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NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES INC

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28 May 2001

Ms Natalie Gouda
Chairperson
Search Warrants Working Party
Criminal Law Review Division
NSW Attorney General's Department
GPO Box 6
Sydney NSW 2001

Dear Ms Gouda

Response to Search Warrants Working Party's Issues Paper: A Review of the Search Warrants Act 1985

The Council for Civil Liberties, in this submission, commends the Criminal Law Review Division upon the succinct and able presentation of the competing points of view which have been presented to it as well as the competing considerations which arise with each proposed amendment.

At the outset this Council records its dismay that it has not been appointed (invited) to participate within the working party. Perhaps it was felt that the civil liberties concerns would be sufficiently ventilated in submissions of the parties invited to participate. Certainly those organisations participating comprise members at the forefront of the daily workings of the *Search Warrants Act*. These organisations will most certainly be aware of the consequences of any change but it is our submission that there is not among these participants any who have the purpose of arguing the civil liberties concerns. For example the Law Society of New South Wales represents among its members those working for the prosecution and on instruction of informants in criminal proceedings and those employed by the state and so on. The position of the Society must depend upon the views of its President for the time being and the composition of its Criminal Law Committee (which is advisory only). The Privacy Committee can be expected to be concerned with the impact upon the statutory regime it administers of any proposed change to the *Search Warrants Act* but this can be no assurance that concerns to Civil Liberties of proposed changes will be advanced by that Committee. Perhaps it is anticipated that the Legal Aid Commission will sufficiently raise matters of civil liberties. Again the Legal Aid Commission has no charter to advance civil liberties concerns in any proposed change although, of course, this Council is glad if these concerns – even though perhaps fortuitously – are advanced by the Law Society or other organisations represented. As it happens in this particular instance there is some common membership between the Law Society Criminal Law Committee and this Council and therefore we have had some indirect input into the drafting of the Law Society's submission and response to the Issues Paper.

It is the opinion of this Council that the composition of the Working Party may reflect a concern with the machinery and implementation of change over or above the significant questions of personal liberty involved in some of the proposals.

An example is given in the Crime Commission paper with regard to urgent telephone applications. This Council cannot test the conclusions which the Crime Commission draws from its example. It is the overwhelming experience of members of this Council that police in urgent cases have no difficulty in obtaining warrants in circumstances of urgency and this Council challenges the Crime Commission to show otherwise. Section 12 of the Act read with *Atkinson* reveals ample power for search and the submissions for change in this area should be resisted. Complaint is made by the law enforcers that the decision in *Police v Atkinson* [1991] 23 NSWLR 495 is an impediment to an urgent search. This Council rejects that assertion for the reasons set out above and in the response of the Law Society and to the Issues Paper and in paragraph 2 of their response to the NSW Crime Commissions submission.

This Council opposes completely the submission that there is or are demonstrated circumstances which require a search to proceed without warrant. The existing powers are sufficient to deal with almost all cases of urgency. It is unimaginable that a court will reject illegally obtained evidence where that evidence is significantly probative of the allegations against a defendant in court. Furthermore the *Evidence Act* has not been given any construction such as to favour exclusion of illegally obtained evidence upon technical grounds only.

There are valuable reasons to be cautious in giving powers to cover all extreme exigencies. Powers once given become routine and cease to be available for some particularly difficult circumstance only. The boundary between personal liberty and the intrusive, but necessary, power of law enforcement is irrevocably shifted. It does not shift back. The Courts take a practical view of the reach of the power involved and measures the strength of the allegation against the means used for its proof. This approach to the exercise of power is appropriate and a sharp departure from the pre *Evidence Act* interpretation of the consequences of using illegal means to obtain evidence. There is and must be some value in the risk or danger of illegality to curtail excessive intrusiveness by law enforcement officers or agencies. Criminal investigation involves choices and alternatives and the community has an interest in some constraint upon the exercise of police powers.

It is precisely the role of judicial intervention, which highlights the weakness in the case made by the Crime Commission in its example of a “group of people involved in the supply of prohibited drugs”.

It is said in the Working Party paper that the initiative for reform all comes from the NSW Drug Summit proposal “to assist police in quickly targeting drug traffickers”. This Council does not know what moved the Drug Summit to this concern. This Council has a large proportion of its membership comprising lawyers (including judicial officers) both in its membership and sitting upon its executive committee. It is possible to make two initial observations.

The first of these is the striking efficiency of police officers in the use of their powers to detect and charge offenders who import and buy and sell drugs. Regularly police officers break into premises while the occupant is not available for personal service of the Occupiers notice and seize goods in respect of which, at best, there can only be a suspicion of its use in criminal drug activity (such as a computer). Regularly persons are charged with offences not moving the issue of a search warrant and those persons are charged because of material located during the search but relevant, perhaps, to some other possible criminal activity.

The *Search Warrants Act* gives wide powers of search and seizure and there has been little complaint since the proclamation of the legislation that law enforcement agencies don't have sufficient power to perform their duty.

The second initial observation which this Council makes is that examples of shortcomings in the legislation which are advanced by the NSW Police Service, but especially by the NSW Crime Commission, are so facile as to leave the observer with the question why proposals for reform are being advanced at all.

In the paper of the Police Service just about the only example which is advanced is what to do with a television seized in a search and having no further use to police and the complaint that for police to hold on to amphetamines after a search result in "the added complication that the service is required to retain possession of potentially hazardous material". About half of the paper of the NSW Police Service is concerned with the Custody and disposal of seized items. This Council finds these concerns generally uncontroversial. The Police Service does not support its claim of lawyers making false claims for privilege with any examples at all.

This Council has had the opportunity to read and consider both the submission of the Law Society of NSW in response to the NSW Crime Commission's submission for proposed reforms to the Search Warrant Act 1985 and the Law Society's response to the Issues Paper and we endorse and adopt that submission and response in toto.

We look forward to being kept informed as to your consideration of the proposed amendments.

Yours sincerely,

Cameron Murphy
President