



Crown
Solicitor's
Office

CSO SEMINAR SERIES 2018

INQUIRIES & CRIMINAL LAW

www.cso.nsw.gov.au

Applications for Serious Crime Prevention Orders

Paper prepared by
Brett Thomson, Special Counsel

17 October 2018

The Crimes (Serious Crime Prevention Orders) Act 2016

Legislative history

The *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) ("the *CSCPO Act*") was passed by the NSW Parliament on 4 May 2016 and came into force on 25 November 2016.

The explanatory note to the *Crimes (Serious Crime Prevention Orders) Bill 2016* states:

The object of this Bill is to enable the Supreme Court and the District Court to make serious crime prevention orders, on the application of the Commissioner of Police, the Director of Public Prosecutions or the New South Wales Crime Commission, so as to prevent, restrict or disrupt involvement by certain persons in serious crime related activities.

The second reading speech for the *Crimes (Serious Crime Prevention Orders) Bill 2016* described the purpose of the Bill as:

...to introduce tough new powers to give police the upper hand in the fight against serious crime. These powers include United Kingdom style serious crime prevention orders to disrupt the activities of serious criminals.¹

The passage of the *CSCPO Act* has attracted criticism. Elyse Methven of Macquarie University and David Carter of the University of Technology Sydney have written:

Passed in under two weeks, the Crimes (Serious Crime Preventions Orders) Bill 2016 ('the Bill') received stinging criticism from the legal community. The NSW Bar Association labelled the Bill 'draconian' and accused the NSW Government of hurriedly introducing its 'unprecedented' provisions without consulting key stakeholders. The rapid passage of the Bill allowed the Government to evade legislative scrutiny processes and, according to the Bar Association, introduced laws that interfere with the liberty of private persons in NSW in an extraordinarily broad way 'not subject to any substantial legal constraints or appropriate judicial oversight'. The SCPO regime pushes well beyond the existing boundaries of an already controversial apparatus of post-custodial preventive detention and supervision powers. The State can now impose extraordinary restrictions upon the activities of people who may never have served a custodial sentence and may never have been found guilty of, nor been charged with, a crime.²

Operation of the Act

Section 5(1) is the key provision of the *CSCPO Act*. Section 5(1) of the *CSCPO Act* provides:

An appropriate court may, on the application of an eligible applicant, make an order (a ***serious crime prevention order***) against a specified person if:

¹ Second reading speech of the Hon. Troy Grant MP, Deputy Premier, Minister for Justice and Police, Minister for the Arts and Minister for Racing, NSW Legislative Assembly, 22 March 2016.

² Elyse Methven and David Carter, "Contemporary Comment: Serious Crime Prevention Orders", *Current Issues in Criminal Justice*, Vol. 28, No. 2, November 2016 (Citations omitted).

- (a) in the case of a natural person—the person is 18 years old or older, and
- (b) the court is satisfied that:
 - (i) the person has been convicted of a serious criminal offence, or
 - (ii) the person has been involved in serious crime related activity for which the person has not been convicted of a serious criminal offence (including by reason of being acquitted of, or not being charged with, such an offence), and
- (c) the court is satisfied that there are reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities

The use of the word “may” in s. 5(1) of the *CSCPO Act* is significant. The use of the word “may” means that the making of a serious crime prevention order (an “SCPO”) is an exercise of judicial discretion, and there is no requirement that a court “must” make a SCPO if criteria are satisfied.³

Once a SCPO has been made, the contravention of the SCPO is an offence: *CSCPO Act* s. 8. The maximum penalties for contravention of a SCPO provided by s. 8 of the *CSCPO Act* are:

- 1,500 penalty units (\$165,000) for a contravention by a corporation; and
- 300 penalty units (\$33,000) or five years imprisonment for a contravention by a natural person.

Definitions of key terms

“An appropriate court”

An appropriate court is defined by s. 3(1) of the *CSCPO Act* as:

- either the Supreme Court or the District Court if the ground for making a SCPO is that the person to whom the SCPO would apply has been convicted of a serious criminal offence; or
- only the Supreme Court if the ground for making a SCPO is that the person to whom the SCPO would apply has been “involved in serious crime related activity”, but has not been convicted of a serious criminal offence.

“A serious criminal offence”

Section 3(1) of the *CSCPO Act* provides that a “serious criminal offence” has the same meaning as that provided for by the *Criminal Assets Recovery Act 1990* (NSW) (“the *CAR Act*”). Section 6(2) of the *CAR Act* provides a list of offences which constitute a “serious criminal offence”. These offences include certain drug related offences, certain offences under the *Firearms Act 1996*, and offences punishable by five years or more of imprisonment which involve theft, fraud, extortion, violence, bribery, corruption, blackmail, perverting the course of justice, forgery or homicide.

³ *Interpretation Act 1987* (NSW) s. 9(1).

“Serious crime related activity”

Section 3(1) of the *CSCPO Act* defines “serious crime related activity” as:

anything done by a person that is or was at the time a serious criminal offence, whether or not:

- (a) the person has been charged with the offence, or
- (b) if charged, the person:
 - (i) has been tried, or
 - (ii) has been tried and acquitted, or
 - (iii) has been convicted (even if the conviction has been quashed or set aside).

Section 4 of the *CSCPO Act* provides that a person is “involved” in serious crime related activity if:

- (a) the person has engaged in serious crime related activity, or
- (b) the person has engaged in conduct that has facilitated another person engaging in serious crime related activity, or
- (c) the person has engaged in conduct that is likely to facilitate serious crime related activity (whether by the person or another person).

Section 4(2) of the *CSCPO Act* provides that, in determining whether the conduct of a person has facilitated another person to engage in serious crime related activity, a court may take into account whether the conduct was reasonable in all the circumstances.

“Reasonable grounds”

The term “reasonable grounds” is not defined in the *CSCPO Act*. In *George v Rockett* (1990) 170 CLR 104, the High Court held at 112:

When a statute prescribes that there must be “reasonable grounds” for a state of mind - including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

In relation to equivalent legislation in the United Kingdom, the Court of Appeal held in *R v Hancox* [2010] 2 Cr App R(S) 74 at [9]:

The order may be made if but only if the court has reasonable grounds to believe that an order would protect the public by preventing, restricting or disrupting involvement by the defendant in serious crime (as defined in section 2 and Schedule 1) in England and Wales. It follows that the court, when considering making such an order, is concerned with future risk. There must be a real (not a bare possibility) that the defendant will commit further serious offences (as defined in section 2 and Schedule 1) in England and Wales.

Who can apply for a SCPO

An application for a SCPO can only be made by an “eligible applicant”: *CSCPO Act* s. 5(1). An eligible applicant is defined by s. 3(1) of the *CSCPO Act* as the Commissioner of Police, the Director of Public Prosecutions, and the New South Wales Crime Commission.

Who can be the subject of an SCPO

Section 5(1)(a) of the *CSCPO Act* provides that a SCPO can only be made in relation to a natural person if the person is 18 years old or older. The *CSCPO Act* therefore contemplates that SCPOs can be made in relation to entities which are not natural persons, and ss. 9-10 of the *CSCPO Act* contain provisions for the winding up of corporations and the dissolution of partnerships which have been subject to, and contravened, a SCPO.

Commencement of proceedings

An application for a SCPO should be commenced by summons: *Uniform Civil Procedure Rules 2005* (NSW) r. 6.4(1)(i). Service of the summons must be effected personally: *Uniform Civil Procedure Rules 2005* (NSW) r. 10.20(2)(a).

Section 5(3) of the *CSCPO Act* requires that, unless the appropriate court orders otherwise, the applicant must serve a copy of the application on the person against whom the serious crime prevention order is sought at least 14 days before the hearing date for the application.

In *Commission of Police v Bowtell* [2018] NSWSC 327, Lonergan J made orders permitting the short service of an application for a SCPO. In allowing the short service of the application, her Honour had regard to evidence from police which showed "series of escalating retaliatory attacks" between rival outlaw motorcycle gangs involving "both arson and the use of firearms which are described as high-powered weapons".

The nature of proceedings

Proceedings for a SCPO are civil, rather than criminal: *CSCPO Act* s. 13. A person who is subject to an application for a SCPO, and any other person whose interests may be affected by the order, may appear at the hearing of the application and make submissions in relation to the application: *CSCPO Act* s. 5(4).

The burden of proof

Consistent with the general rule that "he who asserts, must prove", the applicant for a SCPO bears the onus of proving facts upon which an SCPO application relies.⁴

The standard of proof

Section 13(2)(b) of the *CSCPO Act* provides that the rules of evidence which apply in civil proceedings are to apply to proceedings for an application for a SCPO to be made.

Davies J of the NSW Supreme Court has held the standard of proof described by *Briginshaw v Briginshaw* (1938) 60 CLR 336 ("the *Briginshaw* standard") applies to proceedings for the making of a SCPO.⁵ The *Briginshaw* standard is more stringent than the normal civil standard of proof, which only requires matters to be proven "on the balance of probabilities"; however the *Briginshaw* standard is less stringent than the criminal standard of proof, which requires matters to be proven "beyond a reasonable doubt".

⁴ *Currie v Dempsey* (1967) 69 SR (NSW) 116.

⁵ *Commissioner of Police v Cole* [2018] NSWSC 517 at [35]; *Commissioner of Police v Bowtell (No 2)* [2018] NSWSC 520 at [65].

Other evidentiary matters

Section 5(5) of the *CSCPO Act* provides that, in determining an application for a serious crime prevention order, the court may admit hearsay evidence, despite any rule under the *Evidence Act 1995* (NSW) or otherwise. However, this hearsay evidence may only be admitted if:

- (a) the court is satisfied that the evidence is from a reliable source and is otherwise relevant and of probative value, and
- (b) the person against whom the order is sought to be made has been notified of, and served with a copy of, the evidence before its admission.

A court determining whether a SCPO should be made will be entitled to draw an adverse inference from an unexplained failure by a party to call evidence which might have been expected to be called by the party. In *Commissioner of Police v Cole* [2018- NSWSC 517, Davies J held at [35]:

Because the rules of evidence applicable to civil proceedings apply, a failure on the part of any of the defendants to give evidence means that inferences may be drawn, with the result that I can more readily accept the evidence of witnesses called by the Commissioner: *Jones v Dunkel* (1959) 101 CLR 298.

The *CSCPO Act* does not contain provisions which abrogate a person's privilege against self-incrimination, and a person required to give evidence which might tend to prove they have committed an offence or are liable to a civil penalty would be entitled to the protection of a certificate issued under s. 128 of the *Evidence Act 1995* (NSW).

Relationship with criminal proceedings

In the event that proceedings for a SCPO are brought against a person who is also the subject of criminal proceedings, it is likely the proceedings for the SCPO would be stayed pending the outcome of the criminal proceedings. Such an outcome would be consistent *Commission of the Australian Federal Police v Zhao* (2015) 255 CLR 46, where the High Court recognised the potential prejudice that an accused person might suffer if evidence from a civil proceeding revealed information regarding the accused's planned defence in criminal proceedings.

Content of an SCPO

Section 6(1) of the *CSCPO Act* provides that:

A serious crime prevention order 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.

Section 6(2) of the *CSCPO Act* contains restrictions on the contents of a SCPO. These restrictions include a prohibition against a SCPO requiring a person to answer questions or provide information orally, or provide documents or other information which are the subject of client legal privilege (legal professional privilege).

Other than the restrictions imposed by s. 6(2) of the *CSCPO Act*, there are no provisions which specifically provide what a SCPO may contain.

In *Commissioner of Police v Cole* [2018] NSWSC 517 and *Commissioner of Police v Bowtell (No 2)* [2018] NSWSC 520, Davies J made orders which restricted persons from:

- Approaching, contacting or associating directly or indirectly with any member or associate of any Outlaw Motor Cycle Gang;
- Attending any licensed hotels, pubs, clubs and bars in New South Wales;
- Travelling in any vehicle between certain hours, except in the case of a genuine medical emergency; and
- Attending or approaching premises associated with Outlaw Motor Cycle Gang members.

Davies J also prohibited the persons subject to the SCPO from:

- Possessing or having access to encrypted communications device or applications;
- Possessing more than one mobile telephone and/or mobile telephone number;
- Possessing any weapon, including any firearm or any object that can be adapted to be used as a weapon with the intention of it being available to be used as a weapon; and
- Wearing or displaying insignia or other items of clothing associated with Outlaw Motor Cycle Gangs (other than existing permanent tattoos).