



New South Wales
Council for Civil Liberties

NSWCCL STATEMENT

in opposition to

**The Crimes (Serious Crime
Prevention Orders) Bill 2016**

and

**The Criminal Legislation
Amendment (Organised Crime
and Public Safety) Bill 2016.**

3rd May 2016

1. Introduction

On the 22nd March, the NSW Government introduced two very significant bills into Parliament: the Crimes (Serious Crime Prevention Orders) Bill 2016 and the Criminal Legislation Amendment (Organised Crime and Public Safety) Bill 2016.

The NSW Council for Civil Liberties (NSWCCL) has major concerns about both Bills.

The proposed **Serious Crime Prevention Orders (SCPO)** regime is an extraordinary, unwarranted and dangerous law. It unjustifiably imposes major punitive controls on persons who have not been convicted of any criminal offence- and indeed on persons who have been prosecuted and found not guilty of such an offence or had their convictions quashed.

It undermines the NSW criminal justice system and sets up a softer and less just alternative.

Within the **Organised Crime and Public Safety Bill** our concern is focussed on the Schedule 5 proposal to allow Senior Police Officers to make Public **Safety Orders** 'to prohibit a person from being present at a public event or at premises or another area if the person's presence poses a serious risk to public safety or security.'

Both Bills propose extraordinary laws which will seriously impinge on the liberties of persons in NSW. The Government has not demonstrated these laws are necessary to combat serious crime or to maintain public safety in NSW.

Both Bills are unwarranted in themselves. They are especially disturbing in that they are part of an accelerating trend of disproportionate and extraordinary laws which undermine individual liberties and rights and the Rule of Law in NSW.

Both Bills are particularly disturbing in that they undermine the separation of executive and judicial powers while providing excessive discretionary powers to the Police Force.

NSWCCL urges the NSW Parliament to reject both Bills.

2. Background

These Bills deliver on a 2015 election commitment by the Baird Government to:

- Introduce Serious Crime Prevention Orders (SCPO), to restrict the activities of persons or businesses that are involved in serious crime.
- Allow senior police to issue temporary Public Safety Orders (PSO), to prevent people from attending places or events where they are expected to engage in violence or present a serious threat to public safety or security.
- Improve our ability to confiscate the assets of serious criminals.
- Enhance money laundering offences regarding dealing with the proceeds of crime.¹
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2.1. **Lack of consultation**

As far as we can ascertain, there has been no public consultation on these Bills prior to their introduction into the Parliament.

While we assume there must have been internal consultation on the drafting of such significant legislation, we are not confident there was robust testing of the proposals from differing perspectives within and across relevant parts of the public service during their drafting.

NSWCCL shares the widespread unease of many in the legal profession and the wider community with the current administrative arrangements within the Justice and Police Cluster. The apparent

¹ Targeting the King Pins Media Release 3rd march 2015 <https://www.nsw.gov.au/media-releases-premier/targeting-king-pins-cracking-down-organised-crime>

subordination of the Attorney General to the Justice and Police Minister and the apparent lack of expert legislative review capacity under the AG which is separate and independent from the Police Minister, seriously weaken the capacity for balanced perspectives and advice on new legislation. This exposes the people of NSW to the likelihood of unwise and inappropriate legislative proposals reaching the Parliament without having been subject to adequately balanced advice.

2.2. Lack of justification

No convincing explanation of the necessity for these extraordinary provisions has been given – not in the 2015 election context, in the Explanatory Notes nor in the Minister’s second reading speech. It is asserted, not demonstrated, that these additional laws and police powers are needed to fight serious crime.

The Media Statement at the time gave little in the way of explanation as to what gaps in law or powers these significant new provisions were needed to remedy – beyond broad assertions that they would provide more powers to fight serious crime in NSW (eg. ‘better enable police to prevent and disrupt serious, organized and violent crime in NSW’.

There was one more specific justification:

‘Mr Grant said the Bills would also make it quicker and easier for law enforcement to take restrictive action against crime gang members such as outlaw bikies, than the current lengthy and expensive process of having a gang and its members declared under the Crimes (Criminal Organisations Control) Act.’

This suggests an ‘administrative convenience’ justification to avoid the checks and balances built into the (only recently passed) Crimes (Criminal Organizations Control) Act.’

The NSWCCCL agrees the the Police Force should have adequate powers to combat serious crime and protect public safety - with the caveat that they are consistent with the rule of law and the reasonable protection of liberties in a robust democracy.

While administrative efficiency and reasonable flexibility are important to police operations – administrative efficiency or flexibility is never an adequate justification for laws which seriously breach individual rights and liberties – except in extraordinary contexts.

When announcing this package the then Police Minister stated: *‘We will keep giving police the powers they need to keep the community safe’*. This suggests that the Government intention is to develop further tough laws.

This is an appropriate policy intention but **only** if there is robust and balanced interrogation of the ‘the need’ for extraordinary powers which seriously encroach on liberties and long standing principles of the rule of law.

This does not appear to have occurred in relation to these Bills.

It is difficult not to see these Bills as being driven by Government determination to have regular additions to tough laws and stronger police powers for reasons of electoral politics. This would not be new to NSW.

Police already have extensive powers in NSW to fight serious crime and maintain public safety. Extensions to these powers must be rigorously justified.

2.3. Precedents

The SCPO proposal is modelled closely on the UK **Serious Crime Act 2007** and the **Serious Crime Act 2015**.

The UK legislation was opposed by legal professional bodies, civil liberties and human rights groups and academics on much the same grounds as current opposition to this NSW Bill: orders are punitive rather than preventative; can be used as soft substitute for criminal prosecution; innocent people can be given control orders for unwittingly facilitating a serious crime etc.

The UK Government claims the SCPOs have been successful at hindering organised crime. It is however of interest – given the stated ‘preventative’ objective - that it is recognised that their *‘main*

value is less in prevention than in early identification of criminal activity through breach of an order’. (Serious Crime Prevention Orders: NSW Parliamentary Research Service e-brief, April 2016 P13)
Legislation in other jurisdictions is legitimate as a supporting argument for new laws- but only if the necessity for, and relevance of, the same in NSW has been demonstrated.
NSWCCL would be interested to see the analysis which demonstrated the relevance, usefulness and necessity of the UK SCPO regime to NSW.

3. Crimes (Serious Crime Prevention Orders) Bill 2016

The object of this Bill is to enable the Supreme Court and the District Court to make serious crime prevention orders, on the application of the Commissioner of Police, the Director of Public Prosecutions or the New South Wales Crime Commission, so as to prevent, restrict or disrupt involvement by certain persons in serious crime related activities.

Control order regimes are rightly contentious. Control orders regimes already apply in NSW: Criminal Organisations Control Orders; Extended Supervision Orders and Commonwealth Anti-Terrorism Control Orders. These regimes were opposed by NSWCCL and remain of concern. The proposed SCPO regime is a disturbing addition to these ‘preventative’ laws.

‘Compared to other control order regimes, SCPOs are significantly broader in scope. They may be issued against a wider range of offenders—as well as individuals who on the civil standard of proof are shown to have been involved in serious crime related activity—while also allowing the imposition of any conditions a court believes is appropriate (subject to certain safeguards).’ (Serious Crime Prevention Orders: NSW Parliamentary Research Service e-brief, April 2016 p6)

3.1. Target group

SCPOs can be made against persons 18 or over when:

(b) the court is satisfied that:

(i) the person has been convicted of a serious criminal offence, or

(ii) the person has been involved in serious crime related activity for which the person has not been convicted of a serious criminal offence (including by reason of being acquitted of, or not being charged with, such an offence), and

(c) the court is satisfied that there are reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities. (Cl 5)

It is extraordinarily wide target group- as will be explained.

3.2. Serious Criminal Offence

The definition of a serious criminal offence is as in the **Criminal Assets Recovery Act 1990**.(Cl3). Section 6(2) of that Act sets out an extensive list of offences including:

(d) an offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide,

In addition it specifies offences under sections 80D or 80E, most of Division 15 or 15A of Part 3 and 93T or 93TA of the Crimes Act, sections 50A, 51, 51B, 51BA or 51BB of the Firearms Act, a whole range of drug related offences, and section 197 of the Crimes Act: *‘being an offence involving the destruction of or damage to property having a value of more than \$500’*.

This definition generates a very large pool of persons with convictions for a ‘serious criminal offence. In this context it is worth noting there is no time limit on when the specified person was convicted of or ‘involved’ in a serious crime related activity. NSWCCL has not tried to do a count of the numbers of living persons convicted of a relevant offence but it would be in the numbers of thousands.

3.3. Serious Crime Related Activity

Beyond those actually convicted of a serious criminal offence, the SCPO regime extends to those who have been 'involved in serious crime related activity'. This can include those charged with an offence, and if charged, those tried, or tried and acquitted, or had convictions quashed or set aside. (CI 3(b))

It is extraordinary that not only persons who have not been charged or convicted of a serious criminal offence – but also those who have been acquitted or had their convictions quashed or set aside – can be targeted and have a SCPO issued against them for the same activity.

Strong warnings were issued when the UK SCPO regime was introduced that it was an open invitation for police to by-pass the harder option of prosecution in favour of the 'soft' SCPO option. Specific guidelines were issued by the UK Crown Prosecution Service to discourage this attitude. (e-brief p8)

There were also warnings that the SCPO regime could become an unjustified fall-back option for imposing penalties when prosecution in a court failed to deliver a conviction.

'Serious Crime related activity' is defined as 'anything done by a person that is or was at the time a serious criminal offence' . ..(CI 3)

The meaning of '**involved** in serious crime related activity' is:

- (a) *the person has engaged in serious crime related activity, or*
- (b) *the person has engaged in conduct that has **facilitated** another person engaging in serious crime related activity, or*
- (c) *the person has engaged in conduct that is **likely to facilitate** serious crime related activity (**whether by the person or another person**). (CI 4-CCL emphasis)*

This is a loose and expansive definition. The inclusion of 'conduct that has facilitated another person' or 'is likely to facilitate' another person engaging in serious crime related activity incorporates very tenuous connections with serious criminal activity.

3.4. Satisfaction criteria and hearsay evidence

The significance of the expansive definition of 'involved in serious criminal activity' is exacerbated by the prescribed rules of evidence and standards of proof.

The proceedings are specifically designated to be civil not criminal. Consequently:

- (b) *the rules of evidence applicable in civil proceedings (including as to the burden of proof) apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act. (CI 13 (2)(b))*

Furthermore, hearsay evidence is specifically allowed:

*In determining an application for a serious crime prevention order, the court may admit and take into account **hearsay evidence** despite any rule relating to the admission of hearsay evidence (whether under the Evidence Act 1995 or otherwise)if:*

- (a) *the court is satisfied that the evidence is from a reliable source and is otherwise relevant and of probative value, and*
- (b) *the person against whom the order is sought to be made has been notified of, and served with a copy of, the evidence before its admission. (CI 5(5))*

3.5. Test for issuing a SCPO

Before issuing a SCPO the court must be:

'...satisfied that there are reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.' (CI 5 (c))

Given the proceedings are civil and not criminal this is a weak test.

The court has only to be satisfied that there is an on-balance of probabilities risk of the person being involved in a serious criminal activity (defined very expansively and tenuously) and on reasonable

grounds consider the SCPO would protect the public from any risk of future involvement by the person in serious crime related activities. This is not a stringent test and it is reasonable to expect that it more often than not lead to a court being 'satisfied'

3.6. Content of SCPOs

The content of a SCPO is at the discretion of the court - with a few exclusions:

'A serious crime prevention order may contain such prohibitions, restrictions, requirements and other provisions as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.' (Cl 6(1))

This is a direct copy of the UK 2007 Act provision.

A SCPO cannot require a person to: answer questions or provide information orally (though providing answers or required information in writing is allowed), to provide information subject to client legal privilege, to disclose protected confidences, to provide documents or other information that is held in confidence as part of a banking business or to answer questions and to provide documents or information that would result in a disclosure prohibited by another Act. (Cl 6(2)) Apart from these exclusions, possible orders prohibiting, restricting or requiring behaviours are unrestricted. The UK Act lists the following areas as ones in which restrictions, requirements and prohibitions can be imposed:

'financial, property or business dealings; working arrangements; with whom an individual associates or communicates; the premises an individual is allowed to use and for what purpose; the use of any item; and both domestic and overseas travel'. (Serious Crime Act 2007 (UK) s 5(3); UK Crown Prosecution Service, note 32, cl 3.3)

A person's employment or business options could be considerably restricted. Curfews relating to any activities and places could be imposed. Place of residence, employment or recreations could be specified/prohibited. Access to the internet or mobile phones could be prohibited. Reporting requirements could be imposed. Associating with or communicating with specified persons or groups could be prohibited. Any kind of behaviour/activity could be required.

With the exception of the specified exclusions in Clause 6(2), a person could be required to provide all kinds of information including material which is self-incriminatory or incriminates other persons. While this information cannot be used against that person as evidence in civil or criminal proceedings, it can be used as evidence in proceedings relating to an offence of contravening a SCPO.

The NSW Bar Association points out that this could lead to a bizarre situation of a person being required to incriminate himself as to any contravention of the SCPO – and such information could be used as evidence in the criminal proceeding relating to that offence. They also note that failure to provide the information would in itself constitute a contravention of the SCPO. (Bar Association Submission on this Bill 13th April 2016 p6.)

A SCPO can be imposed for a maximum of 5 years.

The contravention of a SCPO is a criminal offence which carries a maximum penalty of \$33,000 and/or 5 years imprisonment for a person and \$165 000 and/or 5years for a corporation.

3.7. Unjustified and Unacceptable

SCPOs constitute serious infringements on a whole range of a person's liberties and rights -including freedom of movement, freedom of speech, privacy, freedom of association and the critical right of the presumption of innocence.

SCPOs impose wide-ranging conditions that are clearly punitive in character – whether or not they are also effective in preventing serious crime.

That these controls over a person's life can be imposed for a period of 5 years is a major punitive intervention in a person's life.

Given the wide reach of SCPO controls over a person's day to day life – a contravention over a five year period would not be unlikely resulting in a criminal conviction for up to 5 years. These punitive conditions should only be imposed after trial and conviction in a criminal court. It is worth noting that the UK statistics indicate that the effectiveness of the UK SCPO regime relates more to detection of contraventions than in preventative impact. (Parle-Brief p13) It is unacceptable that this severe SCPO scenario can be imposed on persons who have not been convicted, and indeed may have been acquitted of, any serious criminal offence. The proposed SCPO regime seriously undermines central principles of the rule of law in NSW.

3.8. Parallel systems

A particularly disturbing element of this regime is that it is a further, disturbing undermining of the criminal justice system in NSW.

It is dangerous to target and impose major punitive controls on persons who have not only not been charged or convicted for any serious criminal offence – but who have actually been acquitted or had their conviction quashed or overturned.

This can only undermine the status of and confidence in, the current criminal justice system.

We agree with those (eg Rule of Law Institute Australia, the NSW Bar Association, the NSW Law Society) who see the proposed SCPO regime as another, and extreme step in the establishment of a parallel or rival system to the criminal trial system in NSW.

It is an extraordinary development if we come to accept that it is consistent with justice for the state to by-pass a not guilty verdict in a criminal court with an alternative punitive regime under a civil procedure.

3.9. Safeguards and review

NSWCCL notes that there are a number of safeguards against abuse and misuse of the SCPO regime. WE have noted the limited restriction on the content of orders. The most significant safeguard is the right of appeal.

Clause 11 of the Bill allows a right of appeal against a decision of the relevant court in the making of a SCPO; an appeal can be made by the person who is the subject of the order, as well as the applicant. An application for an appeal may occur up to 28 days after the date on which the decision was made unless the Court of Appeal grants leave. The Bill further clarifies that an appeal lies as of right on a question of law, and with leave on a question of fact.

NSWCCL agrees with Bar Association's assessment that given the parameters of the appeal provisions and the making of a SCPO 'involves an exercise of discretion " 'the grounds for finding legal error will be particularly restricted". (Bar ASSOC p 6)

Clause 16 provides for a review of the act after three years by the Minister. A review will be necessary if the Bill is enacted. However as a matter of principle – of particular importance in this context, the review should be conducted by a more independent body than the initiating Police Minister.

If implemented the SCPO regime should be reviewed by a body of respected independent experts and include input from professional and relevant community groups and individuals.

4. Criminal Legislation Amendment (Organised Crime and Public Safety) Bill 2016.

4.1. Schedule 5 Amendment of Law Enforcement (Powers and Responsibilities) Act 2002 No 103 (LEPRA)

NSWCCL's main objections relate to schedule 5 of the Bill which proposes to amend LEPRA :

'Schedule 5 enables a senior police officer to make public safety orders to prohibit a person from being present at a public event or at premises or another area if the person's presence poses a serious risk to public safety or security. In particular, the provisions to be inserted: (a) specify the circumstances in which such orders may, or may not, be made, and

*(b) place limits on the content and duration of public safety orders, and
(c) provide for service and notification requirements with respect to public safety orders, and
(d) enable a police officer to search and enter premises, and stop and search vehicles, if the officer suspects on reasonable grounds that a person to whom a public safety order applies is within the premises to which the order applies, and
(e) enable a person to whom a public safety order applies to appeal on the merits to the Supreme Court against the order (or a variation of the order) if the order is (or is to be) in force for a period exceeding 72 hours, and
(f) make it an offence punishable by a maximum penalty of imprisonment for 5 years for a person to whom a public safety order applies not to comply with the order’ (ExN p3)*

This Bill comes fast on the heels of the passage of the contentious and outrageous Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016 in March. That legislation was the latest law to encroach unwarrantedly on the right to peaceful protest in NSW. The Organised Crime and Public Safety Bill will further extend discretionary police powers to constrain individual’s freedom of movement and association and creates yet another criminal offence punishable by up to 5 years imprisonment for failure to comply with a public safety order. Again there is no convincing explanation from Government as to why these new police powers, with their significant implications for people’s freedoms- and indeed for the NSW justice system - are necessary.

It further undermines the safeguards for individual’s rights and liberties and the rule of law provided by the separation of executive and judicial powers.

4.2. Detailed Comments

The grounds on which a senior police officer can make a PSO against a person or class of persons are broad and malleable. The police officer has to be ‘satisfied’ that the person or persons pose ‘a serious risk to public safety or security’ and that the order is ‘reasonably necessary in the circumstances’. (Cl.87R(1)). However, the matters which must be taken into consideration in determining if the PSO is ‘reasonably necessary’ are broad and include the open-ended ‘any other matter that the officer considers relevant’. (Cl.87R2).

These grounds allow police an unprecedented degree of discretion in prohibiting freedom of association and movement and participation in public events. PSOs can prohibit persons from participating in peaceful protests and industrial actions - unless the officer ‘believes’ that the ‘primary purpose for their presence’ is ‘non-violent advocacy, protest or dissent’ or ‘industrial action’. (Cl.87R(3))

This language allows the authorities to determine the ‘primary purpose’ of an individual’s action, and as well as to determine if the relevant action is in the public interest. It provides significant scope to shut down disagreeable protest, or to prohibit those whose mere presence may create unrest amongst others.

There is no requirement that persons issued with a PSO have any criminal convictions. Law abiding citizens are likely to be subject to PSOs.

Its targeting of ‘persons belonging to a specified class of persons’ is so broad as to potentially target any political, social, racial, religious or age group in a manner which is prejudicial in nature.

PSOs can legally target minors and the mentally ill, exempting the officer from contacting the relevant guardian if not ‘reasonably practicable to do so’ (Clause 87T(2)).

While there is a provision requiring both a copy of the PSO and a notification providing details including reasons and right of appeal be given to the specified person, the police officer can issue the PSO verbally if the officer is satisfied the issuance is ‘a matter of urgency’. (Cl 87T).

There is no right of appeal against orders of less than 72 hours duration – which are likely to be the majority of PSOs issued. This effectively removes any capacity for judicial oversight for most PSOs issued and further undermines the important safeguards of the separation of executive and judicial powers.

A merit appeal to the Supreme Court is available in relation to 'long duration public safety orders.' (Cl.87) However, the effectiveness of any such appeal may be seriously constrained by the provision of a right of appeal by the Commissioner for the non-disclosure of 'criminal intelligence reports or other criminal information' used in making the PSO. (Cl 87X)

The penalty for failure to comply with the order is up to 5 years imprisonment.

The scope of police powers to detain and search without warrant is further expanded to include 'premises and other areas and vehicles' associated with the PSO. (Cl 87ZB)

4.3. In summary

This Bill is another extraordinary, unnecessary and disproportionate attack on fundamental rights and liberties and long standing safeguards against excessive police powers in relation to freedom of association and movement and the right to participate in public events- including peaceful protests and industrial action.

The process specifically bypasses judicial authority by empowering the Police to determine if an individual's presence, rather than actions, constitutes a 'serious risk' to public health and safety (Clause 87R). Its targeting of 'persons belonging to a specified class of persons' is so broad as to potentially target any political, social, racial, religious or age group in a manner which is prejudicial in nature.

The degree of police discretion embodied in these provisions is dangerous. PSOs will have a chilling effect on public life and the freedoms of speech and association.

This is not appropriate legislation for a liberal democracy.

5. Conclusion

The NSWCCCL opposes both these Bills. They are not necessary. They continue a depressing and dangerous trend of laws which unjustifiably undermine the long standing rights and liberties of law abiding persons and further weaken the safeguards provided by the separation of executive power in NSW.

The NSWCCCL urges the Government to withdraw these Bills.

Failing that - the Parliament should not pass these Bills.



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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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