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## Serious Crime Prevention Orders

by Chris Angus

### 1. Introduction

On 22 March 2016, in his role as Minister for Justice and Police, Deputy Premier Troy Grant MP introduced into the NSW Parliament two pieces of legislation designed to crack down on organised crime. The [Criminal Legislation Amendment \(Organised Crime and Public Safety\) Bill](#) amends existing laws to enhance asset confiscation powers, and creates Public Safety Orders, which are issued by police to prohibit a person from being present at a public event or premises if their presence poses a serious risk to public safety or security.<sup>1</sup>

The second Bill, the [Crimes \(Serious Crime Prevention Orders\) Bill 2016](#), introduces a Serious Crime Prevention Order (SCPO) regime into NSW. SCPOs are control orders that could be made by the NSW Supreme and District courts against certain individuals or organisations in order to prevent, restrict or disrupt their involvement in serious crime-related activities and terrorism offences.<sup>2</sup> The proposed SCPO regime is influenced by measures introduced in the United Kingdom through the [Serious Crimes Act 2007](#), which has recently been expanded into Scotland.

This e-brief focuses on the second Bill. It summarises existing organised crime laws in NSW. It then outlines the proposed SCPO regime in NSW, including the process for making orders, restrictions that can be placed on offenders, and penalties for breaches, as well as a comparison with the UK's SCPO regime. The paper also details criticism of the UK regime, and comments by the Government in support of its effectiveness.

### 2. Recent organised crime laws

In recent years, the majority of Australian States and Territories have enacted legislation that gives authorities greater powers to tackle organised crime.<sup>3</sup> In NSW, this activity occurred primarily in response to a 2009 brawl at Sydney Airport involving rival motorcycle gangs, and a large number of drive-by shootings in Western and South-Western Sydney during 2011.<sup>4</sup> Some of the laws enacted since 2009 are outlined below.

### 2.1 Criminal gang offences

In 2006 s 93T was inserted into the [Crimes Act 1900](#). This provision made it an offence for a person to participate in a criminal group, knowing it was a criminal group and knowing or being reckless as to whether his or her participation contributed to any criminal activity.

In 2012, the elements of the offence were changed from “knowing or being reckless”, to “knows or ought reasonably to know”; and new offences were introduced including, directing any of the activities of a criminal group, which carries a maximum penalty of 10 years imprisonment (15 years if the group’s activities are organised and ongoing).

### 2.2 Control orders

After earlier legislation was declared invalid by the High Court,<sup>5</sup> in 2012 the O’Farrell Government introduced a revised [Crimes \(Criminal Organisations Control\) Act](#), with further amendments made in 2013. Under the 2013 Act, the Police Commissioner may apply to the Supreme Court for a declaration that an organisation is a “criminal organisation” on the basis that its members associate for the purpose of organising or engaging in serious criminal activity, and its continued existence is an unacceptable risk to community safety, welfare or order.

The Court may make a control order in relation to a person who is a member of a declared organisation. If a control order is made, it is an offence for the person to associate with another person who is also subject to a control order, with penalties of up to five years imprisonment applying if a breach occurs.<sup>6</sup> In addition, any authorisation for the person to carry on a prescribed activity (e.g. supplying liquor) is automatically suspended.<sup>7</sup>

### 2.3 Consorting offence

In 2012, the existing consorting offence in the *Crimes Act 1900* (section 93X) was “modernised”. It is now an offence for a person to habitually consort with at least two convicted offenders after having been given an official warning in relation to those offenders. The offence has a maximum penalty of three years imprisonment and/or a \$16,500 fine. These provisions were unsuccessfully challenged in the High Court in 2014.<sup>8</sup>

### 2.4 Unexplained wealth laws

Since the 1980s, NSW has had two criminal asset confiscation laws: one civil-based (the [Criminal Assets Recovery Act 1990](#)) and the other conviction-based ([Confiscation of Proceeds of Crime Act 1989](#)). In 2010, the civil-based scheme was extended, allowing the Supreme Court to make an order to confiscate wealth from a person if satisfied that there is a reasonable suspicion that he or she has engaged in serious crime-related activity and he or she cannot lawfully account for the wealth.<sup>9</sup>

### 3. The proposed NSW SCPO regime

#### 3.1 Purpose of the SCPO regime

The NSW SCPO regime was proposed during the 2015 NSW State Election, with Premier Mike Baird and then Minister for Police and Emergency Services Stuart Ayres stating that the orders would be used to disrupt the activities of serious criminals.<sup>10</sup>

In the Second Reading Speech for the [Crimes \(Serious Crime Prevention Orders\) Bill 2016](#), Deputy Premier Troy Grant MP stated that SCPOs form part of the NSW Government's "election commitment to introduce tough new powers to give police the upper hand in the fight against serious crime."<sup>11</sup> The Deputy Premier elaborated further on the goals of the proposed regime:

Serious and organised crime affects our community, economy and way of life. The effects of these crimes can be felt across the community, whether through investment scams, cyber attacks, clandestine drug labs in suburban areas or acts of violence between criminal groups on our streets. Serious and organised crime also has a broader impact on the Australian economy. The Australian Crime Commission [ACC] conservatively estimates that serious and organised crime costs Australia in excess of \$15 billion every year. However, the actual figure is likely to be much higher. Operationally, the NSW Police Force is working effectively with Commonwealth bodies via the National Anti-Gang Taskforce and other joint operations.

...

Under this new package of reforms the bills will introduce serious crime prevention orders to restrict the activities of persons or businesses that are involved in serious crime; allow senior police to issue temporary public safety orders 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; and enhance money-laundering offences of dealing with the proceeds of crime.<sup>12</sup>

#### 3.2 Process for issuing a SCPO

Under cl 3(1) of the [Crimes \(Serious Crime Prevention Orders\) Bill 2016](#), an application for a SCPO may only be made by the Director of Public Prosecutions; the Crime Commission; or the Commissioner of Police.

Both the NSW District and Supreme courts may issue a SCPO if a person or corporation has been convicted of a "serious criminal offence". The term "serious criminal offence" has the same meaning as in the [Criminal Assets Recovery Act 1990](#), including:

... offences such as prescribed drug trafficking offences under the *Drug Misuse and Trafficking Act 1985* or an offence that is punishable by imprisonment for five years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, or obtaining or offering a secret commission, as examples.<sup>13</sup>

SCPOs can also be issued against persons or corporations "involved in serious crime related activity", which is defined under cl 4(1) of the Bill as occurring when:

- 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).

However, if a person is involved in serious crime related activity, but has not been convicted of a serious criminal offence, only the Supreme Court may issue a SCPO.<sup>14</sup>

Clause 5 enables the appropriate court to issue a SCPO upon the application of an eligible applicant. A SCPO may be issued against a person aged 18 years or older, or a corporation, if:

- (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.<sup>15</sup>

The applicant must serve a copy of the application on the person against whom the SCPO is sought at least 14 days before the hearing date for the application. The person against whom the SCPO is sought may appear at the hearing of the application and make submissions in relation to the application.<sup>16</sup>

Importantly, cl 5(5) of the Bill allows the court to admit and take into account hearsay evidence if satisfied that the evidence is from a reliable source and is of probative value. As per the *Criminal Assets Recovery Act 1990*, SCPO proceedings use the civil standard of proof; this means that the court must determine whether to make an order on the balance of probabilities, rather than the criminal standard of proof (beyond reasonable doubt).<sup>17</sup>

### 3.3 Restrictions under an order and penalties if breached

Clause 6 outlines the contents and requirements of a SCPO. An order may include:

... 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.<sup>18</sup>

As noted in the Second Reading speech, a SCPO could include “restrictions in relation to an individual's financial, property or business dealings or holdings, working arrangements, communication means, premises to which an individual has access, an individual's use of an item or an individual's travel.”<sup>19</sup>

Under cl 7 of the Bill, a SCPO commences when it is served on the person or on a later date specified in the order. However, an order cannot exceed a period of 5 years.<sup>20</sup> Clause 12 enables the court that originally made the

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SCPO to vary or revoke the order at any time upon the application of the applicant or the person subject to the order.

If the terms of the SCPO are contravened, the following penalties apply depending on whether the order applies to a person or corporation:

- **Person:** Maximum fine of \$33,000 or five years imprisonment, or both;<sup>21</sup>
- **Corporation or partnership:** Maximum fine of \$165,000.<sup>22</sup>

If a corporation breaches a SCPO, the Bill allows an eligible applicant to apply to the Supreme Court to wind up the company or partnership. The Supreme Court can make a compulsory winding up order if satisfied that:

- A contravention of the order has occurred; and
- There are no further avenues of appeal available to the corporation or partnership in respect of the conviction; and
- It is in the public interest, and just and equitable, for the corporation or partnership to be wound up.<sup>23</sup>

### 3.4 Safeguards for person under an order

Although the scope of possible restrictions that may be imposed under a SCPO is wide, there are a number of safeguards in place to prevent the orders from being misused. Consistent with the UK SCPO scheme (discussed in chapter 4), cl 6(2) states that a person cannot be made to do the following under a SCPO:

- Answer questions or provide information orally;
- Answer questions or provide documents or other information that is subject to legal professional privilege;
- Disclose protected confidences (within the meaning of Division 1A of Part 3.10 of the *Evidence Act 1995*);
- With limited exceptions, provide documents or other information held in confidence as part of a banking business; or
- Answer questions, or provide documents or other information, that would result in a disclosure prohibited by a provision of another Act.

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.<sup>24</sup> The Bill further clarifies that an appeal lies as of right on a question of law, and with leave on a question of fact.<sup>25</sup>

The Deputy Premier noted in his Second Reading speech that the NSW Government intends for the SCPO regime to operate effectively and for its intended purpose.<sup>26</sup> Accordingly, cl 16 of the Bill requires the Minister to review the Act after three years of operation to determine whether its policy objectives remain valid. The findings will be tabled in Parliament within 12 months following the end of this three year period.

### 3.5 Comparison with other NSW control orders

Should the Government’s proposed SCPO regime and Public Safety Orders be adopted, they will operate in conjunction with several existing NSW and Commonwealth control order regimes, including:

- Criminal Organisations Control Orders;<sup>27</sup>
- Extended Supervision Orders;<sup>28</sup> and
- Commonwealth anti-terrorism Control Orders.<sup>29</sup>

A brief comparison of these different control orders is provided below:

<b>Order Name</b>	<b>Issued against</b>	<b>Conditions</b>	<b>Term</b>	<b>Breach penalty</b>
<b>SCPOs (proposed)</b>	Person who has committed/been involved in a serious offence	Any conditions the court considers appropriate (excluding statutory safeguards)	Up to 5 yrs	Up to 5 yrs prison
<b>Public Safety Orders (proposed)</b>	Anyone	Prohibition on being at specified premises or public event	72 hours*	
Criminal Organisations Control Orders	Member of a “declared organisation”	Prohibition on associating with other controlled members	Until revoked	
Extended Supervision Orders	High risk sex/violent offenders who are in custody or are under supervision while serving a term of imprisonment	Any conditions the court considers appropriate (e.g. monitoring by corrective services/electronic equipment; prohibition on residing or working in certain places)	Up to 5 yrs	
Cth anti-terrorism Control Orders	Person suspected of committing terrorism offences	List of conditions in legislation (e.g. monitoring by corrective services/electronic equipment; prohibition on being in certain places or leaving Australia)	12 months	

\*Can be appealed to the Supreme Court if the order lasts for a longer time period

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).

This arguably provides greater flexibility for law enforcement authorities when attempting to hinder organised crime activity, but also has greater potential for intrusions on personal liberty.

### 4. The UK SCPO regime

As noted earlier in the paper, the proposed NSW regime is based in part on the existing UK SCPO regime, which was introduced in 2007 through the [Serious Crimes Act](#) (2007 Act). In the Second Reading Speech for the 2007 Act, Baroness Scotland outlined the aims of these control orders:

[SCPOs] are aimed at the prevention of [serious organised crime]. The people who commit crimes of this nature are often very skilled, very intelligent and very adept at adapting their processes. In short, they are not stupid and will try to distance themselves from criminality while still raking in the profits. They will often coerce those weaker than themselves into taking risks and they will constantly seek to find new ways of making money while avoiding detection by law enforcement agencies.

The Government must be similarly flexible and innovative in providing new law enforcement tools that will help to prevent this. As a result, we are proposing the creation of the orders that I am about to explore with your Lordships. These will add another string to the bow of law enforcement agencies which is flexible enough to prevent those involved in serious crime from carrying on, but which can only be granted by the courts where it is reasonable and proportionate to do so.<sup>30</sup>

Further detail as to the background to the 2007 Act can be found in a 2007 House of Lords Library Note, [The Serious Crime Bill](#). This chapter outlines the operation of the UK regime, highlighting any significant differences between it and the proposed NSW regime.

#### 4.1 Issuing a SCPO

As per the NSW regime, only a limited number of UK government agencies may apply to the court for a SCPO under the 2007 Act; namely, the Director of Public Prosecutions; the Director of Revenue and Customs Prosecutions; and the Director of the Serious Fraud Office.<sup>31</sup> While primarily issued against individuals, SCPOs may also be issued against body corporates, partnerships or unincorporated associations.<sup>32</sup>

A SCPO can be issued in the High Court in England and Wales and the High Court in Northern Ireland (both civil courts), or in the Crown Court (criminal court). For a SCPO to be issued by a High Court, it must be shown that:<sup>33</sup>

- a) A person has been involved in serious crime; and
- b) The Court has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime.

The Crown Court may also issue SCPOs, but only if a person has previously been convicted of a serious offence, and if the court has reasonable grounds to believe that the order would protect the public.<sup>34</sup> As per the proposed NSW regime, UK proceedings use the civil standard of proof to determine whether a SCPO should be imposed, rather than the criminal standard.<sup>35</sup>

Schedule 1 of the 2007 Act sets out 13 categories of serious crime offences under which a SCPO can be issued:

- Drug trafficking;

- People trafficking;
- Arms trafficking;
- Prostitution and child sex;
- Armed robbery;
- Money laundering;
- Fraud;
- Offences in relation to public revenue;
- Corruption and bribery;
- Counterfeiting;
- Blackmail;
- Intellectual property; and
- Environment.

Unlike the NSW Bill, which appears to provide an exhaustive list of serious offences to which a SCPO can apply, the UK Crown Prosecution Service has commented that the list in the 2007 Act is “not exclusive, but it is intended to provide strong guidance as to the level of offending that the orders are intended to prevent”.<sup>36</sup>

Although SCPOs can be issued in relation to a large number of offences, they are not intended to function as “a soft alternative to prosecution”.<sup>37</sup> Accordingly, the UK Crown Prosecution Service has stated that SCPOs should only be applied for under certain circumstances:

[A]n application for an SCPO should generally only be made either following a conviction for a serious offence or following a decision that, applying the Code for Crown Prosecutors, the evidence available does not provide a realistic prospect of a conviction or a prosecution would not be in the public interest, for reasons other than the availability of an SCPO. It will usually be in the public interest to prosecute a defendant for a serious crime listed in the schedule to the Act.<sup>38</sup>

### 4.2 Restrictions on offenders and penalties for breaches

The UK Crown Prosecution Service has noted that a SCPO can impose an extremely broad number of prohibitions or restrictions on an individual:

An order may contain:

- such prohibitions, restrictions or requirements; and
- such other terms;

as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person concerned in serious crime in England and Wales.<sup>39</sup>

Examples of conditions that may be imposed under s 5(3) of the 2007 Act include prohibitions or restrictions on, or requirements in relation to:<sup>40</sup>

- 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.



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A breach of a SCPO is an offence under the 2007 Act. Under s 25, an individual who, without reasonable excuse, fails to comply with the provisions of the order is liable:

- a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both;
- b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both.<sup>41</sup>

Like NSW, the UK courts have the power to wind up a company, partnership or relevant body should a breach occur.<sup>42</sup> Additionally, if a SCPO is breached, s 26 of the 2007 Act gives the court the power to order the forfeiture of anything in a person's possession at the time of the offence which it considers to have been involved in the offence. This forfeiture power does not appear to form part of the proposed NSW regime.

### 4.3 Safeguards and restrictions on SCPOs

Although the terms of a SCPO may restrict or prohibit virtually any area of activity, they must be reasonable and proportionate, as well as preventative rather than punitive.<sup>43</sup> The 2007 Act sets a number of safeguards that apply to SCPOs, including the following:

- Individuals aged under 18 years cannot be subject to a SCPO;<sup>44</sup>
- Any third party likely to be adversely affected to a significant degree by a SCPO may make representations before the relevant court that is considering making, varying or discharging an SCPO;<sup>45</sup> and
- A SCPO is not binding unless the named person is either represented at the proceedings, or formally receives a notice setting out the terms of the order.<sup>46</sup>

Similarly, as per the proposed NSW regime, information safeguards prevent a SCPO from requiring an individual:

- to provide oral answers to questions or requirements to provide information. (Section 11 [of the 2007 Act])
- to answer questions, or provide information or documents which are covered by legal professional privilege. (Section 12)
- to produce excluded material as defined by section 11 ... (Section 13(1)(a))
- to disclose any information or produce any document held by him in confidence as part of a banking business unless:
  - there is consent from the person to whom confidence is owed, or
  - the order specifically required disclosure of information or documents of this kind, or it required disclosure of specified information or documents of this kind. (Section 13 (2)-(4))
- to provide information or documents or answer questions if it would involve a disclosure prohibited by another enactment.<sup>47</sup>

Under s 16 of the Act, a SCPO cannot remain in force for more than five years, and must specify when it comes into force as well as when ceases to be in force.<sup>48</sup> However, following amendments introduced as part of the [Serious Crimes Act 2015](#), orders may be extended beyond this term under certain circumstances (see next section).

#### 4.4 2015 amendments and expansion into Scotland

In March 2015, the [Serious Crime Act 2015 \(UK\)](#) (2015 Act) was passed into law. The 2015 Act expanded the list of offences that could be subject to a SCPO, including the cultivation of cannabis plants,<sup>49</sup> firearms offences,<sup>50</sup> and computer misuse.<sup>51</sup> Crucially, the 2015 Act gave the Crown Court the power to discharge an existing SCPO and impose a new order for up to another five years if it believes that doing so would protect the public.<sup>52</sup>

According to the impact assessment for the 2015 Act, this change was necessary because the Crown Court had limited ability to extend the duration of a SCPO, even when an individual breached an order:

[W]hile the legislation allows an order to be varied by the Crown Court after a criminal conviction for its breach (for example, extending the duration of an order or adding further conditions), it is not possible for a new order to be imposed by the court dealing with the offence. Nor can a variation extend the duration of an existing order beyond a five year limit. So if a person is nearing the end of the five year limit of an existing SCPO, the court that convicts him or her for the breach cannot replace the SCPO to prevent continued involvement in serious crime.<sup>53</sup>

The result of this amendment means that a SCPO can be extended beyond the five year maximum period required under s 16 of the 2007 Act. Despite this change, the UK Crown Prosecution Service has stated that the purpose of applying for a SCPO must still be a reasonable and proportionate response in the circumstances:

An SCPO should not be seen as a means of adding to the defendants sentence. The following questions should be posed. In the circumstances of this defendant, are there reasonable grounds to believe that there is a real risk that this defendant will be involved in further conduct falling within the Act from which the public requires protection? What is the need for and what will an SCPO add to the sentencing powers that the court already has? Is there a real risk of further serious offending upon release from what may well be a long prison sentence or, perhaps even more rarely, a risk of further serious offending while serving such a sentence? The imposition of an order should not be a normal part of the sentencing process but rather an exceptional course in particular circumstances.<sup>54</sup>

This power does not appear to be part of the proposed NSW regime.

Section 46 of the 2015 Act extended the SCPO regime and other elements of the 2007 Act to Scotland, which was not previously part of the regime.

According to a 2013 Scottish Government Consultation Paper, the Scottish Government chose not to be part of the original SCPO regime in part so that it could consider the effectiveness of the regime before expanding it into its jurisdiction. However, following several years of operation, the Scottish Government concluded that the SCPO regime operating in England, Wales and Northern Ireland made it harder for criminals to carry out illegal activities, and therefore sought to extend the regime into Scotland.<sup>55</sup>

### 5. Criticism of and concerns about the UK regime

#### 5.1 Criticism of the 2007 Act

During debates over the introduction of the 2007 Bill, a number of concerns were raised by peers in the House of Lords. Baroness Anelay of the Conservative Party criticised existing control orders (e.g. anti-social behavioural orders and terrorism control orders) for their inability to effectively control offenders, and argued that the SCPO scheme may have similar shortcomings.<sup>56</sup>

Separately, crossbench member Lord Lloyd stated that he could not understand the justification for applying SCPOs to individuals who have not committed crimes, and also criticised the UK Government's claim that these orders were preventative rather than punitive:

The Government say that the restrictions to be imposed under the present Act are justified because they are preventive, not punitive. However, restrictions do not cease to be punitive just because they are called preventive. I regard, and still regard, control orders as punitive and an abuse of the civil process. I say the same about the prevention orders proposed in the Bill.<sup>57</sup>

In a 2007 briefing paper for the House of Lords, UK civil liberties organisation Liberty also contended that SCPOs were punitive, despite Government claims to the contrary:

The Government has insisted that SCPOs *"are not punitive, but preventive"* and that civil rather than criminal fair trial standards are, therefore, appropriate. Liberty is not convinced. SCPOs would impose quasi-criminal sanctions and should be subject to criminal fair trial procedures: they would impose severe restrictions on individual rights and freedoms, including restrictions on with whom a person can communicate and where a person can live, work or travel; would enable criminal sanctions to follow from doing something that is not in itself a crime; and would attach the stigma of serious criminality to their recipients. It is difficult to see how such severe restrictions on an individual's freedom of movement could be characterised as anything but punitive.<sup>58</sup>

Human rights organisation Justice also raised a number of concerns about the 2007 Act in a briefing paper for the House of Commons. It gave the following summary as to why the legislation should not be adopted:

- 'Serious Crime Prevention Orders' (SCPOs) should not be used as a substitute for criminal prosecutions;
- Civil orders of this type cannot provide sufficient protection for the public in very serious cases;
- SCPOs can be imposed in too wide a range of circumstances; even innocent people can be given an order because they have unwittingly facilitated crime;
- An SCPO's conditions can be so severe as to amount to a criminal penalty; in these circumstances, the procedural protections of a criminal trial should apply.<sup>59</sup>

#### 5.2 Concerns about the expansion into Scotland

According to the 2013 Scottish Government Consultation Paper, the proposal to expand the SCPO regime into Scotland received support from most respondents.<sup>60</sup> Nevertheless, it acknowledged that some respondents

emphasised that any regime operating in Scotland should “be proportionate and necessary for the prevention of crime”:

Respondents also highlighted [the] need for Orders to be proportionate and not unduly oppressive, that the court should apply strict criteria before granting an order, and there must be grounds to believe that the granting of an order will protect the public against organised crime. One respondent suggested that there should be an obligation on the subject to willingly provide information to the authorities rather than the authorities having to request it.<sup>61</sup>

Some respondents identified areas of concern in their submissions to the Scottish Government. For example, the Law Society of Scotland commented that it had reservations about restricting individuals on a purely speculative basis based on previous offending, suggesting that there should be some test to be met in order to avoid accusations that an order is unduly oppressive.<sup>62</sup>

Dr Liz Campbell, from the University of Edinburgh School of Law, also argued that SCPOs not only breached human rights laws, but were an ineffective deterrent for stopping organised crime:

Serious organised crime prevention orders interfere considerably with various human rights, such as are protected by Articles 6, 8, and Article 1 of Protocol 1 to the European Convention on Human Rights. ... While serious organised crime prevention orders certainly hold the potential to disrupt organised crime, it is remarkably optimistic to think that they will serve as a deterrent to someone who has yet to be involved in such criminality. They will serve a preventative purpose in specific instances, but I would argue that they are unlikely to act as a general deterrent more broadly.<sup>63</sup>

### 5.3 Other criticism and concerns

There remain concerns about the potential to misuse control orders, including SCPOs. In a 2012 journal article, Zedner criticised the growing trend of governments imposing pre-emptive legal responses to alleged criminal activities:

ASBOs (Anti-Social Behaviour Orders), control orders, sexual offences prevention orders and serious crime prevention orders are just some of the more notorious examples of the many preventive orders that now restrict liberty in respect of harms or risks of harm that may be too barely specified, remote, or indirect to satisfy the requirements of criminalisation. Counterterrorism offences also have an increasingly pre-emptive aspect.

...

These examples give only a flavour of the larger temporal shift in crime control now occurring. The resultant rapid expansion of criminal liability invites scrutiny of the pathologies, as well as the benefits, of prevention. Prevention makes good sense but measures that act coercively against individuals need to be subject to rigorous principled restraint. Without restraint we face a future in which the search for security tramples basic liberties.<sup>64</sup>

## 6. Effectiveness of UK SCPOs

Although a number of stakeholders have criticised SCPOs or raised concerns about potential misuse, the UK Government has argued that SCPOs have been successful at hindering organised crime. A 2012 Memorandum to the UK Home Affairs Committee and Justice Committee

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concluded that SCPOs have been an effective crime fighting tool, and have helped to disrupt organised crime in the UK:

SCPOs are now seen as an important tool in disrupting organised crime. Their main value is less in prevention than in early identification of criminal activity through breach of an order. Alongside the full range of enforcement options available to law enforcement agencies, they are a powerful and cost effective tool in protecting society from organised criminality by allowing for wide-ranging restrictions to be placed on people involved in serious organised crime, including in relatively new and expanding areas of cyber crime.

...

One measure of success of a SCPO is a lack of evidence or intelligence linking an individual with an active SCPO to further criminality, which suggests that the implementation of the order has prevented further criminality. More commonly, the effectiveness of SCPOs is demonstrated by the early identification of criminal activity through the breach of a SCPO.<sup>65</sup>

Additionally, the 2012 Memorandum stated:

There have not been any challenges to the lawfulness of the scheme. Relevant litigation in the Court of Appeal has concerned the application of the statutory scheme to the facts of the case (see *R v Hancox and Duffy* [2010] EWCA Crim 102). Similarly, when making Crown Court applications, the CPS has sometimes been confronted by arguments that the proposed SCPO is unnecessary, given the existence of the licence conditions regime. These arguments have been dealt with on their merits.<sup>66</sup>

The 2015 Bill's overarching impact assessment gave the following statistics as to the use of SCPOs since the 2007 Act was introduced:

Although it is a civil order, most SCPOs are imposed on people who have just been convicted of a serious crime in the Crown Court. As at 31 March 2014, a total of 181 'post conviction' SCPOs have been obtained by the NCA and its predecessor the Serious Organised Crime Agency (SOCA). A further 136 have been obtained by police forces and other agencies and notified to the NCA/SOCA. There has also been one 'stand alone' SCPO imposed by the High Court outside of criminal proceedings. The law enforcement agencies who use SCPOs, notably the NCA and HM Revenue & Customs (HMRC), find them to be a very effective tool against serious and organised crime.<sup>67</sup>

The UK's National Crime Agency reported that, as of August 2015, 47 people were currently subject to an SCPO. Examples of restrictions under the terms of the orders included:<sup>68</sup>

- Restriction or notification of money transfers or creation of bank accounts;
- Notification of ownership and use of vehicles;
- Restriction on communications;
- Restriction on email accounts or Internet access;
- Restriction on possession of identity documents; and/or
- Non-association with certain individuals.

## 7. Conclusion

There has been continuing debate across Australia over what legislation should be enacted to address organised crime. In NSW, the Baird Government has recently introduced legislation to create UK-style Serious

Crime Prevention Orders as a means of protecting the public from individuals involved in serious crime. If passed, NSW would be the first Australian jurisdiction to introduce such laws.

Both the proposed NSW SCPO regime and the existing UK regime allow the courts to impose sweeping restrictions on people and corporate entities convicted of, or involved in, serious criminal activity, with strict penalties should an order be breached. Nevertheless, a number of safeguards are present in both NSW and UK legislation that, among other things, prevent the forced disclosure of information, grant third parties the right to have their claims heard, and set maximum time limits for the operation of a SCPO.

The UK Government has argued that the SCPO regime has helped disrupt organised crime, and the regime was extended into Scotland in March 2015. However, there remain concerns that SCPO regimes could be misused, and criticism that these orders are punitive in practice rather than preventative, and can be used against individuals who have not been convicted of any offence.

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<sup>1</sup> T Grant, [Second Reading Speech](#), NSW Parliamentary Debates, 22 March 2016, p 60.

<sup>2</sup> Ibid.

<sup>3</sup> The following NSW Parliamentary Research Service Papers provide further information on existing anti-gang legislation in Australian jurisdictions: L Roth, 'Organised Crime Laws' in NSW Parliamentary Research Service, [Key Issues for the 56th Parliament](#), Briefing Paper 04/2015; G Griffith, [The High Court and the constitutional limits of anti-gang laws: in summary](#), e-brief 14/2014; L Blayden, [Anti-gang laws in Australia](#), Issues Backgrounder 5/2013; G Griffith, L Roth, [Crimes \(Criminal Organisations Control\) Bill 2012: the constitutional issues](#), e-brief 6/2012.

<sup>4</sup> L Roth, 'Organised Crime Laws' in NSW Parliamentary Research Service, [Key Issues for the 56th Parliament](#), Briefing Paper 04/2015, p 123.

<sup>5</sup> Ibid; *Wainohu v State of New South Wales* [2011] HCA 24.

<sup>6</sup> [Crimes \(Criminal Organisations Control\) Act 2012](#) (NSW), Pt 3, Div 3.

<sup>7</sup> Ibid s 27.

<sup>8</sup> *Tajjour v NSW* [2014] HCA 35.

<sup>9</sup> Ibid Pt 3, Div 2.

<sup>10</sup> NSW Government, [Targeting the king pins: Cracking down on organised crime](#), Media Release, 3 March 2015.

<sup>11</sup> Grant, note 1.

<sup>12</sup> Ibid

<sup>13</sup> Ibid.

<sup>14</sup> [Crimes \(Serious Crime Prevention Orders\) Bill 2016](#) (NSW) cl 3(1).

<sup>15</sup> Ibid cl 5(1).

<sup>16</sup> Ibid cls 5(3)-(4).

<sup>17</sup> Ibid cl 13.

<sup>18</sup> Ibid cl 6(1).

<sup>19</sup> Grant, note 1.

<sup>20</sup> [Crimes \(Serious Crime Prevention Orders\) Bill 2016](#) (NSW) cl 7(2).

<sup>21</sup> Ibid cl 8(a).

<sup>22</sup> Ibid cl 8(b).

<sup>23</sup> Ibid cls 9-10.

<sup>24</sup> Ibid cl 11(3).

<sup>25</sup> Ibid cl 11(2).

<sup>26</sup> Grant, note 1.

<sup>27</sup> [Crimes \(Criminal Organisations Control\) Act 2012](#) (NSW).

<sup>28</sup> [Crimes \(High Risk Offenders\) Act 2006](#) (NSW); L Roth, [Reducing adult reoffending](#), Briefing Paper 02/2015, pp 40-1.

<sup>29</sup> [Criminal Code Act 1995](#) (Cth), Pt 5.3, Div 104.

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- <sup>30</sup> Baroness Scotland, [Second Reading Speech: Serious Crime Bill \[HL\]](#), 7 February 2007, Hansard HL col 728.
- <sup>31</sup> [Serious Crime Act 2007 \(UK\)](#) s 8.
- <sup>32</sup> UK Crown Prosecution Service, [Legal Guidance: Serious Crime Prevention Orders, Serious Crime Act 2007 - Sections 1 - 41 and Schedules 1 and 2](#), cl 11; [Serious Crime Act 2007 \(UK\)](#) ss 30-4.
- <sup>33</sup> [Serious Crime Act 2007 \(UK\)](#) ss 1(1)-(2).
- <sup>34</sup> *Ibid* s 19.
- <sup>35</sup> *Ibid* ss 35-6.
- <sup>36</sup> *Ibid* cl 18.7.
- <sup>37</sup> Baroness Scotland, note 30.
- <sup>38</sup> UK Crown Prosecution Service, note 32, cl 18.3.
- <sup>39</sup> *Ibid* cls 3.1-3.2.
- <sup>40</sup> [Serious Crime Act 2007 \(UK\)](#) s 5(3); UK Crown Prosecution Service, note 32, cl 3.3.
- <sup>41</sup> [Serious Crime Act 2007 \(UK\)](#) s 25(2).
- <sup>42</sup> *Ibid* s 27.
- <sup>43</sup> Memorandum to the Home Affairs Committee and Justice Committee, [Post-legislative Scrutiny of the Serious Crimes Act 2007](#), November 2012, p 5.
- <sup>44</sup> [Serious Crime Act 2007 \(UK\)](#) s 6.
- <sup>45</sup> *Ibid* s 9.
- <sup>46</sup> *Ibid* s 10.
- <sup>47</sup> UK Crown Prosecution Service, note 32, cl 5.1.
- <sup>48</sup> [Serious Crime Act 2007 \(UK\)](#) s 16.
- <sup>49</sup> [Serious Crime Act 2015 \(UK\)](#) ss 47(2), 47(6).
- <sup>50</sup> *Ibid* ss 47(3), 47(7).
- <sup>51</sup> *Ibid* ss 47(4), 47(8).
- <sup>52</sup> [Serious Crime Act 2007 \(UK\)](#) s 20; House of Commons Library, [Serious Crime Bill](#), Commons Briefing papers RP14-67, 18 December 2014, p 23.
- <sup>53</sup> UK Home Office, [Serious Crime Bill – Improvement to the Serious Crime Prevention Order](#), 23 May 2014, p 4.
- <sup>54</sup> UK Crown Prosecution Service, note 32, cl 18.9.
- <sup>55</sup> Scottish Government, [Serious Crime Prevention Orders in Scotland: A Consultation Paper](#), September 2013, p 3.
- <sup>56</sup> Baroness Anelay, [Second Reading Speech: Serious Crime Bill \[HL\]](#), 7 February 2007, Hansard HL cols 734-5.
- <sup>57</sup> Lord Lloyd, [Second Reading Speech: Serious Crime Bill \[HL\]](#), 7 February 2007, Hansard HL cols 741, 743.
- <sup>58</sup> Liberty, [Serious Crime Bill: Liberty's Briefing and Amendments for Report Stage in the House of Lords](#), April 2007, p 6.
- <sup>59</sup> Justice, [Serious Crime Bill \(HL\): Briefing for House of Commons Second Reading](#), June 2007, p 2.
- <sup>60</sup> Scottish Government, note 56, p 5.
- <sup>61</sup> *Ibid* p 5.
- <sup>62</sup> Law Society of Scotland, [Response to Serious Crime Prevention Orders in Scotland – Consultation](#), October 2013, p 2.
- <sup>63</sup> L Campbell, [Response to Serious Crime Prevention Orders in Scotland – Consultation](#), October 2013, pp 5-6.
- <sup>64</sup> L Zedner, 'Pre-crime and pre-punishment: a health warning' (2012) 87 *Criminal Justice Matters*.
- <sup>65</sup> Home Affairs Committee and Justice Committee, note 43, p 30.
- <sup>66</sup> *Ibid* p 26.
- <sup>67</sup> UK Home Office, [Serious Crime Bill – overarching impact assessment](#), 3 November 2014, p 14.
- <sup>68</sup> UK National Crime Agency, [Publication of ancillary orders](#), August 2015.