CHAPTER 5

TELECOMMUNICATIONS INTERCEPTION

Provisions in the Bill

5.1 Criminal organisation offences have been introduced in New South Wales by the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* and in South Australia by the *Serious and Organised Crime (Control) Act 2008 (SA)*. In general terms, these acts:

- allow organisations to be declared criminal organisations;
- allow control orders to be granted over members of a declared organisation; and
- create offences in relation to associating with members of a declared organisation.[1]

5.2 Part 2 of Schedule 4 of the Bill would amend the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to allow state and territory law enforcement agencies greater access to telecommunications interception warrants for the purpose of investigating criminal organisation offences.[2]

5.3 Under the TIA Act, interception agencies may only be granted a telecommunications interception warrant in relation to the investigation of a 'serious offence.[3] Item 17 of Schedule 4 would amend the definition of 'serious offence' in section 5D of the TIA Act to include associating with, contributing to, aiding and conspiring with a criminal organisation or a member of that organisation for the purpose of supporting the commission of prescribed offences.[4] 'Prescribed offence' is defined in section 5 of the TIA Act and includes serious offences and offences punishable by at least three years imprisonment.[5]

Issues raised in submissions

5.4 The South Australian Commissioner of Police supported these amendments.[6] However, submissions from the New South Wales Government expressed concern that the proposed amendments would limit the use of interception warrants to investigations involving organisations that have already been declared, and thus offer no assistance in relation to investigations against organised criminal activity where a

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1 For a more detailed discussion of these laws see: Law Council, *Submission 6,* pp 7-9.

2 Explanatory Memorandum, p. 143.

3 Paragraphs 46(1)(d) and 46A(1)(d) of the TIA Act; Explanatory Memorandum, p. 144.

4 Explanatory Memorandum, p. 144.

5 Explanatory Memorandum, p. 144.

6 *Submission 8,* p. 2. See also Mr Jon Hunt-Sharman, Police Associations, *Committee Hansard,* 28 August 2009, p. 26.

declaration has yet to be made against an organisation.[7] The New South Wales police portfolio explained that:

> 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.[8]

5.5 To remedy this, the New South Wales police portfolio proposed amending the TIA Act to allow the use of material obtained through telecommunications interception warrants in proceedings under the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* to obtain criminal organisations declarations as well as proceedings to obtain interim control orders or control orders over members of those organisations.[9]

5.6 In addition, the New South Wales Government noted that the definition of 'prescribed offence' would not capture the offence of controlled members of a declared organisation associating with each other because under the New South Wales legislation this offence carries a maximum penalty of two years imprisonment for a first offence.[10] The New South Wales police portfolio pointed out that, to the extent that association between members occurred by telephone and electronic means, this would effectively mean this offence could not be investigated.[11]

5.7 The New South Wales Department of Justice and Attorney-General suggested that the proposed amendments take an unnecessarily broad approach by treating all 'prescribed offences' associated with criminal organisations as 'serious offences'. Instead, the department advocated including only the following specified offences within the definition of 'serious offence':

- knowingly participating in a criminal group;
- controlled members of a declared organisation associating with each other; and
- recruiting others to become a member of a declared organisation.[12]

5.8 By contrast, the Law Council argued that telecommunication interception powers should not be available in relation to the New South Wales and South Australian criminal organisation offences. The Law Council submitted that:

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7 New South Wales Department of Justice and Attorney-General, *Submission 11*, p. 2; New South Wales police portfolio, *Submission 13*, pp 2-3.

8 *Submission 13*, p. 3.

9 *Submission 13*, p. 4. The proposed amendment would involve including these proceedings within the definition of 'exempt proceeding' in section 5B of the TIA Act.

10 New South Wales Department of Justice and Attorney-General, *Submission 11*, p. 2; New South Wales police portfolio, *Submission 13*, pp 3-4; section 26 of the *Crimes (Criminal Organisations Control) Act 2009 (NSW).*

11 *Submission 13*, p. 3.

12 *Submission 11*, pp 2-3; section 93T of the Crimes Act 1900 (NSW); and sections 26 and 26A of *Crimes (Criminal Organisations Control) Act 2009 (NSW).*

> Legislation adopted at the State level to outlaw certain groups and create related offences contains features that run counter to established criminal law principles, infringes human rights and relies on broad and ambiguous terms that give rise to the risk of arbitrary application. As a result the Law Council is of the view that these provisions should not be replicated at the federal level, nor should the Commonwealth's extensive investigative powers be amended so as to make these powers generally available to State and Territory law enforcement agencies to utilise in the investigation and prosecution of these draconian laws.[13]

13 *Submission 6*, p. 5. See also pp 57-60; Ms Julie Ayling, *Submission 12*, pp 7-8.