

DEPARTMENT OF THE SENATE
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Morgan



**MEMORANDUM OF UNDERSTANDING ON THE
EXECUTION OF SEARCH WARRANTS ON FEDERAL
MEMBERS OF PARLIAMENT BETWEEN
*THE MINISTER FOR POLICE AND EMERGENCY
MANAGEMENT FOR TASMANIA*
THE ATTORNEY-GENERAL FOR TASMANIA
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES
*THE PRESIDENT OF THE SENATE***

1. Preamble

This Memorandum of Understanding records the understanding of the Attorney-General for Tasmania, the Minister for Police and Emergency Management for Tasmania, the Speaker of the House of Representatives and the President of the Senate on the process to be followed where Tasmania Police propose to execute a search warrant on premises occupied or used by a member of Federal Parliament ('a Member'). This includes the Parliament House office of a Member, the electorate office of a Member and the residence of a Member.

The process is designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and so its Members and their staff are given a proper opportunity to raise claims for parliamentary privilege or public interest immunity in relation to documents or other things that may be on the search premises.

2. Execution of search warrants and parliamentary privilege

The agreed process is spelt out in the Tasmania Police *Guideline for Execution of Search Warrants on Federal Members of Parliament* (the Guideline). This Guideline establishes the procedures that Tasmania Police officers should follow when executing search warrants on premises occupied or used by a 'Member'. The Guideline is set out at Annexure A to this Memorandum of Understanding and covers the:

- Preamble
- Legal background
- Purpose of the Guideline
- Application of the Guideline
- The substantive Guideline:
 - a) Procedure prior to obtaining a search warrant
 - b) Procedure prior to executing a search warrant
 - c) Executing the search warrant
 - d) Procedures to be followed if privilege or immunity is claimed
 - e) Obligations at the conclusion of a search

3. Promulgation of the Memorandum of Understanding

This Memorandum of Understanding will be promulgated within Tasmania Police by publishing the Memorandum of Understanding and Guideline on the Tasmania Police POLICENET site. Notification of the existence and location of the Memorandum of Understanding and the Guideline will be published in the Tasmania Police Gazette and Tasmania Police Manual.

This Memorandum of Understanding will be tabled in the House of Representatives and the Senate by the Speaker of the House of Representatives and the President of the Senate respectively.

4. Variation of the guideline

Section 7(3) of the *Police Service Act 2003 (Tasmania)*, provides that the Commissioner of Police for Tasmania may issue orders, directions, procedures and instructions for the efficient, effective and economic management and superintendence of the Police Service, and do anything else necessary or convenient for the efficient, effective and economic management and superintendence of the Police Service.

Tasmania Police will consult with the Speaker of the House of Representatives and the President of the Senate, or his or her representative, when revising and reissuing the guideline.

The most current guideline applies to this Memorandum of Understanding. The version attached at Annexure A is current at the time this Memorandum of Understanding is signed.

5. Conflict Resolution

Any issues or difficulties which arise in relation to the interpretation or operation of this Memorandum of Understanding are to be discussed, at first instance, by the parties to the Memorandum of Understanding. If necessary, the Attorney-General or the Minister for Police and Emergency Management will raise those issues or difficulties with the Commissioner of Police.

6. Variation of this Memorandum of Understanding

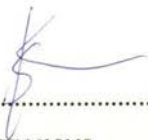
This Memorandum of Understanding can be amended at any time by the agreement of all the parties to the Memorandum of Understanding.

This Memorandum of Understanding will continue until any further Memorandum of Understanding on the execution of search warrants on Federal Members of Parliament is concluded between the parties holding the positions of the Minister for Police and Emergency Management for Tasmania, the Attorney-General for Tasmania, the Speaker of the House of Representatives and the President of the Senate.

7. Revocation of agreement to this Memorandum of Understanding

Any party to this Memorandum of Understanding may revoke their agreement to the Memorandum of Understanding. The other parties to this Memorandum of Understanding should be notified in writing of the decision to revoke.

Signatures



.....
STEVEN KONS

Attorney-General for Tasmania

13/6/2006



.....
DAVID LLEWELLYN

Minister for Police and Emergency Management for Tasmania

29/5/2006



.....
DAVID HAWKER

Speaker of the House of Representatives

9/6/2006



.....
PAUL CALVERT

President of the Senate

8/8/2006

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Guideline for Execution of Search Warrants on Federal Members of Parliament

Acknowledgement

The Department of Police and Emergency Management wish to acknowledge the Australian Federal Police for their permission to reproduce the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*, in this Guideline.

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1. Preamble

This Guideline sets out procedures to be followed where Tasmania Police propose to execute a search warrant on premises occupied or used by a member of Federal Parliament (a Member). The Guideline applies to any premises used or occupied by a Member, including the Parliament House office of a Member, the electorate office of a Member and the residence of a Member.

The Guideline is designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and that Members and their staff are given a proper opportunity to raise claims of parliamentary privilege or public interest immunity in relation to documents or other things that may be on the search premises.

2. Legal background

A valid search warrant can be executed over premises occupied or used by a Member. Evidential material cannot be placed beyond the reach of Tasmania Police simply because it is held by a Member or is on premises used or occupied by a Member.

However, it can be a contempt of Parliament for a person to improperly interfere with the free performance by a Member of the Member's duties as a Member. The Houses of Parliament have the power to imprison or fine people who commit contempt of Parliament.

Some of the principles of parliamentary privilege are set out in the *Parliamentary Privileges Act 1987 (Cth)*. They are designed to protect proceedings in Parliament from being questioned in the courts, but may also have the effect that documents and other things which attract parliamentary privilege cannot be seized under a search warrant.

Parliamentary privilege applies to any document or other thing which falls within the concept of "proceedings in Parliament". That phrase is defined in the *Parliamentary Privileges Act 1987* to mean words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a Committee. It includes evidence given before a Committee, documents presented to a House or a

Committee, documents prepared for the purposes of the business of a House or Committee and documents prepared incidentally to that business. It also includes documents prepared by a House or Committee. The courts have held that a document sent to a Senator, which the Senator then determined to use in a House, also fell within the concept of proceedings in Parliament.

It is not always easy to determine whether a particular document falls within the concept of "proceedings in Parliament". In some cases the question will turn on what has been done with a document, or what a Member intends to do with it, rather than what is contained in the document or where it was found.

It is also possible that a document held by a Member will attract public interest immunity even if it is not covered by parliamentary privilege. The High Court has held that a document which attracts public interest immunity cannot be seized under a search warrant (*Jacobsen v Rogers* (1995) 127ALR159).

Public interest immunity can apply to any document if the contents of the document are such that the public interest in keeping the contents secret outweighs the public interest in investigating and prosecuting offences against the criminal law. Among other things, public interest immunity can apply to documents if disclosure could damage national security, defence, international relations or relations with the States, or if the document contains details of deliberations or decisions of Cabinet or Executive Council, or if disclosure could prejudice the proper functioning of the government of the Commonwealth or a State.

Public interest immunity can arise in any situation, but it is more likely to arise in relation to documents held by a Minister than by a Member who is not a Minister.

3. Purpose of the Guideline

This Guideline is designed to ensure that Tasmania Police officers execute search warrants in a way which does not amount to a contempt of Parliament and which gives a proper opportunity for claims for parliamentary privilege or public interest immunity to be raised and resolved.

4. Application of the Guideline

- 4.1 The Guideline applies, subject to any overriding law or legal requirement in a particular case, to any premises used or occupied by a Member including:
- the Parliament House office of a Member;
 - the electorate office of a Member; and
 - any other premises used by a Member for private or official purposes, on which there is reason to suspect that material covered by parliamentary privilege may be located.
- 4.2 The Guideline should also be followed, as far as possible, if a search warrant is being executed over any other premises and the occupier claims that documents on the premises are covered by parliamentary privilege.
- 4.3 If a Member raises a claim for Legal Professional Privilege (sometimes called Client Legal Privilege), the executing officer should assess each matter on a case-by-case basis, the appropriate advice being sought from the office of the Principal Legal Officer and/or the office of the Director of Public Prosecutions (DPP). Where documents are seized by virtue of a search warrant, and the provisions of section 22 of the *Search Warrants Act 1997 (Tas)* are sought to be relied upon, the documents should be retained by an independent third party until the impasse is resolved.

5. The Substantive Guideline

Procedure prior to obtaining a search warrant

- 5.1 A Tasmania Police officer who proposes to apply for a search warrant in respect of premises used or occupied by a Member will seek approval from the Commissioner or Deputy Commissioner before applying for the warrant.
- 5.2 If approval is given, the officer will consult with the appropriate office of the DPP before applying for a search warrant. In cases

involving alleged offences against Commonwealth law, the appropriate DPP is the Commonwealth DPP. In cases involving alleged offences against Tasmanian law, the appropriate DPP is the Tasmanian office of the DPP for Tasmania. The appropriate DPP can provide assistance to draft the affidavit and warrant and can provide any legal advice required in relation to the execution of the warrant.

- 5.3 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.

Procedure prior to executing a search warrant

- 5.4 If the premises which are to be searched are in Parliament House, the executing officer should contact the relevant Presiding Officer before executing the search warrant and notify the Presiding Officer of the proposed search. If a Presiding Officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee.
- 5.5 The executing officer will also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the search warrant so as to minimise the potential interference with the performance of the Member's duties.

Executing the search warrant

- 5.6 If possible, the executing officer will comply with the following procedures, unless compliance would affect the integrity of the investigation:
- (a) a search warrant will not be executed over premises in Parliament House on a parliamentary sitting day;
 - (b) a search warrant will be executed at a time when the Member, or a senior member of his/her staff, will be present; and

(c) the Member, or a member of his/her staff will be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed.

- 5.7 If the Member, or a senior member of his/her staff, is present when the search is conducted, the executing officer will ensure that the Member, or a member of staff, has a reasonable opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises.
- 5.8 There is a public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Accordingly, even if there is no claim for privilege or immunity, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search.
- 5.9 As part of that process, the executing officer will consider inviting the Member, or a senior member of his/her staff, to identify where in the premises those documents which fall within the scope of the search warrant are located.

Procedures to be followed if privilege or immunity is claimed

- 5.10 If the Member, or a member of staff, claims parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises the executing officer should ask the Member, or member of staff, to identify the basis for the claim. The executing officer should then follow the procedure in paragraph 5.11, unless the executing officer considers a claim to be arbitrary, vexatious or frivolous. In the latter circumstances, the procedure in paragraph 5.13 should be followed.
- 5.11 The executing officer should ask the Member, or member of staff, making the claim whether they are prepared to agree to the following procedure to ensure that the relevant documents are not examined until the claim has been resolved.

- a) The relevant document or documents should be placed in exhibit bags in accordance with Tasmania Police guidelines.
- b) The Member, or member of staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer.
- c) The items so secured should be delivered into the safekeeping of a neutral third party, who may be the warrant issuing authority or an agreed third party.
- d) The Member has five working days (or other agreed period) from the delivery of the items to the third party, to notify the executing officer and the third party either that the claim for parliamentary privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained. In this respect, it is a matter for the Member to determine whether he/she should seek that ruling from a Court or the relevant House.
- e) When a Member notifies the executing officer that the Member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the neutral third party until the disposition of the items is determined in accordance with the ruling.
- f) If the Member has not contacted the executing officer within five working days (or other agreed period), the executing officer and the third party will be entitled to assume that the claim for parliamentary privilege or public interest immunity has been abandoned and the third party will be entitled to deliver the items to the executing officer.

5.12 If the Member, or member of staff, is not prepared to agree to the procedure outlined above, or to some alternative procedure which is acceptable to the executing officer, the executing officer should proceed to execute the search warrant, doing the best that can be done in the circumstances of the case to minimise the extent to which the members of the search team examine or seize documents

which may attract parliamentary privilege or public interest immunity.

- 5.13** In some cases a Member, or member of staff, may make a claim which appears to be arbitrary, vexatious or frivolous, for example a claim that all the documents on the relevant premises attract parliamentary privilege or public interest immunity and therefore, the proposed search should not proceed in any form. If this occurs, the executing officer should consider whether there is a reasonable basis for the claim. If there is, it may be necessary for a large number of documents to be placed in exhibit bags. However if the executing officer is satisfied, on reasonable grounds, that there is no proper basis for the claim he/she should inform the Member, or member of staff, the he/she intends to proceed to execute the search warrant unless the Member, or member of staff, is prepared to specify particular documents which attract parliamentary privilege or public interest immunity.
- 5.14** Tasmania Police will notify the Attorney-General (in his/her capacity as First Law Officer) and the Minister for Police and Emergency Management in any case where a claim of parliamentary privilege has been made by or on behalf of a Member.

Obligations at the conclusion of a search

- 5.15** The executing officer should provide a receipt recording things seized under the search warrant (whether requested or not). The receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.
- 5.16** The executing officer should inform the Member that Tasmania Police will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties. Tasmania Police will provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

- 5.17 Tasmania Police will comply with any law including the requirements set out in the legislation under which the relevant search warrant was issued.