

30 April 2003

Standing Committee of Attorneys General
Joint Working Group
On National Investigation Powers

Submission: New South Wales Council for Civil Liberties

Cross-Border Investigative Powers

The NSW Council for Civil Liberties (“NSWCCL”) has considered the discussion paper of the JWG on the question of Cross-Border Investigative Powers.

The NSWCCL has read and considered the submission to the JWG by the International Commission of Jurists – Australian Section (“ICJ-AS”) on the issue. The NSWCCL supports and adopts the submissions of the ICJ-AS where those submissions are consistent with our submissions below. We understand the ICJ-AS submissions have been sent to the Group.

Submissions

The NSWCCL emphasises the following particular concerns:

Controlled Operations

Whilst acknowledging the current existence of controlled operations, the NSWCCL does not support the authorisation of illegal conduct by the police.

The Australian Police’s (generally cast) longstanding history of corruption is well known to the NSWCCL. Much of this corruption has been related to the lucrative area of illegal trade in drugs. The model bill is aimed at least in part at that area of criminal activity. The possibility for abuse and for endemic corruption to flourish is significant.

Police should not be in a significantly different position to other members of the community as regards the law. Authorising Police to commit the very criminal acts they seek to investigate is an unhealthy mode of operation. The police service should not be seen or judged merely on outcomes (read: convictions). They should be capable of respect as models of conduct in conformity with the law. Often they are not; this proposal merely allows them protection for what should be illegitimate policing activity. We should not be seeking to legitimise activity that is at best undesirable, and at worst criminal.

Internal Authorisation of Investigations

In the alternative, (if controlled operations are to exist and be authorised) the NSWCCCL is concerned about the internal authorisation of controlled operations. The history of corruption in Australian police forces is again the main concern. This past proven corruption does not provide confidence in mechanisms of internal authorisation. Such mechanisms could provide a means for police to protect their corrupt conduct or that of their colleagues. Authorisation of illegal conduct on the part of police should be undertaken very sparingly if at all. The possibility of a return to or an entrenchment of, systemic corruption is significant and should be avoided.

The alternative to internal authorisation is obviously the authorisation of controlled operations by the judiciary. The integrity and incorruptibility of the judiciary in this country is vastly superior to that of the police forces. The NSWCCCL prefers the judicial authorisation model to that of the internal model, should such operations need to be undertaken.

Offences under the Model Bill

The offences created in the model bill – for protection of the operation of the bill - carry too low a level of intention.

The offences are effectively created as strict liability offences. The punishment and the objective criminality (by comparison to the entire spectrum) are completely unbalanced.

Strict liability offences have traditionally been only applied to low level crimes (speeding etc) carrying low level penalties. The expansion of strict liability offences is a general concern of the NSWCCCL. In these cases the 10 year penalty puts the offence into the mid range of offences – and it remains a strict liability offence.

The intention involved has been “pegged low” in the drafting of the offences. This allows the ambit of the offence to cover errors in the actions of individuals holding knowledge about controlled operations (or the alternate offences). If this is the intention then that is strongly objected too by the NSWCCCL. If not the drafting should be corrected. The phrase “knowingly discloses” should be expressly included.

The recklessness problem is also noted. The NSWCCCL strongly asserts that the standards in the offence should not be drafted to include a recklessness standard. Rather, the offences should consist of classical criminal intention. Anything lower is a very grave imposition on

holders of any minute amount of knowledge about controlled operations (or the alternate offences).

Conclusion

The NSWCCCL is concerned about the tenor of the model bill; the expansion of police power; the internal authorisation of police illegality and the creation of new offences with very low thresholds of intention attached to them.

The NSWCCCL recommends that the draft bill not be supported by the Joint Working Group.

The NSWCCCL, alternatively, recommends that the bill be fundamentally redesigned to incorporate the submissions above.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Cameron Murphy', written in a cursive style.

Cameron Murphy
President
New South Wales Council for Civil Liberties Inc.