THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/PWrg:1314060

9 May 2017

The Hon Mark Speakman SC MP
Attorney General
GPO Box 5341
Sydney NSW 2001

Mark

Dear Attorney General,

Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016 – safeguards to protect vulnerable persons

I write on behalf of the Law Society of NSW.

Members of our Criminal Law Committee have raised concerns about the impact on vulnerable persons of Schedule 5 of the *Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016* ("the Act"). The Act commenced on 31 March 2017.

Schedule 5 of the Act introduced a new Part 6B to the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA") which enables senior police officers to make public safety order ("PSOs") prohibiting a person from being present at public events, premises or other areas if the officer believes their presence poses a serious risk to public safety or security, and the PSO is reasonably necessary to mitigate this risk.

The Law Society has previously raised concerns about this legislation in our letter dated 29 April 2016 to the Hon Troy Grant MP, then Minister for Police and Justice (a copy of the letter is enclosed).

The new police power to make PSOs applies to vulnerable persons, including children and persons with impaired intellectual functioning.

There are limited safeguards to the exercise of the power: section 87T(2) of LEPRA requires a senior police officer to serve a copy of a PSO made against a vulnerable person on their parent or guardian, but only if it is "reasonably practicable" to do so. A failure to serve the order on a parent or guardian does not, in any event, invalidate the order.

However, when introducing the legislation, the Government highlighted a new regulation-making power in section 87ZC of the Act "*to provide for further safeguards for vulnerable persons who may be subject to a public safety order.*"[1]

[1] The Hon Troy Grant, Deputy Premier, Minister for Justice and Police, Minister for the Arts, and Minister for Racing, Second Reading Speech to the Criminal Legislation Amendment (Organised Crime and Public Safety) Bill 2016, 22 March 2016. Specifically, section 87ZC(2)(c) of LEPRA now contains a regulation-making power in respect of *safeguards for vulnerable persons in connection with the making, service, variation or revocation of public safety orders that apply to them.*

The Law Society is very concerned that as yet, and despite that statement, no regulations have been made under section 87ZC(1)(c). The Law Society understands that the Department of Justice intends to rely on NSW Police Force training, policies and procedures concerning vulnerable people in place of regulating what are important and necessary safeguards.

The lack of additional legislative safeguards for vulnerable persons under Part 6B of LEPRA is of particular concern in light of:

- The serious criminal consequences for breaching a PSO (the offence carries a maximum 5 year jail term).
- The offence is one of strict liability.
- The limited avenue for appeal against a PSO.
- The breadth of police discretion to make a PSO and the resulting expansion of police powers to search and detain a person without warrant (section 87ZB).
- The mechanism for urgent PSOs to be made and served by way of verbal communication of the contents of the order to the person (section 87T(6)).

Recent experience of legislation ostensibly targeting organised and serious crime has borne out concerns that such laws would be used disproportionately against vulnerable individuals.[2] It would not be inconceivable for a vulnerable person to be remanded in custody or convicted in relation to a breach of a PSO in circumstances where they had no understanding at all as to the existence of an order or the conduct it prohibited.

The Law Society would welcome consultation with Government about a regulation containing safeguards to prevent such injustices arising. In its meetings last year, the LEPRA Regulation Working Group made considerable progress in reviewing the recent changes to the LEPRA regulations concerning police investigation and questioning of vulnerable persons. The Working Group would, in our view, be an appropriate forum in which a regulation under section 87ZC could be developed.

Thank you for considering this letter. Should you have any questions or require further information, please contact Rachel Geare, Senior Policy Lawyer, on 9926 0310 or rachel.geare@lawscociety.com.au.

Yours sincerely,

Pauline Wright
President

Encl.

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[2] The NSW Ombudsman's April 2016 *Consorting Law Review on the operation of Part 3A, Division 7 of the Crimes Act 1900* found that consorting provisions introduced in NSW in 2012 had been used to address policing issues not connected to serious and organised crime and in a manner that impacted unfairly on disadvantaged and vulnerable persons including Aboriginal people, people experiencing homelessness, and children and young people. The review also found an exceptionally high police error rate when issuing consorting warnings in relation to children and young people: see http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/CLC/GUvk:1121150

29 April 2016

The Hon Troy Grant MP
Minister for Justice and Police
GPO Box 5341
SYDNEY NSW 2001

Dear Minister,

Crimes (Serious Crime Prevention Orders) Bill 2016 and Criminal Legislation Amendment (Organised Crime and Public Safety) Bill 2016

The Law Society of NSW has serious concerns about the Crimes (Serious Crime Prevention Orders) Bill 2016 ('the SCPO Bill") and the Criminal Legislation Amendment (Organised Crime and Public Safety) Bill 2016 ("the OCPS Bill") together ("the Bills"). As a rule of law matter, and in order to protect fundamental rights and democratic institutions in NSW, the Law Society strongly opposes the passage of the Bills.

Summary of the Law Society's position

The Government has stated that the Bills are targeted at organised crime and community safety. However, it remains unclear why the Bills are necessary, and how they are proportionate to those aims.

The proposals under the Bills appear to be an attempt to circumvent the usual protections of criminal justice procedures. In addition to our concerns that individuals who could not be said to be serious criminals could be subject to these orders (with significant criminal consequences if they are breached), the Law Society is seriously concerned that the alternate processes proposed by the Bills would see:

- An effect upon the balance between executive and judicial powers;
- The longstanding rules in relation to hearsay evidence removed;
- Arbitrary outcomes in respect of the confiscation of proceeds of crime;
- The court's discretion fettered in relation to making certain declarations about asset forfeiture;
- An extraordinary expansion of police powers, where individual police officers are granted the discretion to issue "public safety orders" that restrict individual movement and carry five year prison terms for breach, without (in some circumstances) any avenue for appeal and;
- A further expansion of police powers to search and detain without warrant.

The Law Society considers that the extension of executive powers proposed by the Bills would erode longstanding rights including the presumption of innocence, the right to a fair trial, the right to property, and the right to be protected against double punishment.

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The Bills would potentially also place limitations on fundamental human rights[1] protecting against arbitrary arrest and detention, and the freedoms of expression, communication and association. The Bills are also likely to compromise the integrity of court processes, and the Law Society submits that this would erode democratic institutions.

The Law Society considers that these amendments have been proposed without the Government having demonstrated:

- any necessity for the Bills;
- how the Bills are rationally connected to their stated aims; or
- how they are proportionate to achieving these aims.

For these reasons, and the reasons set out in more detail in this submission, the Law Society strongly opposes the passage of the Bills.

More generally, we note that the Bills appear to be part of a very concerning trend of legislative encroachment on individual rights and liberties in NSW, in circumstances where the Government has not demonstrated that any real gains will be achieved in respect of community and public safety. The Government's recent legislative activity demonstrates the necessity of an effective legislative scrutiny mechanism in NSW, and legislation protecting and promoting fundamental rights and liberties.

Further comments specific to the Bills are set out below.

1. The Crimes (Serious Crime Prevention Orders) Bill 2016

The Law Society has had the benefit of considering the NSW Bar Association's submissions on the SCPO Bill, and endorses these submissions.

1.1. Operation of the SCPO Bill

The SCPO Bill proposes to allow the Commissioner of Police, the DPP or the NSW Crime Commission ("applicant") to make an application for a "serious crime prevention order" (SCPO) against someone who has been convicted of a "serious criminal offence" (as defined in the *Criminal Assets Recovery Act 1990*) or has been involved in "serious crime related activity".

The court may make the order if it is satisfied that there are "reasonable grounds" to believe that 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 application is to be made to the District Court or Supreme Court where the person against whom the SCPO is sought has been convicted of a serious criminal offence (as defined); or to the Supreme Court where there is no conviction but that person is "involved in serious crime related activity" (according to the civil standard of proof).

The SCPO may contain "such prohibitions, restrictions, requirements and other provisions that 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" (clause 6 (1)).

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[1] The Law Society considers that the Bills may potentially breach the following articles of the *International Covenant on Civil and Political Rights*, which Australia is bound to uphold as a signatory:

- Art 9 (right to be protected against arbitrary arrest and detention),
- Art 12 (right to liberty of movement),
- Art 14 (right to a fair and public hearing by a competent, independent and impartial tribunal),
- Art 17 (right to be protected against arbitrary interference with privacy, family home or correspondence),
- Art 19 (right to freedom of expression), and
- Art 21 (right of peaceful assembly).

Once the SCPO is made, it must be personally served on the subject person, and takes effect upon service, or at a specified later date. The SCPO may operate for a period of up to 5 years.

1.2. "Serious crime related activity" and "involved in a serious crime related activity"

The definition in clause 3 of "serious crime related activity", imported from the *Criminal Assets Recovery Act 1990*, means that a person may be found to have engaged in "serious crime related activity" even if that person has not been charged with an offence; or has been tried and acquitted; or has been convicted but where the conviction has been quashed or set aside. The term also includes "anything done by a person that is or was at the time a serious criminal offence."

In addition, the SCPO Bill introduces a new legislative concept of "involved in serious crime related activity," which includes conduct where a person:

- has facilitated another person engaging in serious crime related activity (clause 4(1)(b); or
- is likely to facilitate serious crime related activity (by that person or another person) (clause 4(1)(c)).

In addition to the example provided by the NSW Bar Association, the Law Society notes that these provisions might also conceivably be applied to a family member or friend who, for example, provided accommodation for a person who then went on to engage in "serious crime related activity."

The breadth of these definitions is extraordinary. It is difficult to see how the reach of the SCPO Bill can be said to be targeted at organised crime, or at individuals who the general community would consider serious criminals.

The proposed reach of the SCPO Bill is of particular concern as breach of the orders made under the Bill is a criminal offence, carrying a maximum prison term of 5 years or a fine of up to $33,000, or both, for a natural person. The proposed contravention provision appears to be a strict liability provision.

1.3. Content of serious crime prevention orders

Clause 6(1) of the SCPO Bill provides that an SCPO may:

> contain such prohibitions, restrictions, requirements and other provisions as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.

There is little that limits the scope and nature of the orders that could be made.

The examples given by the Minister in his Second Reading speech are that SCPOs:

> [...] 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.[2]

Further, the Minister's media release suggested that SCPOs might be used to ban people from:

> contacting certain associates, conducting certain business dealings or possessing certain equipment such as a computer or mobile phone.[3]

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[2] New South Wales *Parliamentary Debates*, Legislative Assembly, 22 March 2016, 8034 (Troy Grant).
[3] Troy Grant, 'New laws to hit crime gangs where it hurts' (Media Release, 22 March), 1.

Subject to the very limited restrictions on what SCPOs can require (set out in clause 6(2) and discussed in greater detail in the NSW Bar Association's submission), there is little limit to the range of liberties and rights that could be constrained under such open-ended orders. For example, the orders appear to be so broad that they might allow significant restrictions on leaving one's place of residence. Or they may prohibit people from associating with other people (noting that there are already laws in place prohibiting consorting in the context of organised crime).[4] It appears that they may also place positive obligations on people to do certain things.

As the NSW Bar Association has noted, given the test for making an SCPO is a "very low hurdle", it is likely that the liberties of many individuals in NSW may potentially be affected, potentially very seriously, even if they have never been previously convicted or even charged with a criminal offence.

1.4. Procedural safeguards

The Law Society is concerned that the process proposed by the SCPO Bill would operate essentially as a means to circumvent the usual criminal justice system. Built into the usual criminal justice process are rules of evidence and procedure to account for the fact that the resources of individuals are unlikely to match the considerable resources of the state.

The SCPO process could, as the NSW Bar Association has noted, operate as an alternative to a successful prosecution. It could be used to extend restrictions over a person who has already completed a custodial sentence and could therefore amount to additional punishment. In this respect, the Law Society notes that in his Second Reading speech, the Minister gave the example of the SCPO being served while a person is in custody, and taking effect on their release.[5] Given this, the lack of procedural safeguards is all the more concerning.

A. "Eligible applicants" and the independence of the prosecution

The Law Society notes that the "eligible applicants" are the DPP, the Police Commissioner and the Crime Commission. It is of concern that the Police Commissioner and Crime Commission would be able to bring SPCO applications, given that those agencies would play dual investigative and prosecutorial roles.

The Law Society submits that, even if only as a matter of public perception, this arrangement might be said to undermine the integrity of the court process, as it might call into question the impartiality of the decision to bring an SCPO application.

B. Proof and evidence

The Law Society is very concerned that the SCPO Bill proposes to create a process that when contravened, may have criminal consequences for individuals, but which avoids the usual rules that apply to "level the playing field" between individuals and state power in criminal proceedings.

The applicable standard of proof that would apply is the civil standard of satisfaction on the balance of probabilities (clause 13(1)). The usual rules of construction applicable only in relation to criminal law do not apply in the interpretation of the provisions of this Act (clause 13(2)(a) and the rules of evidence applicable only in criminal proceedings do not apply (clause 13(2)(b)).

Further, in determining an application for an SCPO, the hearsay rule, a longstanding rule of

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[4] These laws are a good example of how broadly drafted legislation, ostensibly targeted at organised crime, have in fact been used disproportionately against vulnerable individuals. The NSW Ombudsman's review of the use of anti-consorting laws by police showed that they were disproportionately used against Aboriginal people, including Aboriginal children and young people (NSW Ombudsman, *Review of the use of the consorting provisions by the NSW Police Force* (2013), 9-10).

[5] Note 2.

evidence that usually applies in both civil and criminal proceedings, would not apply (clause 5(5)). The general rule against the admission of hearsay is a protection recognising that hearsay evidence may be unreliable, difficult to test, and may often be more prejudicial than probative.

It would be extremely concerning if the effect of removing the hearsay rule from these proceedings would be, for example, to allow police to provide as evidence prejudicial information obtained from confidential and anonymous sources that the person subject to the application would be unable to counter.

The Law Society notes also that clause 5(4) allows "defendants" to "appear...and make submissions". It is unclear whether defendants would be permitted to call evidence. Further, under clause 5(3), even the application need not be served on the defendant if a Court allows it. If the application is served, it will still be very difficult for the person who is subject of the application to know the case against him or her without appropriate disclosure. There appears to be no provision requiring such disclosure.

It is unclear why it is necessary to set up an alternative set of rules of proof and evidence for a determination that has serious consequences for individual liberties, criminal or otherwise.

1.5. Constitutional validity

The Law Society refers to, and endorses, the views of the NSW Bar Association in respect of the doubtful Constitutional validity of the SCPO Bill. We note the Bar's "central proposition" that "it is an unacceptable diminution of the institutional integrity of the courts of the State to require them to conduct substandard simulacra of criminal trials at the behest of the Executive."[6]

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

2.1. Operation of the OCPS Bill

The OCPS Bill proposes to allow the confiscation of substitute property if the property of a person convicted of a serious criminal offence used in, or in connection with, that offence is unavailable for forfeiture. The amendments also propose to require (provided certain minimal conditions have been met) the Supreme Court to make a forfeiture order in respect of property used in, or in connection with, a serious crime related activity, or if that property is not available for forfeiture, other property of the offender. The OCPS Bill also proposes to amend the *Crimes Act 1900* to recast the offence of dealing with property suspected of being proceeds of crime so as to adopt certain provisions of the corresponding offence in the *Criminal Code Act 1995* (Cth).

The OCPS Bill further proposes to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to allow a senior police officer to make a "public safety order" to prohibit a person from being present at a public event or at specified premises or another area if the person's presence poses a "serious risk to public safety or security."

2.2. Public safety orders

A. Police issued orders

The OCPS Bill proposes to allow senior police officers to make "public safety orders" if the senior police officer is satisfied that the presence of the person or class of persons poses a serious risk to public safety or security[7], and the making of the order is reasonably necessary in the

[6] NSW Bar Association submission, Crimes (Serious Crime Prevention Orders) Bill 2016, 13 April 2016 < http://www.nswbar.asn.au/docs/webdocs/SCPO_13042016.pdf>

[7] "Serious risk to public safety or security" means if there is a serious risk that the presence of the person might result in death or serious physical harm to a person, or serious damage to property. Serious damage to property includes destruction of the property, alteration to the property that depreciates its value, rendering the property useless or inoperative, or if in relation to an animal, injuring, wounding or killing it.

circumstances (clause 87R(1)). There is no requirement that the persons, or class of people, subject to a public safety order, have been charged with or convicted of a criminal offence. The breach of these orders also has serious criminal consequences (a maximum prison term of 5 years), which appear disproportionate to the conduct captured.

These orders can prohibit people from attending specified events or premises, or other specified areas, for a specified period of time. Under clause 87R(2), in determining whether an order is reasonably necessary, there is a list of matters to be taken into account. However the officer may also take into account 'any other matter the officer considers relevant'.

The order should be in writing and must provide a statement of reasons and be served on the person. It is binding upon service. However, the OCPS Bill provides a wide exclusion in respect of what a statement of reasons should contain. That is, it must not contain information that would result in the disclosure of a criminal intelligence report, or other criminal information held in relation to that person. This is of concern as there is no guidance in the OCPS Bill in relation to, for example, what "other criminal information held in relation to that person" means, nor is there a means provided in the Bill for the person to obtain that information.

Further, if the senior police officer considers that the public safety order is urgent, the senior police officer can communicate the contents of that order verbally to the person subject to the order, and the order would be binding upon that verbal communication.

No appeal is available if the order is for a period shorter than 72 hours. Appeals are available to the Supreme Court only if the order is made for a period longer than 72 hours. In this case an appeal may lie against the decision to make the order, or a decision to vary the order.

The Law Society is extremely concerned that this proposal would to allow senior police officers the power (with very wide discretion) to make "orders". The OCPS Bill does not provide for avenues of appeal if the public safety orders last for a period of less than 72 hours. While there is limited provision for an order to be revoked[8], there is no clear process for seeking such a revocation. Further, breach of such police-issued public safety orders would have criminal consequences, apparently on a strict liability basis. In respect of contravention, the Law Society notes that the OCPS Bill does not provide for any consideration of how reasonable or practicable the order is, or whether there may have been any circumstances which might have reasonably justified or mitigated the breach.

This proposal could see an extraordinary expansion of executive power into judicial functions, with virtually none of the safeguards usually present in a criminal justice process. Little or no justification has been provided for what would be a very serious shift of the balance between executive and judicial powers that underpin our democratic institutions.

Further, the Law Society is very concerned that such public safety orders could, in the absence of a fair judicial process, operate to interfere with the freedoms of movement, association and communication.

B. Vulnerable accused

The Law Society notes that children and people with cognitive impairments are not excluded from public safety orders, and although the OCPS Bill provides that regulations might be made to provide for safeguards, there are no safeguards provided by the OCPS Bill itself. Under the clause 87T, the senior police officer is only required to effect service on a parent or guardian

[8] A public safety order might be varied or revoked by a senior police officer (clause 87U(1)), and the Police Commissioner must revoke a public safety order if he or she becomes aware that the order was made in error, or that the grounds for making the order no longer exist (clause 87U(2)). However, such revocation only takes effect if the person subject to the order has been personally served with a written notice of the revocation (clause 87U(5)).

where they consider that a person is under 18 or has impaired intellectual functioning but only where it is 'reasonably practicable to do so'.

Noting that the Law Society opposes the OCPS Bill in its entirety, the Law Society notes the law accepts that children require supervision and guidance, and as such should not be treated in the same way as adults. Similarly, the law generally recognises that people with cognitive impairments should also be treated differently in the criminal justice process, especially where criminal sanctions may be involved.

In addition, clause 87T does not include a requirement that the notice be in a language that the person understands. Given the consequences of a breach, where police are aware that a respondent cannot speak English, they should be obliged to have the notice translated.

Furthermore, clause 87T(7) provides no guidance about what is meant by urgent, and merely requires that a police officer believes it to be so. Given the inability of a person to appeal against a decision with an effect of 72 hours or less, it might readily be assumed that any such order would be 'urgent'. Personal service of the order should be a requirement under all but wholly exceptional circumstances. Moreover, the requirement in clause 87T(7) does not require the police officer to explain the possible consequences of a breach of the order.

C. Expanded police powers to search and detain without warrant

Under clause 87ZB, police powers to search and detain without a warrant are also expanded in relation to a person to whom a public safety order applies. Police can search any premises, or public areas; and search and detain any vehicles, if the police officer reasonably suspects that a person subject to a public safety order is in those premises or other specified area, or a vehicle that is in, or is approaching or leaving such premises or other specified area.

2.3. Confiscation of proceeds of crime

A. Substituted tainted property declarations

The OCPS Bill includes very broad provisions in relation to confiscation of proceeds of crime. The bill would amend clause 33 of the *Confiscation of Proceeds of Crime Act 1989* to allow a "substituted tainted property declaration" to be made where the "tainted property", as used in or connected with the commission of a "serious offence", is not available to be forfeited because it has been sold or is owned by another. This has the potential to result in arbitrary and unjust outcomes.

For example where a car worth $200,000 (as opposed to a $3,000 car) is used in, or in connection with, the commission of an offence (whether or not the offender owned that car), a substituted tainted property declaration can be made for not more than the same value. While clause 33(8)(b) suggests that the substituted property must be of the same kind, this only applies where it is "practicable to do so". If the court makes a substituted tainted property declaration, the property, or interest in property (or combination or properties or interests) become available for forfeiture as tainted property for the purposes of the *Confiscation of Proceeds of Crime Act 1989.* It would not matter whether the original tainted property is returned to its rightful owner or if insurance covered the loss. The elements of the offence do not differ, simply the value of an article of property connected with the offence.

Also of concern is the fettering of judicial discretion proposed by clause 33(5) of the OCPS Bill, which provides that the court must make a substituted tainted property declaration if certain conditions are met. Currently s 18(1) of the *Confiscations of Proceeds of Crime Act 1989* allows the court the discretion to make a forfeiture order. To the extent that the Supreme Court's discretion is fettered, the Law Society queries the constitutional validity of the proposed provision.

B. Hardship

The hardship provisions currently contained in s 18(1)(b) of the *Confiscations of Proceeds of Crime Act 1989* have not been included under the proposed s 33. The court, under these provisions, must take into account the ordinary use of the property and hardship considerations in deciding whether to forfeit property.

The hardship provisions, which protect against unduly harsh orders being made, provide a safeguard and level of discretion available to the Court to consider the ramifications of an order being made.

C. Offence of dealing with property suspected of being proceeds of crime

The penalties in relation to the proposed amendment to s 193C of the *Crimes Act 1900* have also been increased beyond those set in the Commonwealth legislation, but without explanation as to why the Commonwealth penalties were considered inadequate. Section 400.9(1A) of the *Criminal Code Act 1995* (Cth) ("the Code") provides that an offence involving less than $100,000 is punishable by a maximum of 2 years imprisonment. If the offence involves $100,000 or more, it is punishable by a maximum prison term of 3 years. Under the proposed amendments to the *Crimes Act 1900,* it is 3 years and 5 years, respectively.

D. Burden of proof

If, as proposed by the OCPS Bill, the current offence under s 193C of the *Crimes Act 1900* becomes indictable, the reversed onus of proof may cause difficulties for juries. Juries will need to be directed that, for the primary offence (under s 193B(1), (2) or (3)), the ordinary onus applies (that is, the Crown must prove the elements beyond reasonable doubt). However, in relation to s 193C, once the Crown has provided sufficient evidence that there are (objectively) reasonable grounds to suspect that the property is proceeds of crime, the accused would bear a reversed onus to establish the defence.

As the offence is a statutory alternative to offences under s 193B (to which the reversed onus of proof does not apply), this will involve the Crown explaining to a jury that:

a) on the primary offence, the normal onus of proof applies; and then
b) on the alternate offence that (if the primary offence is not proven), the accused must satisfy the jury that he or she had no reasonable grounds to suspect the matters in hand to be proceeds of crime.

This will inevitably lead to confusion for the jury. Any evidence provided by the accused in order to discharge their burden of proof for the alternate offence under the proposed s 193C may be used against an accused in relation to the primary offence, inevitably prejudicing an accused, who must either risk conviction on the alternate offence, or give up their right to silence in respect of all offences.

E. Combining contraventions

The Law Society further notes that the content of clause 193FA which provides for the combination into a single charge of two instances of the defendant engaging in conduct constituting an offence (whether at the same time or different times). Clause 193FA (2) provides that, where a single charge relates to two or more instances (of relevant conduct), the value of the property is taken to be the sum of the values of the property dealt with in each of those instances.

Given that the penalties relating to the proposed 'new' offences depend upon the value of the property, this appears unfair. Identical conduct by two different individuals would be punished

differently based upon the value of the property involved, rather than the nature of the conduct itself.

3. Conclusion

The Law Society does not consider the Bills to be appropriately targeted at organised crime, or even at maintaining public order. Rather, they appear to be an attempt to circumvent the usual criminal justice process (and its attendant safeguards in respect of individual liberties).

The Law Society submits that if the Bills became law, it would be to the serious detriment to the rights of individuals in NSW, and to the integrity of democratic institutions in this state, including our courts, without any evidence that public safety would in fact be enhanced.

Yours sincerely,

Gary Ulman
President

C.c. The Hon Mike Baird MP, **Premier of NSW**
The Hon Gabrielle Upton MP, **Attorney General of NSW**