



NSW Police Force
www.police.nsw.gov.au

OFFICE OF THE COMMISSIONER

Mr Allen Shearan MP
Chair
Legislative Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

D/2010/78178

Submitted via email: legislation.review@parliament.nsw.gov.au

Dear Mr Shearan,

I refer to your letter dated 11 May 2010, inviting the NSW Police Force to comment on the Legislation Review Committee's Discussion Paper No. 3: *Public Interest and the Rule of Law* (the Discussion Paper).

This Discussion Paper contains case studies of recent NSW legislation including the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009*; the *Housing Amendment (Registrable Persons) Act 2009*; and the *Crimes (Criminal Organisations Control) Act 2009*. These case studies demonstrate the complexities encountered by the Legislation Review Committee when reporting to Parliament on whether bills introduced trespass unduly on personal rights and liberties.

In reviewing these case studies, I have formed the view that it may be inappropriate for the NSW Police Force to provide specific comments on these provisions. Indeed, the proper role of the NSW Police Force is to maintain and uphold the law as it exists. However, I submit the following general comments which may assist the Legislation Review Committee.

I note that the Legislation Review Committee has regard to a range of sources in determining which rights and liberties proposed legislation might impact upon. I suggest that the rights the Committee would properly have regard to are those recognised under Australian law. It is common for many stakeholders and interest groups to assert rights which, while they may be respected by practice and custom, are not necessarily rights as that term is understood according to the principles of domestic law and international human rights law. The distinction between rights at law and other expectations is important for the NSW Police Force as it is police officers who frequently must make instant decisions as to whether rights are being infringed and are in need of protection.

Chapter Two of the Discussion Paper examines what is public interest. From the perspective of the NSW Police Force, attempts to define public interest should be approached with great



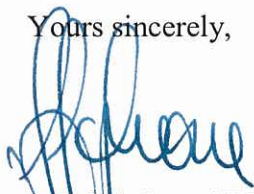
caution as the public interest can change dramatically due to emerging events and issues, and may depend on whether a circumstance is viewed in the short or the longer term.

One area in which the NSW Police Force is required to regularly consider the meaning of public interest is when making applications for public interest immunity. This common law concept remains one of the principal ways of ensuring that information that would be dangerous to certain sections of the community if disclosed, is not disclosed. Public interest immunity also preserves a confidential space for the discussion of high level cabinet, political and diplomatic issues without fear that disclosure may disrupt, for example, international relations. The court acts as an arbiter as to what the public interest is and its primary focus is not whether a document or the information is inherently secret or confidential, but rather whether its disclosure would harm the public interest. The NSW Police Force has found that decisions with respect to public interest immunity, and what constitutes the public interest, are determined on a case by case basis with careful reflection on the circumstances giving rise to the application. Consequently, I suggest that the Legislation Review Committee retain a degree of flexibility to allow for developing notions of what the public interest may include, avoiding a standard definition or standard list of inclusions.

Chapter Six of the Discussion Paper contains four possible models or tests which may be used in the assessment of the necessity of trespassing on personal rights to achieve the public interest or legislative objectives. I suggest that the adoption of any one model to be applied to all bills before Parliament is unnecessarily restrictive and may fail to consider the myriad combinations of rights, public interest and circumstances to be addressed by the proposed legislation.

Thank you for the opportunity to provide comment on this Discussion Paper.

Yours sincerely,



A P Scipione APM
Commissioner of Police

7 JUN 2010