



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

OFFICE OF THE COMMISSIONER

The Honourable Kayee Griffin MLC
Chair, Legislative Council
Privileges Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Mr Paul Pearce MP
Chair, Legislative Assembly
Privilege and Ethics Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

D/2010/121264

Dear Chairs,

I refer to your letter dated 16 July 2010, responding to comments provided on the draft *Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the NSW Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly* (the draft MoU).

Reviewing the feedback provided and drafting revisions, I agree that the finalisation of a Memorandum of Understanding is achievable.

I refer to the following proposed clause 4 to the revised draft MoU (numbering added for review purposes):

4. Procedure prior to obtaining a search warrant

- (1) An officer of the NSW Police Force who proposes to apply for a search warrant in respect of premises used or occupied by a member should seek approval from the Commissioner or the Commissioner's delegate before applying for the warrant.
- (2) If approval is given, the officer should obtain legal advice before applying for a search warrant.
- (3) Care should be taken when drafting a search warrant to ensure that it does not cover a wider range of material than is necessary to advance the relevant investigation

Notwithstanding comments provided to the Privileges Committee in 2006, it is the current position of the NSWPF that the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) is the proper source of police procedures for obtaining lawful search warrants in NSW, and that the appropriate focus for this draft MoU is the interface between the NSWPF and Parliament during the execution of a search warrant.



However, in the interests of progressing the draft MoU, the following revisions are recommended should clause 4 be retained.

In reference to clause 4 (2), whilst legal advice may be obtained in any investigation, this course of action is best informed by the individual circumstances of a particular matter and need not be mandatory. It is proposed that clause 4 (2) either be removed or amended to provide that the officer *may* obtain legal advice before applying for a search warrant.

In reference to clause 4 (3), it is the practice of the NSWPF to draft search warrants in accordance with the statutory requirements of section 62 (3) of LEPR. As you are aware, section 62 (3) of LEPR provides that, when determining whether there are reasonable grounds to issue a warrant, the eligible issuing officer is to consider (but is not limited to considering) the following matters:

- (a) the reliability of the information on which the application is based, including the nature of the source of the information,
- (b) if the warrant is required to search for a thing in relation to an alleged offence – whether there is sufficient connection between the thing sought and the offence.

Whilst it is difficult to appreciate what additional protection clause 4 (3) provides, its inclusion places no additional burden on the NSWPF and may remain as drafted.

Clauses 5 (13) and 6 (12) of the revised draft MoU concern reporting claims of parliamentary privilege for the purpose of determining whether the NSWPF will object to such a claim. To provide an appropriate chain of command for this reporting, the following revision is proposed:

Any claim of parliamentary privilege will be reported by the Search Team Leader to their Commander who will consider the matter in conjunction with the Commissioner's delegate for the purpose of determining whether the NSW Police Force will object to such a claim.

Practical considerations concerning clauses 5 (8) and (9) have also been identified:

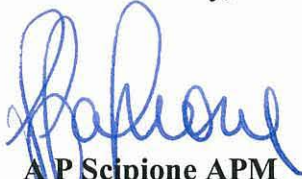
- 5 (8) The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made
- (9) Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

Where a Search Team Leader complies with clause 5 (8) and does not *access* a document over which a claim of privilege is made, it may be unfeasible for the Search Team Leader to compile a list of documents as required at clause 5 (9). I suggest that a redrafting of this clause, and similarly clauses 6 (7) and (8), may be required to achieve the necessary practical arrangements.

Finally, I accept your advice that parliamentary privilege may only be waived by express statutory provision.

Should you have any queries concerning the comments provided, please do not hesitate to contact Ms Letitia Davy, Office of the Commissioner, on (02) 8263 6361 or email davy1let@police.nsw.gov.au

Yours sincerely,



A P Scipione APM
Commissioner of Police

17 SEP 2010