THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:RHrg:1990513

5 November 2020

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

Dear Attorney,

Drug Supply Prohibition Order Pilot Scheme Bill 2020

We refer to the Drug Supply Prohibition Order Pilot Scheme Bill 2020 (Bill), which was introduced into Parliament on 22 October 2020. We note that we were not consulted on the contents of the Bill. We have written to the Shadow Attorney General and members of the cross bench to express our concerns with the Bill.

The Bill establishes a drug supply prohibition order (DSPO) scheme, which will give police extraordinary new powers to search an individual and their home without a warrant.

According to the 2019 Government media release announcing the scheme:

> … Drug Supply Prohibition Orders will help the NSW Police Force smash organised crime gangs who prey on young people, in particular, and profit from the large-scale supply of illegal drugs in NSW.[1]

As discussed below, the threshold for making an order is very low and, in our view, creates an unjust process. The new search powers contained in the Bill add to a suite of expanding police powers in NSW that can be exercised without the oversight and safeguards of due criminal process.

The Law Society does not support the Bill. We have made a number of suggestions for amendments to improve the operation of the Bill, in the event that the Bill progresses.

Provisions of the Bill

Person who may be subject to a DSPO

Clause 5 provides that an application can be made against an 'eligible person' who is 18 years of age or older and has been convicted of a 'serious drug offence' in the past 10 years. We consider that the threshold is too low.

The definition of 'eligible person' includes a person who could have been convicted as a juvenile, as long as the person is now over 18. We submit that offences committed as a juvenile should be excluded from the operation of the scheme. Further, the period of 10 years is too long and should be reduced to five years.

[1] Liberal Party Media Release, *New police powers to crack down on drug dealers*, 17 March 2019.

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The definition of a 'serious drug offence' includes a supply offence involving more than a trafficable quantity – the Bill does not require an indictable quantity, much less a commercial quantity. We submit that the amount required should be at least an indictable quantity.

As currently drafted, a 19 year old person, previously convicted as a juvenile, and placed on a community based order for deemed supply of five to six MDMA pills at a festival, could be subject to these extraordinary powers, if a police officer reasonably believes they may be engaging in supply of a prohibited drug. While a Magistrate may not exercise their discretion to make an order in such circumstances, we consider that the legislation needs to be amended to protect against unintended consequences.

Form and content of application

While the factors in clause 7 are relevant, there is inherent disproportionality in an application without a contradictor. This is immediately apparent in two ways:

1. There is no safeguard whatsoever as to the accuracy of the information provided in clause 7; and
2. There is no way of verifying the information provided by the police officer, some of which, it is readily apparent, the police may not know. For example, the police are unlikely to have access to reliable information adverse to the order, or other persons likely to be affected, especially if the person in question is homeless.

The Oversight Commissioner ought to have an obligation to appear as a contradictor in the applications to ensure that there is at least some scrutiny of the information provided in the applications. This would require that the proceedings be determined in a hearing in a court room, not in chambers.

Clause 7(2) provides that the application must also set out details of other DSPOs that are currently, or have previously, been in force. We submit clause 7(2) should also refer to other relevant surveillance/supervision regimes that may be relevant to the Magistrate's assessment of the person's risk of engaging in future drug supply/manufacture. These include:

- Extended Supervision Orders under the *Crimes (High Risk Offenders) Act 2006* (NSW).
- Parole conditions (an electronic monitoring condition would, for instance, be relevant to the assessment of the risk of future offending).
- Serious Crime Prevention Orders under the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW).
- *Firearms Prohibition Orders under the* Firearms Act 1996 *(NSW), which give police broad and warrantless search powers.*

The applicant should also include the reasons why police cannot apply for a usual search warrant in relation to the eligible person.

The requirement that the application be authorised by an officer of the rank of superintendent or higher is of little comfort, as clause 7(3) does not require that the superintendent has reviewed the information in the application.

There is little regard to other persons affected by the order, such as family, carers, children, or other people living at the home where the eligible person resides or owns. This is particularly concerning as the Bill allows for the seizure of items not related to drugs and for searches of places and vehicles in the absence of the owner (clause 4(1)).

Clause 7(5) requires an affidavit supporting the application to 'as far as reasonably practicable, identify persons who may be incidentally affected by the order'. Police should have an obligation, specified in the Bill, to investigate for the purpose of informing the court whether there are any persons who may be affected by the order. Further, the provision should include a requirement that the affidavit list the name, age and vulnerabilities of any person known to be living or frequenting any place the eligible person resides or owns. This would avoid leaving it to police to make a judgment call as to whether the person may be incidentally affected. The language of the test should also be broader, e.g. 'any person who could be affected in any way by making or carrying out the order'.

Clause 7(6) requires the affidavit to include 'information known to the applicant that may be adverse to the application for the order' with a note: 'Example. Steps that the eligible person has taken to stop or reduce the risk of the person committing drug-related offences'. This example is poorly worded and is unlikely to be considered carefully. Clause 7(6) should include a comprehensive list of possible adverse impacts of making the order that must be disclosed by police, as well as an obligation on police to investigate these possible adverse impacts. It is also unclear how the Magistrate will be made aware of the subject's participation in a lawful drug treatment or rehabilitation programme (under clause 10(1)(b)), when the person is not entitled to be told of the application and the Oversight Commissioner has no right of appearance.

We note that clause 10(2) provides that despite the police being required to tell the Magistrate about alternative means of reducing the risk of committing offences, it is not an essential consideration for the Magistrate when making the decision.

We support the inclusion of an additional provision that specifies the consequence of failing to disclose to a Magistrate a matter known to police, or a matter police could have investigated but failed to do so. Where procedural fairness is taken out of the equation, a higher degree of responsibility (e.g. to actively investigate matters that would have been put to the Magistrate by the eligible person's counsel), and significant consequences for failing to provide all relevant information by police, is justified.

<u>Drug supply prohibition order may be made by authorised Magistrate</u>

It is of serious concern that being an eligible person and a likelihood of engaging in the manufacture or supply of a prohibited drug are the only requirements that need to be met for a Magistrate to make the order (clause 9(1)).

The failure of clause 9 to require the Magistrate to consider clause 7 factors is of concern. It is imperative that the Magistrate consider clause 7 factors, in particular any adverse effects of making the order and alternative means of obtaining evidence.

This should be made clear by including the clause 7 factors in clause 9. If the factors are not included in clause 9, they may not be given sufficient weight and, further, there may be confusion about if, and how, they are to be taken into account. This is compounded by the facts that the ultimate test in clause 9 does not include any element whatsoever of necessity or proportionality. There is little utility in the Magistrate being informed of 'alternative means' to obtain evidence or 'steps that the eligible person has taken' to reduce the risk of committing an offence, if the ultimate threshold is simply that the eligible person is likely to engage in supply or manufacture of a prohibited drug.

The inclusion of a further provision to address this concern could be based on s5(c) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW), in requiring that:

> The court is satisfied that there are reasonable grounds to believe that the making of the order is necessary to prevent, restrict or disrupt involvement by the person in the manufacture or supply of a prohibited drug.

Clause 9(3) provides that the person who is to be subject to the DSPO is not entitled to be told about the application and not permitted to make a submission. DSPO applications are not required to be decided in a courtroom (clause 9(4)).

The explanation in the Second Reading Speech for the application and determination of the orders being secret is that it "… is necessary to protect confidential criminal intelligence that may form part of an application".[2] Provisions can be made under existing laws for closed courts and suppression orders in relation to putting sensitive evidence before a court.

Clause 9(8) provides that the subject of the order is not entitled to know the reasons for the decision to make the order or to be given access to the application. This is a denial of natural justice and will effectively prevent judicial review of a successful application. This is likely to undermine public confidence in the scheme and in the administration of an impartial justice system in NSW.

In our view, the case has not been made for the need for a more extensive secret scheme with such a long timeframe, particularly in light of the existing search powers of police, including covert search and surveillance powers and powers directed specifically at drug manufacture and supply, in particular s140 of the *Law Enforcement (Powers and Responsibilities Act 2002*:

> **Issue of search warrant—suspected drug premises**
>
> (1) A police officer who is in charge of an investigation into the suspected use of premises as drug premises may apply to an authorised officer for a search warrant in respect of the premises if the officer has reasonable grounds for believing that the premises are being used for the unlawful supply or manufacture of any prohibited drug or the unlawful cultivation of prohibited plants by enhanced indoor means.
>
> (2) An authorised officer to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any police officer to enter and search the premises.

Revocation of a DSPO

We are opposed to the minimum waiting period of six months to apply for revocation of the order (clause 13(8)).

As drafted, the Bill permits a situation where a person must be subject to an order for six months even though the order may be 'unreasonably onerous' on the finding of the Magistrate upon challenge.

We note that one of the tests for revocation requires the applicant to prove a negative, which is a very difficult task (clause 13(5)(b)).

Reports of Commissioner of Police

Clause 14 provides that the Commissioner of Police is to provide reports concerning matters relating to the DSPO to the authorised Magistrate and the Oversight Commissioner after the order ceases to be in force, whether because it has expired or been revoked.

[2] Second Reading Speech, Drug Supply Prohibition Order Pilot Scheme Bill 2020, Legislative Council Hansard, 22 October 2020.

Given that they will be collecting relevant information for the purpose of such a report, in our view the Commissioner of Police should be obliged to apply for revocation of the order where it is no longer considered necessary.

More broadly, the legislation should be monitored by the Ombudsman. For that purpose, the Ombudsman should be given broad powers to require the Commissioner of Police to provide information about the exercise of the new powers and to report to Parliament.

Regulations

Clause 17(1)(b) provides for a very wide regulation making power, and it is unclear to what use this could be put, leaving significant aspects of the scheme open to change with limited Parliamentary scrutiny.

Impact on the community, including disadvantaged people

The powers may have the effect of exacerbating disadvantage, where there is a disproportionate application to parties in poor communities and may, as a result, increase barriers to treatment and rehabilitation. As discussed by the Special Commission of Inquiry into the drug 'Ice', there is a marked correlation between homelessness and drug use.[3] Our members' experience is that a significant proportion of persons convicted of drug supply experience drug abuse.

Homeless people will be more likely to be disproportionality affected by a DSPO (a homeless person is more often in public, and more visible to police), by being stopped and searched in the manner provided for by clause 4(1)(a) or 4(1)(c). When the person subject to a DSPO has unstable housing or is 'couch-surfing', people who make their homes available to them will be exposed to searches, as per clause 4(1)(b). It is likely that a person who is subject to a DSPO will find it more difficult to find someone who will agree to let them stay.

These difficulties will likely create yet more barriers to treatment and make getting on, and staying on, waiting lists less likely than they already are.

Similar to Firearm Prohibition Orders (FPOs), there is a risk that DSPOs may result in the harassment of individuals by frequent searches with poor results – a review by the NSW Ombudsman found that that firearms, ammunition and firearm parts were found in only 2% of all FPO searches.[4]

We submit that there should be a limit on the frequency with which police can exercise their powers under s4(1) in respect of any individual.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Richard Harvey
President

[3] Professor Dan Howard SC, *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants - Volume 3*, January 2020, p732.
[4] NSW Ombudsman, *Review of police use of the firearms prohibition order search powers*: *Section 74A of the Firearms Act 1996,* August 2016, p10.