THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/HRC/GUvk:1097500

14 March 2016

The Hon. Anthony Roberts, MP
Minister for Industry, Resources and Energy
GPO Box 5341
SYDNEY NSW 2001

By email: office@roberts.minister.nsw.gov.au

Dear Minister,

Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016

The Law Society of NSW writes in relation to the Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016 (the "Bill").

The Law Society is concerned that the proposed new laws may interfere with the ability of people in NSW to engage in demonstrations, protests, processions or assemblies. The Law Society considers this right an important aspect of a democratic state. These amendments appear to again expand police powers, without the safeguard of judicial oversight. They may also interfere with the right against arbitrary deprivation of property.

The Bill:

- Amends the *Inclosed Lands Protection Act 1901* to create an aggravated form of the offence of unlawful entry on inclosed lands, increasing the maximum penalty from $550 to $5,500. It is not clear why intending to interfere with a business should be an aggravating factor;
- Amends the *Crimes Act 1900* in relation to the offences of intentionally or recklessly interfering with a mine to extend the meaning of 'mine' to mineral, gas or petroleum exploration sites;
- Amends the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA") to confer additional search and seizure powers (without warrant);
- Amends the LEPRA to remove limitations on the exercise of police powers to give certain directions in public places;

As a rule of law matter, the Law Society does not support the proposed amendments to the *Inclosed Lands Protection Act 1901* or to the *LEPRA*.

We consider that the NSW Police already have extraordinary powers of search and seizure, and are able to restrain and detain people for their own, or others', safety. The proposed amendments do not appear to be either necessary or proportionate.

We have previously opposed the extension of police powers set out in the LEPRA in relation to warrantless search powers[1], and now oppose the further expansion of police powers to search, seize, detain and restrain without the safeguard of judicial oversight.

Our concerns are provided in further detail below.

1. Expanded police powers to give directions in the context of protests, demonstrations, processions and assemblies

The Law Society is very concerned that these amendments appear to be aimed at non-violent forms of public assembly and protest. Currently, people in NSW have a right to engage in demonstrations, protests, processions or assemblies without police interference. Protests remain an important means of political expression.

The common law right to assembly has been expressly recognised by Australian courts, including the High Court of Australia and the Supreme Court of NSW. The Law Society notes also that the Australian Constitution has been interpreted by the High Court as requiring Australian citizens to be able to assemble before the Federal Parliament.[2] Additionally, the High Court has interpreted the Australian Constitution as providing an implied freedom of political communication. While this implied freedom is not a personal right, it would invalidate laws that burden that right if such a law is "not appropriate or adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government."[3]

Courts have noted that peaceful assemblies are "perfectly reasonable and entirely acceptable modes of behaviour in a democracy"[4] and peaceful assemblies are "integral to a democratic system of government and way of life."[5]

The International Covenant on Civil and Political Rights also protects the right to "peaceful assembly" (Article 21) and any limitation of that right must be "necessary in a democratic society."

In NSW, Part 4 of the *Summary Offences Act 1988* facilitates the exercise of the common law right to assembly. Hamilton J in *Commissioner of Police v Gabriel*[6] emphasised the role of Part 4 in providing a mechanism for promoting and managing the conduct of public assemblies. As his Honour said, "the whole purport of [Part 4] is not to prohibit public assemblies but ... to facilitate them[7]. As currently drafted, s 200 of LEPRA recognises this right.

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[1] The Law Society of New South Wales, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* (2009) http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/063503.pdf.
[2] R v Smithers [1912] HCA 96 cited in NSW Parliamentary Research Service, *Protests and the Law in NSW Briefing Paper No7* (2015) 7, http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/930B6895CA9EDEE1CA257E6D00008178/$File/Protests+and+the+law+in+NSW.pdf
[3] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 567-568.
[4] Ibid citing *NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015 at [3]–[4] per Adams J.
[5] Ibid citing *Commissioner of Police v Rintoul* [2003] NSWSC 662 per Simpson J at [5].
[6] *Commissioner of Police v Gabriel* [2004] NSWSC 31 at [1].
[7] NSW Parliamentary Research Service, above n. 1.

However, this Bill proposes to amend s 200 of LEPRA, and appears to encroach upon and limit fundamental rights to assemble and protest. The direction issued is to be based purely upon an assessment by a police officer that interference is necessary on "reasonable grounds" to deal with a "serious risk to safety." Yet, in a potentially charged situation where the police officer is the sole decision-maker of whether to issue a direction, there is little guidance in the proposed legislation as to how and whether a direction should be issued. For example, the proposed legislation does not set out what constitutes a 'serious risk'.

The Law Society considers that existing common law and statutory powers are sufficient to maintain public peace and safety, and should be utilised by police in the exercise of their duties. Common law powers available to the police to maintain public order include powers relating to breaches of the peace and restraint of a person for his or her own (or others' safety)[8].

We note that the existing provisions in LEPRA dealing with police powers to give directions already represent an expansion of common law police powers, noting that failure to comply with police directions is an offence (s 199, LEPRA).

In the Law Society's view, the right to protest and assemble is a fundamental right itself, and its importance is augmented by the constitutionally implied freedom of political communication. Given this, and the already existing police powers to maintain public safety, we submit that the Government has not demonstrated why it is a necessary or proportionate response to amend s 200 of LEPRA to allow police officers to issue directions in the context of protests and assemblies without warrants. This is particularly so where failure to comply with such directions amounts to a criminal offence.

We further note that the proposed penalty for the new offence of aggravated unlawful entry on inclosed lands increases the existing penalty from $550 to $5,500. This is a very significant fine and in our view such an increase, appears to be entirely disproportionate.

We are concerned that where a number of protesters, who are part of a legitimate social group, 'lock on' or secure themselves to plant, equipment or structure, there is potential for each of these individuals to be fined at or near the maximum penalty. If, for example, five protestors are fined in relation to this offence, the total fine could be $27,500. Such a penalty may greatly limit the ability of the individuals or the group to engage in legitimate political activity or communication.

2. Expanded search and seize powers for police

The laws that allow the police to conduct a personal search without a warrant must strike a balance between the rights to privacy and protest, and the safety of the community.

We are concerned that the Bill proposes to give police officers significantly extended powers to search and seize certain "things" from people without a warrant. The International Covenant on Civil and Political Rights ("ICCPR") protects against arbitrary and unlawful interference with privacy (Article 17). Given the importance of the right, as well as the long-standing common law reluctance to give free rein to

[8] *DPP v Gribble* [2004] NSWSC 926

executive searches, [9] it is desirable that any interference with this right be safeguarded by a warrant.

In NSW, warrantless searches are permitted, however only where concurrent safeguards limit and control their use. In our view, it would be extraordinary to extend the power to search to a thing which is not of itself intrinsically dangerous (for example a piece of rope or padlock as opposed to a weapon or prohibited drug) on the suspicion of an offence punishable by a fine. To do so without judicial oversight removes that crucial safeguard.

As a rule of law matter, the automatic forfeiture proposed in the new s 45C of LEPRA appears to be unjustified. The proposal would appear to involve property being converted automatically to the Crown with no consideration of:

1. the lawfulness of the search;
2. any lawful explanation as to possession; and
3. any later acquittal of the offence related to the search.

We are also concerned that courts are specifically excluded from ordering that people can reclaim these 'things' which may interfere with the right against arbitrary deprivation of property.

The Law Society is very concerned with the apparent trend of expanding police powers without corresponding judicial and other safeguards. In our view, such a trend would represent an erosion of long-standing democratic institutions and individual rights. For the reasons set out above, the Law Society is not able to support the Bill in its current form.

Thank you for considering the submissions of the Law Society. Questions may be directed to Vicky Kuek, Principal Policy Lawyer, on victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

Gary Ulman
President

[9] Indeed warrantless searches were outlawed at common law as long ago as 1765, in the case of *Entick v Carrington* [1765] EWHC KB J98 where Lord Chief Justice, Lord Camden held:

> It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.