to an authorised justice that includes lawfully obtained telecommunications interceptions product from previous investigations into serious and prescribed offences. Such material can already be used in several analogous proceedings, such as ICAC and PIC hearings.

Without further amendments to the *Telecommunications (Interception and Access) Act 1979* (the TIA Act), it is likely that crucial and lawfully obtained evidence implicating members of a criminal organisation would not be able to be presented in proceedings for a criminal organisation declaration; thus depriving an authorised justice of the fullest possible picture of an organisation's criminality.

Police will also be unable to obtain telecommunications interception warrants to investigate first-instance associations between controlled members of declared criminal organisations unless they suspect that association relates to the commission of a prescribed offence.

Associations under the COCC Act, and as defined within the Bill, include associations by post, fax, telephone, email or other electronic means. Without the ability to apply for a telecommunications interception warrant, police will have no way to investigate first-instance associations via those electronic and telephonic mediums.

I note that telecommunications interception warrants will be able to be obtained for second-instance association offences, as these offences meet the definition of 'prescribed offence' in that they carry a maximum penalty of more than 3 years imprisonment.

Given that first-instance associations between controlled members must also include an element of a prescribed offence for a telecommunications interception warrant to be issued, the amendments to the TIA Act, in their current form, add very little value to the current regime. If police are unable to investigate and detect a first offence, they will obviously be unable to

investigate a second offence.

The TIA Act should also allow warrants to be obtained for (criminal participation) offences under s.93T of the *Crimes Act 1900* of NSW. Currently, the Bill does not provide for telecommunications interception warrants to be issued for s.93T association offences unless the criminal group has already been subject to a declaration under the COCC Act.

The use of telecommunications interception would allow s.93T to become a much more effective provision in detecting and charging those who aid and assist organised criminal enterprises but may not be the principals. I also note that provisions similar to s.93T are currently being considered as part of the development of nationally consistent criminal association laws.

If it is the intention of the Commonwealth Government to provide state police with an enhanced capacity to investigate organised crime, and disrupt criminal organisations using state organised crime legislation, then telecommunications interceptions should be made available for the full range of offences and proceedings under the COCC Act and for s.93T of the *Crimes Act 1900* of NSW. Indeed, as I have noted above, without the power to obtain telecommunications interceptions warrants for first-instance associations, police will be unable to investigate these unless the association is face-to-face.

It is therefore recommended that:

- the requirement that an officer reasonably suspects an association with members of a criminal organisation involves a prescribed offence be removed from the Bill;
- the Bill be amended to allow warrants to be obtained for criminal participation offences under s.93T of the *Crimes Act 1900* of NSW;
- that the Bill include amendments to the definition of exempt proceeding under the *Telecommunications (Interception and Access) Act 1979* that include interim control orders, applications for control orders and applications for criminal organisation declarations as defined by the COCC Act of NSW; and,
- that the Bill include amendments to the definition of permitted purpose under the *Telecommunications (Interception and Access) Act 1979* to permit the use of telecommunications interception product in the investigation and prosecution of criminal association and criminal organisation offences under the COCC Act.