MEDIA BRIEFING

SERIOUS CRIME PREVENTION ORDERS

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Note on differences between the *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW) and the *United Kingdom Serious Crime Act 2007*

NEW SOUTH WALES
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In his opinion piece 'To avoid embarrassment, the Bar Should consult over complex matters' published in *The Australian* on 22 April 2016, Mr Alister Henskens SC, MP, the NSW state member for Ku-ring-gai, criticises the NSW Bar Association's submission of 13 April 2016 (the Bar Association's submission[1]) in relation to the *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW) (the NSW Bill) for making 'no reference to the fact that virtually identical provisions to the proposed NSW law have been the law of England of England, Wales and Northern Ireland since 2007 and Scotland since last year after the Scottish saw the success of the British laws.'

In his reference to 'virtually identical provisions' in the NSW Bill and the *United Kingdom Serious Crime Act 2007* (the UK Act), the member for Ku-ring-gai goes further than the Deputy Premier and Minister for Justice and Police, the Hon. Troy Grant MP in his Second Reading Speech for the NSW Bill on 22 March 2016, who said:

> These reforms have adopted **some aspects** of the United Kingdom's serious crime prevention order provisions in the *Serious Crime Act 2007* - United Kingdom - adapted to suit the New South Wales legislative framework.' (emphasis added)

On a fair reading of the serious crime prevention order provisions in Part 1 of and Schedules 1 and 2 to the UK Act, it is apparent that the provisions in the NSW Bill are far from 'virtually identical' to those in the UK Act. Further, it is significance that the UK has a Human Rights Act – the *Human Rights Act 1998* – and any interference in rights guaranteed under the European Convention on Human Rights is required to satisfy a test of proportionality.

In particular, there are the following important differences between the two pieces of legislation.

1. No concept in the UK Act of 'serious crime related activity', and no provision for a person to be found to have engaged in serious crime related activity for which the person was charged and acquitted of an offence.

In contrast to the NSW Bill, the UK Act does not employ distinct concepts of a 'serious criminal offence' and 'serious crime related activity'.

Under the UK Act, a serious crime prevention order may only be made if the High Court in England and Wales or the High Court in Northern Ireland is satisfied, relevantly 'that a person has been involved in serious crime (whether in England and Wales or elsewhere)': ss 1(1)(a) and 1(2)(a).[2] A person 'has been involved in serious crime' if the person:

(a) has committed a serious offence …;

(b) has facilitated the commission by another person of a serious offence …; or

(c) has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence … (whether or not such an offence was committed).': ss 2(1) and 3 (1).

Section 4 provides that in considering for the purposes of Part 1 whether a person has committed a serious offence:

(a) the court must decide that the person has committed the offence if—

  (i) he has been convicted of the offence; and

  (ii) the conviction has not been quashed on appeal nor has the person been pardoned of the offence; but

(b) the court must not otherwise decide that the person has committed the offence.

Under the NSW Bill, by contrast, the expression 'serious crime related activity' is defined in clause 4 to mean:

> anything done by a person that is or was at the time a serious criminal offence, whether or not (a) the person has been charged with the offence, or (b) if charged been tried, or been tried and acquitted, or been convicted (even if the conviction has been quashed or set aside).

The consequence is that a person may be found to have engaged in serious crime related activity where anything done by the person was a serious criminal offence, even where the person was charged and acquitted of an offence: see clause 5(1) (b) (ii). Accordingly, the SCPO provides a means to restrict a person's liberty where a prosecution fails, but the authorities ('eligible applicants') continue to believe the acquitted (or not convicted) person poses some threat to public safety.

The possibility of a SCPO absent a conviction, and in the face of an acquittal, or in the face of a decision not to prosecute, is a critical aspect of the NSW Bill. As noted in the Bar Association's submission, the proposed legislation requires, or at least invites, a judge to second guess a jury by deciding that a person who has undergone a trial in which the tribunal of fact, namely the jury, was not satisfied of his or her guilt is nonetheless to be dealt with as an offender whose liberty may be denied on account of the very conduct the prosecution failed to prove. Under the NSW Bill, the same officer, as well as officers of agencies that are investigative rather than officers of the court, can force a judge to proceed to consider alleged guilt of or 'involvement' in a crime even if a criminal trial had occurred and had resulted in an acquittal.

2. Provision in the UK act in relation to procedure and proof.

Section 35(1) of the UK Act provides that proceedings before the High Court in relation to serious crime prevention orders are civil proceedings. One consequence of this is that the standard of proof to be applied by the court in such proceedings is the civil standard of proof: s 35(2). Other consequences are not identified.[3]

However, it is clear that there is nothing in the UK act which contemplates that the hearsay rule which generally applies in civil and criminal proceedings is effectively disapplied. Clause 5(5) of the NSW Bill provides that the court, in determining an application for a SCPO, may admit and take into account hearsay evidence 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. As noted in the Bar Association's submission, presumably this would extend to evidence from a police officer who testifies that he has been given information about the person from a confidential source who has provided reliable information in the past.

The approach in the NSW Bill undermines very essential ideas of the ability in an adversarial system to test evidence, all the more so where the liberty of the individual is involved. It delivers an extraordinary amount of power to the Executive in an area whether the courts have been jealous of liberty and concerned to uphold the fundamental rights of the accused.

3. Test for making a SCPO: The UK Act requires the Court to 'have 'reasonable grounds to believe'; the NSW Bill that 'there are reasonable grounds to believe'.

Further, under the UK Act, a serious crime prevention order may only be made if the High Court in England and Wales or the High Court in Northern Ireland is satisfied, relevantly 'that it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime': ss 1(1) (b) and 1(2) (b).

Under the NSW Bill, by contrast, a SCPO may be made by a court if 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': clause 5(1)(c).

The former focusses on the satisfaction of the Court; the latter on an external standard of satisfaction.

4. Indication in the UK Act of the type of provision that may be made by orders.

The UK Act provides in s 5 examples (non-limiting) of prohibitions, restrictions or requirements that may be imposed by serious crime prevention orders on individuals (s 5(3), (5) and (6)) and on bodies corporate, partnerships and unincorporated associations (s 5(4)). As noted in the Bar Association's submission, under the NSW Bill, apart from the limitation in clause 6(2), the nature and scope of a SCPO is

open-ended, and no guidance is provided in relation to the kinds of orders which might be 'appropriate' for 'the purpose of protecting the public': see clause 6(1).

Further, in the UK context, it is of significance that the *Human Rights Act 1998* will bear upon any judicial consideration of possible prohibitions, restrictions and requirements in individual cases. As stated in the Crown Prosecution Service *Legal Guidance Serious Crime Prevention Orders Serious Crime Act 2007 - Sections 1 - 41 and Schedules 1 and 2:*

> 13.4. … reference needs to be made to the Human Rights Act. When consideration is given to the likely prohibitions and restrictions that it is anticipated that an order will contain, as exemplified in section 5, all are likely to engage various articles of the European Convention on Human Rights and in particular, Article 5 (liberty and security), Article 8 (private life), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association). While clearly the Act satisfies the requirement for any interference with these rights to be lawful, any interference must also be necessary and proportionate to the desired aim.[4] (emphasis added)

There is (presently) no requirement in NSW that an interference in fundamental human rights and freedoms also be necessary and proportionate to the desired aim. Under s 6(1) of the UK *Human Rights Act 1998*, by contrast, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. For the purposes of s 6, 'public authority' is defined to include (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature: s 6(3).

5. More limited class of applicants for making of orders in the UK Act.

Section 8 of the UK Act limits the class of applicants for the making of a serious crime prevention order, in the case of an order in England and Wales, to the Director of Public Prosecutions; the Director of Revenue and Customs Prosecutions; or the Director of the Serious Fraud Office; and the case of an order in Northern Ireland, to the Director of Public Prosecutions for Northern Ireland.

The NSW Bill provides a broader class of applicants: an 'eligible applicant' for a SCPO may be the New South Wales Commissioner of Police, as well as the New South Wales Director of Public Prosecutions or the New South Wales Crime Commission: clause 3(1). This delivers considerable power to the Police and Crime Commission, both and especially the latter of which are secretive investigative agencies, and feeds into intelligence based orders, and defendants who are unable to test the intelligence. The DPP, by contrast, proceeds on the basis of proofs of evidence.

6. Provision in the UK Act for the right of third parties to make representations.

Section 9 of the UK Act requires the High Court to give persons an opportunity to make representations in proceedings about the making, the variation and the discharge of a serious crime prevention order if it considers that the making of the order would be likely to have a significant adverse effect on that person: s 9(1), (2) and (3). A right of third parties to make representations in appeals in relation to a serious crime prevention order is also conferred: s 9(5).

There are no comparable safeguards in relation to a SCPO in the NSW Bill.

Endnotes

1. http://www.nswbar.asn.au/docs/webdocs/SCPO_13042016.pdf
2. See also ss 19 to 22 of the UK Act in relation to the extension of jurisdiction to the Crown Court to make or vary a serious crime prevention order on conviction. Sections 19(2) and 20(2) apply where the Crown Court in England and Wales is dealing with a person who (a) has been convicted by or before a magistrates' court of having committed a serious offence in England and Wales and has been committed to the Crown Court to be dealt with; or (b) has been convicted by or before the Crown Court of having committed a serious offence in England and Wales: ss 19(1) and 19(2). In other words, in the Crown Court, the power to make an SCPO is dependent upon conviction of a serious offence.
3. In the case of proceedings in the Crown Court, two other consequences of this are that the court (a) is not restricted to considering evidence that would have been admissible in the criminal proceedings in which the person concerned was convicted; and (b) may adjourn any proceedings in relation to a serious crime prevention order even after sentencing the person concerned: s 36(3).
4. In relation to the test of proportionality, the UK Department of Constitutional Affairs publication, *A Guide to the Human Rights Act 1998* (3rd ed, 2006) states:

   > 3.10 … even if a particular policy or action that interferes with a Convention right pursues a legitimate aim (such as the prevention of crime) this will not justify the interference if the means used to achieve the aim are excessive in the circumstances.
   >
   > 3.11 Any interference with a Convention right should be carefully designed to meet the objective in question and must not be arbitrary or unfair. Public authorities must not 'use a sledgehammer to crack a nut'. Even taking all these considerations into account, interference in a particular case may still not be justified because the impact on the individual or group is just too severe. … Under the Human Rights Act, the Courts have accepted that they need to consider proportionality. They do this by looking with 'anxious scrutiny' at decisions that impinge on human rights, to see if they should be upheld.'