SUBMISSION

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CRIMINAL LEGISLATION AMENDMENT (ORGANISED CRIME AND PUBLIC SAFETY) BILL 2016

A submission of the New South Wales Bar Association.

NEW SOUTH WALES
BAR ASSOCIATION®

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Introduction and overview

Like the *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW) (SCPO Bill) with which it was introduced to Parliament (and which is the subject of a separate submission of the NSW Bar Association dated 13 April 2016), the *Criminal Legislation Amendment (Organised Crime and Public Safety) Bill 2016* (NSW) (the Bill) has serious implications for the rule of law and individual freedoms in New South Wales.

The Bill was announced on 22 March 2016 by the Deputy Premier and Minister for Justice and Police the Hon. Troy Grant MP. The announcement was made in the company of New South Wales Police Commissioner, Andrew Scipione. Notice of motion for the Bill and its second reading in the Legislative Assembly occurred on the same day.

The New South Wales Bar Association opposes the Bill. As with the SCPO Bill, the New South Wales Bar Association is concerned at the manner in which a Bill with such serious implications for the liberties of persons in New South Wales was introduced in Parliament. It occurred without any prior consultation with appropriate legal professional bodies, law reform agencies or civil liberties organisations.

In Schedule 5, the Bill seeks to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) by inserting a new Part 6B to provide for the making of a 'public safety order' (PSO) by a senior police officer only if satisfied that:

(a) the presence of a person (or class of person) at a public event or premises or other area poses a 'serious risk to public safety or security'; and

(b) the making of the order is 'reasonably necessary in the circumstances': clause 87R.

The presence of a person or persons at a public event or premises or other area poses a serious risk to public safety or security if there is a '*serious risk*' that the presence of the person or persons '*might result*' in, inter alia serious damage to property: clause 87R(5)(b) (emphasis added). In the case of a so-called long duration PSO, the Bill imposes no upper limit on the duration of the order.

The Bill will apply to restrict the freedoms of persons in NSW, including children and persons with impaired intellectual functioning, irrespective of whether they have committed or are likely to commit a criminal offence. The Bill represents a significant encroachment on freedoms of assembly, association, expression and movement, based upon the satisfaction of a senior police officer (and in the case of urgent orders, any police officer, potentially a probationary constable – see clause 87T (7)). No case has been made as to why such powers should be conferred on the police at all, let alone in circumstances where it is recognised that rates of crime in New South Wales are declining.

There already exists a broad range of powers under State and federal laws to control the conduct of individuals where there are risks to public safety. These include control orders under the *Crimes (Criminal Organisations Control) Act 2012* (NSW), preventative detention powers under the *Terrorism (Police Powers) Act 2002* (NSW), banning powers under Division 5 of the *Major Events Act 2009* (NSW), 'move on' powers under Part 14 of LEPRA, and control order powers under Division 104 of the *Criminal Code Act 1995* (Cth).

These specific statutory powers exist in addition to general powers under the LEPRA and common law to commence criminal proceedings against persons who attempt to commit an offence, who conspire to commit an offence, and who aid, abet, counsel, procure, solicit or incite the commission of an offence by another person. All of these existing offences permit police to take pre-emptive action in relation to criminal conduct.

In particular, the New South Wales Bar Association is of the view that:

(a) the Bill confers very broad and far-reaching powers on the police, and creates a real danger of arbitrary and excessive interference with the liberty and freedoms of persons in New South Wales:

i. the threshold in clause 87R(5) for the making of a PSO - a '*serious risk*' that the presence of a person or persons '*might result*' in certain eventualities is exceedingly low;

ii. there is no applicant for a PSO, no testing of or contradiction of material relied on by the senior police officer in making a PSO, no opportunity for the person the subject of the PSO to be heard;

iii. in the case of urgent orders, a PSO can be made by any police officer, and its contents communicated verbally to the person to whom it applies;

iv. a PSO may be made in relation to children and persons with impaired intellectual functioning;

v. the Bill is silent as to what might constitute a 'class of persons' for the purposes of the power to make a PSO;

vi. the concept of an 'area' to which a PSO can apply is undefined and entirely unconfined;

vii. in relation to a long duration PSO, there is no upper limit on the duration of the order;

viii. in many cases, a person the subject of an order a will have no means of knowing the basis upon which a senior police officer has reached the satisfaction required by s 87R - in accordance with clause 87T(4), a statement of the reasons for making or varying a PSO must not contain information that would result in the disclosure of a criminal intelligence report or other criminal information held in relation to a person;

ix. there is no right of appeal to the Supreme Court in relation to a PSO which is not a long duration PSO. In the case of an appeal against a long-duration PSO, the non-disclosure of criminal intelligence and other criminal information held in relation to the person, and the hearing of argument in the absence of the person and their representative

(unless the Commissioner approves otherwise) is likely to render the right to appeal practically meaningless;

x. clause 87ZA creates a criminal offence of contravening a PSO carrying a maximum penalty of imprisonment for 5 years, and in contrast to 32 of the *Serious and Organised Crime (Control) Act 2008* (SA), there is no defence of reasonable excuse for being within or entering a specified area;

(b) there has been no public debate about the Bill, and no case made as to why such broad and far-reaching powers should be conferred on the police;

(c) the Bill strikes at fundamental human rights and freedoms of citizens of NSW, in particular freedoms of association, assembly, expression and movement, guaranteed under international human rights law;

(d) the constitutional validity of aspects of the Bill must be regarded as doubtful. The Supreme Court is required to stand in the shoes of the original decision maker (a senior police officer) and make what the Court considers to be the correct and preferable decision. That is a non-judicial function that is substantially incompatible with the functions of the Supreme Court of a State. The Supreme Court is enlisted in implementing decisions of the Executive in proceedings in which there is an inherent lack of fairness between the parties, and in which the Commissioner retains a level of control: *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319. There must also be a real doubt about the validity of the proposed power to make public safety orders in its application to individuals or groups that are exercising their implied constitutional freedom of communication about government and political matters (notwithstanding the operation of proposed section 87R(3)(a)).

BREADTH OF POWERS CONFERRED BY THE BILL

The Bill, if enacted, creates a real danger of excessive interference with the liberty of New South Wales citizens. The powers to constrain freedom of assembly, association, expression and movement to be conferred on police are sweepingly broad, and not subject to any substantial legal constraints or procedural safeguards, and subject to flawed and legally objectionable oversight in which there are inherent elements of unfairness.

(a) The state of satisfaction which founds the making of a PSO

A senior police officer may make a PSO only if satisfied that (a) the presence of the person (or class of persons) concerned at the public event or premises or other area concerned poses a serious risk to public safety or security; and (b) the making of the order is reasonably necessary in the circumstances: clause 87R(1).[1]

For the purposes of clause 87R, the presence of a person or persons at a public event or premises or other area poses a serious risk to public safety or security if there is a *serious risk* that the presence of the person or persons *might result* in (a) the death of, or serious physical harm to, a person, or (b) serious damage to property (emphasis added): clause 87R (5). In clause 87R, 'damage, in relation to the property' is defined broadly to include (a) destruction of the property, (b) an alteration to the property that depreciates its value, (c) rendering the property useless or inoperative, and (d) in relation to an animal - the injuring, wounding or killing the animal: clause 87R(6).

The existence of a serious risk that a person's presence might result in certain eventualities is an exceedingly low threshold for the making of PSO, with its attendant consequences for the curtailment of fundamental freedoms. In particular, the expression 'might result' suggest no more than 'could happen' or 'is possible, but not a negligible chance'.

(b) A PSO is made by a senior police officer absent an application – an urgent PSO by any police officer

A PSO is made by a senior police officer, defined as a police officer of the rank of Inspector or above: clause 87P.

There are no procedures in the Bill whereby a decision-maker makes an order on application. There is no applicant for a PSO. There is no testing or contradiction of material relied on by the decision-maker, no opportunity for a contradictor let alone the person to be affected to be heard, no occasion for the decision-maker to be persuaded as to the appropriateness of making the order. The absence of such procedures removes a layer of scrutiny and oversight, and safeguards and protections found in all,

or almost all existing legislation countenancing profound interference in the liberties of NSW citizens.

Both a PSO and a 'long duration public safety order' (being a PSO that is (or is to be in force) for a period exceeding 72 hours - see clause 87V) can be made by a senior police officer. Under the *Serious and Organised Crime (Control) Act 2008* (SA), by contrast, the power to make an order beyond 72 hours rests effectively with a magistrate from whom the senior police officer must seek an authorisation order: s 25.

In the case of urgent orders, the PSO can be made by any police officer, and its contents communicated verbally to any person to whom it applies: clause 87T (7).

(c) The person or class of persons who may be subject of a PSO

A PSO may prohibit a specified person, or 'persons belonging to a specified class of persons' from (a) attending a specified public event (including entering, or being present at, premises being used in connection with the public event), or (b) entering, or being present at, specified premises or other specified area at any time during a specified period: clause 87Q.

The Bill contains no definition of 'person'. It contemplates that a PSO may apply to persons under the age of 18 years and persons with impaired intellectual functioning (clause 87T (2)), as well as to 'vulnerable persons' (clause 87ZC (1) (c)). The latter are defined in clause 87ZSC (2).[2]

The regulation-making power in clause 87ZC(1) provides that the regulations may make provision for or with respect to inter alia '(c) safeguards for vulnerable persons in connection with the making, service, variation or revocation of public safety orders that apply to them'. The Bill itself contains no such safeguards, in particular not in relation to persons under the age of 18 years and persons with impaired intellectual functioning.[3]

The making of a PSO in relation to a 'class of persons' significantly broadens the possible application of the order and the potential for the power to make a PSO to be exercised arbitrarily.

The difficulty in assessing the risk to public safety or security posed by the presence of a specified person at a public event or premises or other area is manifest. The difficulty is magnified, and the potential for arbitrariness, disproportionality, discrimination and unfairness commensurately greater, in assessing the risk posed by the presence of a 'class of persons' at the event or premises or other area.

The Bill is silent as to what might constitute a 'class of persons' for the purposes of the power to make a PSO. It says nothing, for example, as to whether a proscribed ground of discrimination under say the *Anti-Discrimination Act 1977* (NSW) (for example, homosexuality or race) or a proscribed ground of persecution under the *Refugees Convention 1951* (such as religion, nationality or membership in a particular social group) could establish a class of persons in respect of whom a senior police officer may make a PSO. The concept of a class of persons, undefined, could cover any manner of ways in which people in the community identify or organise themselves, however large or small, general or specific.

Absent any statutory indication to the contrary, the concept of a 'class of persons' for the purposes of the power to make a PSO is entirely unconfined.

(d) The content and duration of a PSO

As noted above, the concept of a 'class of persons' for the purposes of the power in clause 87W to make a PSO is undefined.

Likewise, the concept of an 'area' is undefined and unconfined, providing no geographical or other physical limitations upon the area to which a PSO can apply. The Bill is silent, for example, as to whether Greater Sydney or the Southern Highlands and Shoalhaven, or the Wollongong suburbs of Coledale or Port Kembla could be an 'area' to which a PSO could apply.

Further, the failure to define or regulate the 'area' in respect of which an order may be made has the clear potential for abuse by allowing a senior police office to restrict the places to and from which a person or group may move. There would be nothing on the face of the proposed legislation to prevent a senior police officer from forming a view that a person or group is such a danger to public safety that they should be confined to house arrest (for example, by defining the 'area' as all places in NSW other than a particular residence), or otherwise dramatically curtailing and restricting freedom of movement. The Parliament should not enact legislation that confers on a police officer a statutory power that permits such a serious intrusion

upon the liberty and freedom of movement of persons, and could otherwise constitute a trespass to or detention of the person.

In relation to the duration of a PSO, a senior police officer must not make a public safety order if the period during which the order will be in force would, when added to the period of any previous orders made in connection with the same person or persons and public event or premises or other area, result in the combined period exceeding the maximum period of duration for the kind of order concerned referred to in clause 87S (1): see clause 87R (4). Clause 87S (1) provides as follows in relation to the maximum period of duration of a PSO:

(a) in the case of an order that applies to premises or another area other than in connection with a public event—a period not exceeding 72 hours: clause 87S(1)(d);

(b) in the case of an order that applies to a public event that is held over non-consecutive days—a combined period that does not exceed 72 hours in total: clause 87S(1)(e)(iii); and

(c) in the case of an order that applies to a public event that is held over consecutive days—when the event is taken to start and finish: clause 87S (1) (e) (ii).

It follows that where the order relates to an event that occurs over a period longer than 72 hours, the order could be made by a senior police officer for the duration of the event. As noted above, under the *Serious and Organised Crime (Control) Act 2008* (SA), by contrast, the power to make an order beyond 72 hours rests effectively with a magistrate from whom the senior police officer must seek an authorisation order: s 25.

In relation to a long duration PSO, the Bill imposes no upper limit on the duration of the order. The 2014 FIFA Football World Cup took place in Brazil over a period of four weeks (12 June to 13 July). The 2016 20th Biennale of Sydney, for example, lasts for more than ten weeks (18 March to 5 June).

(e) Limited review and appeal rights

The service and notification requirements in clause 87T require the notification accompanying service of a PSO order to include a statement of the reasons for making or varying the public safety order, and in the case of a long duration PSO include an explanation of the right of appeal to the Supreme Court against the decision under Division 3: clause 87T (3) (c).

However, in accordance with clause 87T(4), a statement of the reasons for making or varying a PSO must not contain information that would result in the disclosure of a criminal intelligence report or other criminal information held in relation to a person. The practical effect is that in many cases the person will have no means of knowing the basis upon which the senior police officer has reached the satisfaction required by s 87R.

Further, in relation to a PSO (which is not a long duration PSO) there is no right of appeal to the Supreme Court. Whilst there may exist in theory the possibility of seeking judicial review in the Supreme Court, this will practically be extremely difficult if not impossible given the limited duration of the order, and the non-disclosure to the person of criminal intelligence and other criminal information held in relation to them. In the case of a weekly event of several hours in duration, such a weekend football fixture or religious service, a PSO could conceivably be made on a weekly basis, thereby avoiding any right of appeal under Division 3.

In the case of a long duration PSO, there exists under Division 3 an appeal to the Supreme Court before the order ceases to be in force: clause 87W. Again, however, the Commissioner may make an application to the Supreme Court in an appeal not to disclose the existence of any criminal intelligence report or other criminal information used in connection with the making or variation of the order under appeal: clause 87X(1). If the Supreme Court refuses the application, the Commissioner is entitled to withdraw the tender of the information to which the application relates as evidence in the appeal: clause 87(5).

Again, whilst there may exist in theory the possibility of an appeal to the Supreme Court, this will practically be difficult if not impossible given the non-disclosure to the person of criminal intelligence and other criminal information held in relation to the person. Further, if the Supreme Court grants the application, in order to prevent the disclosure of the criminal intelligence report or other criminal information, the Court is to receive evidence and ***hear argument in the appeal*** in the absence of the public, the appellant, the appellant's representative and any other

party, *unless the Commissioner approves otherwise*: clause 87X (4) (b) (emphasis added).

Accordingly, it is artificial to suggest that the Supreme Court can 'hear argument' – which connotes an exchange of diverging or opposite views - absent the appellant's representative.

In accordance with clause 87Y (1), on an appeal under Division 3, the Court is to determine the appeal on the merits and to 'decide what the correct and preferable decision is having regard to the material then before it, including … any relevant factual material'. The result is that the appeal would operate other than in accordance with the rules on evidence and on material not sought to conform with the rules of evidence. Moreover, it is entirely obscure what matters the Court is required to consider in deciding 'what the correct and preferable decision is'; for example, whether the Court is required to consider the matters enumerated in clause 87R(2) that the senior police officer is required to take into account in determining whether the making of a PSO is reasonably necessary.

(f) Contravention of a PSO – no defence of reasonable excuse

Clause 87ZA creates a criminal offence of contravening a PSO carrying a maximum penalty of imprisonment for 5 years.

In contrast to 32 of the *Serious and Organised Crime (Control) Act 2008* (SA), there is no defence of reasonable excuse for being within or entering a specified area.[4]

(g) The political purpose exception in clause 87R(3)

In accordance with the so-called political purpose exception in clause 87R(3), a senior police officer must not make a PSO if (a) the officer believes that non-violent advocacy, protest or dissent is likely to be the primary purpose for the presence of the person or class of persons at the public event or premises or other area, or (b) the officer believes that industrial action is likely to be the primary purpose for their presence at the public event or premises or other area, or (c) the order would prevent them from entering their principal places of residence: clause 87R(3).

The so-called political purpose exception in s 23(5) of the *Serious and Organised Crime (Control) Act 2008* (SA) is expressly more narrowly, and provides a greater measure of protection.[5] Under the SA provision, a senior police officer could not make an order if the officer believed that 'advocacy, protest, dissent or industrial action is the likely reason for … persons to be present' at a protest. In other words, so long as the organisation was formed for non-violent advocacy etc, a PSO could not be made where the senior police officer apprehended that the advocacy, protest, dissent or industrial action ***might*** become violent. The distinction to the NSW provision might appear subtle, but the practical consequences could be significant.

NO CASE ADVANCED FOR THE CONFERRAL OF SUCH BROAD AND FAR-REACHING POWERS ON THE POLICE

As with the SCPO Bill, the New South Wales Bar Association considers that no case has been made for the conferral of such broad and far-reaching powers on the police, at all, let alone in circumstances where it is recognised that rates of crime in New South Wales are declining.

In his Second Reading Speech on 22 March 2016, the Deputy Premier and Minister for Justice and Police, Mr Grant, said:

> The measures contained in these bills provide law enforcement agencies with *a more effective means of reducing serious and organised crime* by targeting their business dealings and restricting their behaviour. The bills deliver on the New South Wales Government's election commitment to introduce *tough new powers* to give police the upper hand in the fight against organised crime. I commend the bills to the House'. (emphasis added)

There has been no public debate about the Bill, and no case advanced as to how criminal activity would be thwarted and the public protected by the 'tough new powers' proposed to be given to police. No evidence has been provided as to particular threats of 'serious and organised' crime in New South Wales, or of an inability of police in New South Wales to reduce crime using existing legislative powers. As noted, there exists a broad range of powers to control the conduct of individuals where there are risks to public safety, including control orders under the *Crimes (Criminal Organisations Control) Act 2012* (NSW), preventative detention powers under the *Terrorism (Police Powers) Act 2002* (NSW), banning powers under Division 5 of the *Major Events Act 2009* (NSW), 'move on' powers

under Part 14 of the LEPRA, and control order powers under Division 104 of the *Criminal Code Act 1995* (Cth).

These powers are in addition to general powers under LEPRA and the common law to commence criminal proceedings against persons who attempt to commit an offence, who conspire to commit an offence, and who aid, abet, counsel, procure, solicit or incite the commission of an offence by another person. These existing offences permit police to take pre-emptive action in relation to criminal conduct. Under LEPRA and the common law, the police have the full range of enforcement powers required for maintaining a lawful and peaceful society.[6]

INTERFERENCE WITH FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

Like the SCPO Bill, the Bill strikes at fundamental human rights and freedoms of citizens of NSW, in particular the right to liberty of the person, and freedoms of association, assembly, expression and movement, guaranteed by articles 9, 12, 19, 21 and 22 of the *International Covenant on Civil and Political Rights* (ICCPR).

Under international human rights law, these rights may be subject to limitations, but only if the limitations satisfy the conditions provided for under the ICCPR. An authoritative formulation of the framework for analysing whether such limitations are permissible is provided by the Australian Parliamentary Joint Committee on Human Rights (established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)). A limitation must be provided by law and the government must also demonstrate that:[7]

1. the limitation is aimed at achieving a legitimate objective;
2. there is a rational connection between the limitation and the achievement of the objective; and
3. the limitation is a proportionate means for the achievement that objective. This includes consideration of whether there are less restrictive alternatives, and whether a measure is overbroad.

It is true that the maters required to be taken into account by a senior police officer in determining whether the making of a PSO in a particular case is reasonably necessary in the circumstances include other measures reasonably available to mitigate the risk (clause 87R(2)(g).

Overall, however, the 'tough new powers' proposed to be conferred by the Bill cannot be characterised as a necessary and proportionate means for achieving the purpose of ensuring public safety. As noted, there is no identified deficiency in existing law enforcement powers for maintaining a lawful and peaceful society. The potential interference in the human rights and freedoms of persons in New South Wales is arbitrary and excessive, and likely to contravene Australia's international obligations.

DOUBTFUL CONSTITUTIONAL VALIDITY

Two areas of constitutional law create a real doubt about the constitutional validity of some provisions of the Bill, if they were to be enacted.

First, the principles laid down by the High Court of Australia in *Kable v DPP (NSW)* and cases flowing from it must be considered. Those principles were summarised in *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41, (2015) 326 ALR 16 at [39] (referring to cases that include *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1 and *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393). Four of the principles relevant for present purposes are:

1. A State legislature cannot confer upon a State court a function or power which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian court system.
2. The term 'institutional integrity' applied to a court refers to its possession of the defining or essential characteristics of a court including the reality and appearance of its independence and its impartiality.

…

6. A State legislature cannot authorise the executive to enlist a court to implement decisions of the executive in a manner incompatible with the court's institutional integrity or which would confer on the court a function (judicial or otherwise) incompatible with the role of the court as a repository of federal jurisdiction.

7. A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.

In the Bill, the government has acknowledged the seriously intrusive potential of the powers conferred in the Bill by providing (in clause 87Y) for an appeal to the Supreme Court against a long duration public safety order. That is an appeal on the merits –the Supreme Court is required on the appeal to consider all the evidence and make the 'correct and preferable' decision in respect of the public safety order. In other words, the Supreme Court is required to stand in the shoes of the original decision maker (a senior police officer) and make what the Court considers to be the correct and preferable decision. That is a non-judicial function that is substantially incompatible with the functions of the Supreme Court of a State.

A particular aspect of a *Kable* type constitutional objection is to the enlisting of the Supreme Court in implementing decisions of the Executive in proceedings in which there is an inherent lack of fairness between the parties, and in which the Commissioner retains a level of control. This might well be a manner incompatible with the institutional integrity of the Court in the sense recognised by the High Court in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319. In this respect, notable features of the procedure contemplated by Division 3 include:

(a) in many instances, in bringing an appeal, the appellant will have a statement of reasons which must not contain information resulting in the disclosure of criminal intelligence report or other criminal information held in relation to the appellant. In such cases, the appellant will have no means of knowing the information upon which the police reached the satisfaction required by clause 87R;

(b) in the proceedings in the Court, the Commissioner may make an application not to disclose the existence of any criminal intelligence report or other criminal information used in connection with the making or variation of the order under appeal: clause 87X(1). If the Court refuses the application, the Commissioner is entitled to withdraw the tender of the information to which the application relates as evidence in the appeal; clause 87(5);

(c) there is not even a requirement that the appellant and his or her representative be provided with the 'gist' of the material relied upon by the police in making a PSO, or by the Commissioner in resisting an appeal against the making of the order;

(d) if the Court grants the application, in order to prevent the disclosure of the criminal intelligence report or other criminal information, the Court is to receive evidence and hear argument in the appeal in the absence of the public, the appellant, the appellant's representative and any other party, *unless the Commissioner approves otherwise*: clause 87X(4)(b).

Secondly, there must be a real doubt about the constitutional validity of proposed power to make public safety orders in its application to individuals or groups that are exercising their implied constitutional freedom of communication about government and political matters, notwithstanding the operation of proposed section 87R(3)(a). That subsection provides that 'a senior police officer must not make a public safety order that would prohibit a person or class of persons from being present at any public event or premises or other area if: (a) the officer believes that non-violent advocacy, protest or dissent is likely to be the primary purpose for their presence at the public event or premises or other area'. It can be seen that the purported protection of political speech and protest in the Bill turns on the belief of a police officer about the primary purpose of the event. That is a pale shadow of the protection afforded to political speech under our Constitution. A Court is likely to consider the law not appropriate and adapted to the achievement of the reasonable regulation of persons posing a risk to public safety, on the basis that it does not adequately provide an exception for people or groups who are exercising their implied constitutional freedom of communication about government and political matters.

Endnotes

1. In determining whether the making of the order is reasonably necessary in the circumstances, the senior officer must take into account the matters specified in clause 87R(2), as well as any other matters the officer considers relevant. The matters specified in clause 87R(2) include (a) whether the person has previously behaved in a way that posed a serious threat to public safety and security or has a history of engaging in a serious crime related activity; (b) whether the person is or has been a member of a declared organisation or subject to control orders or associates or has associated with such persons; (c) the public interest in maintaining freedom to participate in advocacy, protest, dissent or industrial action; (d) whether the person will be prevented from being present at various places, including a place of work, an educational institution, a place of worship, a place at which they receive a health or welfare service, a place at which they are provided with legal services; (e) whether the degree of risk justifies the imposition of the prohibitions; (f) the extent to which the order will mitigate any risk to public safety or security; and (g) the extent to which the order is necessary having regard to other measures reasonably available to mitigate the risk.
2. Cf a SCPO under the SCPO Bill which cannot be made in relation to a person under the age of 18 years.
3. Other than the notice requirement in clause 87T (2) which provides that if the senior police officer considers that a person to whom the order applies is a person under the age of 18 years or has impaired intellectual functioning, the officer must ensure that the order and notification are also served by means of personal service on a parent or guardian (if any) of the person if it is reasonably practicable to do so. However, a failure to do so does not prevent the order or variation from becoming binding when it is served on the person.
4. Section 32 provides: 'If a public safety order prohibits a person from entering or being within a specified area, it is a defence to a prosecution for an offence against this section to prove that the defendant had a reasonable excuse for entering or being within the specified area'.
5. Section 23(5) provides:
   (5) Despite any other provision of this section, a senior police officer must not make a public safety order that would prohibit a person or class of persons from being present at any premises or event, or within an area, if—
      (a) those persons are members of an organisation formed for, or whose primary purpose is, non-violent advocacy, protest, dissent or industrial action; and
      (b) the officer believes that advocacy, protest, dissent or industrial action is the likely reason for those persons to be present at the premises or event or within the area.
6. For example, in certain circumstances to arrest without a warrant, search without a warrant, and enter and search without a warrant.
7. Practice Note 1; also *Annual Report 2012-2013* at [1.53].