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Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs References Committee
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters

The Rule of Law Institute of Australia (RoLIA) thanks the Committee for the opportunity to make a submission to this Inquiry.

RoLIA is a non-political and not-for-profit body. It does not receive any government funding. The Institute currently employs three staff comprising two high school teachers and a CEO. The teachers predominately teach Rule of Law in secondary schools in Victoria, New South Wales and Queensland including regional areas. In addition we are active in various University law and journalism schools including sponsoring a professorial rule of law chair at the University of Sydney, which is currently occupied by his Honour Justice Lindgren.

The objectives of the Institute include reducing the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

The first of three fundamental principles of the rule of law is the absolute supremacy or predominance of the law as opposed to the influence of arbitrary power. The rule of law excludes the existence of arbitrariness of wide discretionary authority on the part of the Government and its agencies.¹

At the core of this inquiry is the discretion of the AFP to obtain search warrants under s225, of the *Proceeds of Crimes Act 2002*. In particular whether the AFP's wide power to obtain a search warrant under s225 should be permitted to continue or be tempered in some manner.

¹ Professor AV Dicey 'Introduction to the Study of the Law of the Constitution' 1885 p120

Search warrants represent a serious intrusion into private and property rights of which the common law “has long been jealous” (*George & Rockett* (1990) 170 CLR 104 at 110). Search warrants authorise actions which would otherwise constitute trespass and, in so far as searches of the person are concerned, an assault (*Seven West Media Limited v AFP* [2014] FCA 263 at [75]).

Quite properly the Committee is not seeking to consider the *validity* of the five search warrants executed at (among other places) three Seven West Media locations in Sydney on 18 February 2014. That is properly the purview of the Courts. This issue was determined by the Federal Court of Australia yesterday in favour of Seven West Media². There may however be an appeal by the AFP. The prospect or outcome of such an appeal, which might take many months, does not prevent the Committee considering any provisions of the *Proceeds of Crime Act 2002* at this time, including by reference to the events surrounding the application for and execution of the five search warrants. Federal Parliament enacted these laws and is ultimately responsible for them. The Committee may wish to consider the factual findings in the Court’s judgment as it should assist the Committee in this Inquiry.

The Institute makes the following submission.

Section 225 of the *Proceeds of Crime Act* provides:

“225 *Issuing a search warrant*

- (1) *A magistrate may issue a warrant to search *premises if the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is at the premises, or will be within the next 72 hours, *tainted property or *evidential material.”*

It may surprise the Committee to learn that this provision gave considerably more power to the AFP to obtain a search warrant for evidentiary material than it had previously. This however does not seem to have been brought to the attention of the Parliament generally and certainly not to the Senate Legal and Constitutional Legislation Committee when it considered the *Proceeds of Crimes Bill 2002*.

In the case of Seven West Media, the AFP were wanting to seize evidentiary material that related to a benefit that may have been obtained by Schapelle Corby for the commercial exploitation of her notoriety for committing a foreign indictable offence. The matters that may indicate a misuse of the AFP’s power to obtain the warrants are as follows:

- 1 It was accepted by the AFP that Seven West Media had not and indeed could not have committed a civil offence, even if it had paid or offered to pay any money to Ms Corby. Nor was it a criminal or civil offence for Ms Corby to accept such monies or for Ms Corby to be

² Judgment by her Honour Justice Jagot in *Seven West Media Limited v AFP* [2014] FCA 263

interviewed. According to the AFP s225 is a preliminary discovery provision³. It is unclear to us why a preliminary discovery provision can operate in such an intrusive manner.

- 2 Apparently the search warrants were executed by 34 armed AFP officers.
- 3 These same officers objected to Seven News filming the raid on its own premises, when they had no basis to do so unless the filming interfered with their ability to carry out the search and seizure. It has not been suggested the filming did interfere with the AFP's ability to search and seize.
- 4 Orders sought and obtained by the AFP stated that the Magistrates who issued the search warrants were satisfied the recipients of them were reasonably suspected of having committed the offence stated in the warrant. The AFP said this was an innocent word processing error.⁴
- 5 The search warrants wrongly identified 33 people and entities as being "suspects" when nobody could have been regarded as a suspect.⁵
- 6 The AFP has acknowledged that Seven was very co-operative prior to the execution of the search warrants⁶. However the Federal Court found that the affidavits of Mr Kokles and Mr Phun regrettably created an impression about the status of Seven's production of documents contrary to the true position. *"Any reasonable person reading Mr Kokles' affidavit would infer that Seven had produced documents up to 14 February 2014 and this production was inadequate. This was not the true position"*⁷ The Court further found that the AFP submission that there was no evidence that Mr Kokles or Mr Phun knew about the status of all communications with Seven's solicitors at the time they swore their affidavits, had no merit.⁸
- 7 Prior to obtaining the search warrant the AFP obtained a production order under s202 of the *Proceeds of Crime Act 2002* requiring Seven West Media to produce to the AFP certain documents. Although there is no suggestion the notice was not fully complied with by Seven West Media⁹ the AFP took the view Seven West Media held further documents. The AFP took the view it should apply for search warrants to obtain these documents rather than obtain a further production order. It is self evident that a production order is far less intrusive than the execution of a search warrant.

³ Legal and Constitutional Affairs Legal Committee 24/2/2014 p123.

⁴ [2004] FCA 263 at [50]

⁵ [2014] FCA 263 at [59]

⁶ Legal and Constitutional Affairs Legal Committee 24/2/2014 p123

⁷ [2014] FCA 263 at [101]

⁸ [2014] FCA 263 at [102]

⁹ Legal and Constitutional Affairs Legal Committee 24/2/2014 p123

8 The Magistrates that issued the search warrants were led into error by the AFP.¹⁰

The Proceeds of Crime legislation at the Federal level in Australia dates back to 1987 with the passage of the *Proceeds of Crimes Act 1987*. The Australian Law Reform Commission 'Proceeds of Crime Report' published in 1999 summarised the then law enforcement powers under that Act:

"19.3 The existing law enforcement powers can be exercised pursuant to

- *search warrants in relation to tainted property, section 36*
- *production orders for documents relevant to identifying, locating or qualifying property relating to an offence, section 66*
- *search warrants in relation to such property tracking documents in cases **where a production order would be ineffective or has not been not complied with**, section 71 and*
- *monitoring orders requiring financial institutions to give information obtained about transactions conducted through an account held by a particular person, section 73."*¹¹

A copy of s71 is attached at Appendix A.

The Committee will note from [19.3] of the Commission's Report that in relation to property tracking documents that the AFP could only obtain a search warrant under the 1987 Act if it first obtain a production order, where a production order would be ineffective, or where a production order had not been complied with. This is not the position under s225 of the *Proceeds of Crime Act 2002* (see above). Provided there are reasonable grounds for suspecting evidential materials are at a premises, the AFP can apply for a search warrant without first obtaining a production order. A property tracking document includes a document relevant to identifying and locating tainted property. There is considerable overlap with the definition of 'evidentiary material' which term is used in the 2002 Act.

In October 2001 the Proceeds of Crime Bill 2001 was introduced into the House of Representatives. It was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 21 November 2001. However on 8 October 2001 the House of Representatives was dissolved for the Federal election. The Committee business of the 39th Parliament ceased on 11 February 2002. On 12 February 2002 that Committee agreed to recommend to the Senate that its inquiry into the *Proceeds of Crime Bill 2001* be referred to it.

It is relevant for this Committee to note that clause 219 of the 2001 Bill contained the following provision:

¹⁰ [2014] FCA 263 at [78] et seq

¹¹ p295

“219 Documents identifying etc. evidential material etc.

*If the evidence in respect of which a warrant to search *premises is being issued is a *property-tracking document, the magistrate must not issue a *search warrant in respect of such a document unless:*

- (a) the document cannot be identified or described with sufficient particularity for the purposes of obtaining a *production order; or*
- (b) a production order requiring the document has been given but not complied with; or*
- (c) there are reasonable grounds to suspect that a production order would not be complied with; or*
- (d) the investigation for the purposes of which the warrant is being sought might be seriously prejudiced by seeking a production order if an *authorised officer does not gain immediate access to the document without notice to any person.”*

In other words clause 219 of the 2001 Bill was similar to s71 of the 1987 Act which did not give the AFP an open discretion to obtain evidential material, but limited that right to circumstances where it was not appropriate for the AFP to seek to obtain that material by way of production order.

On 14 February 2002 the Senate proposed the referral of the Proceeds of Crime Bill 2002 (the bill of the current Act) to the Senate Legal and Constitutional Legislation Committee. The Committee conducted public hearings in Canberra on 31 January 2002 and in Sydney on 27 March 2002. The Committee’s final report dated April 2002 was presented to the Senate on 14 May 2002. From our analysis of the various documents it does not appear to us that the AFP’s proposed new power to bypass the production order regime and directly obtain a search warrant for evidentiary material was ever brought the attention of the Parliament including that Committee. No reference is made to it in the Explanatory Memorandum to the 2002 Bill. It is not referred to in this Committee’s report presented to the Senate on 14 May 2002. Indeed a significant part of the report was concerned with the use of telephone intercept material in cases of civil forfeiture (see [3.59] – [3.64]) when clearly the new search warrant power for obtaining evidentiary material was likely to have a much greater impact on third parties.

Of the 22 witnesses that gave evidence before the Committee only one, a barrister from the NSW Bar Association, gave evidence opposing some of the provisions. It would appear that he was also unaware of the proposed changes to the AFP’s power to obtain search warrants. The other 21 witnesses were from the CDPP, AFP, NCA (now ACC), Attorney-General’s Department and the Western Australian Police Service. None of them were opposing aspects of the 2002 Bill.

There were occasions during which evidence was given to the Committee where the difference between the existing and proposed search warrant powers might have been raised. The first witness before the Committee was a special adviser to the Attorney-General’s Department who

sought to highlight for the Committee the changes between the existing 1987 Act and the provisions of the 2002 Bill. The witness stated that *"The Bill contains the existing information gathering powers of production orders, search warrants and monitoring orders"*.¹²

On 27 March 2002 there were also the following exchanges between Senator Cooney and the special adviser:

"What about search warrants? Can they be used in a civil case? I am just looking at section 236 and thereabouts. Can they be used for civil proceedings?"

"Yes, they can. The purposes of those search warrants is to search for proceeds of crime and so-called property tracking documents. They exist under the current act and they will apply also to the civil forfeiture proceedings under this Act."

Nor was the difference in the provisions mentioned in any of the speeches in the House of Representatives.

In these circumstances the Committee could not be expected to be aware of the proposed change to the power of the AFP to obtain search warrants for evidentiary material.

RoLIA makes two recommendations to the Committee.

First, the *Proceeds of Crimes Act 2002* be amended by including a provision (s225A) to the same effect as clause 219 of the 2001 Bill. Very minor amendments will need to be made to that clause to adopt the language of the 2002 Act. RoLIA has prepared a draft provision, attached at Appendix B.

Second, the current Attorney-General, Senator George Brandis, to his great credit, has asked the Australian Law Reform Commission to conduct a sweeping review of Commonwealth legislation to find provisions that encroach upon "rights, freedoms and privileges". In December 2013 he said:

"I have asked the Commission to identify where traditional rights, freedoms and privileges are unnecessarily comprised within the legal structure of the Commonwealth. Where encroachments exist, the Commission will determine whether they are justified."

The Attorney-General has indicated the Commission should report by 1 December 2014, however it is possible the inquiry may run for much longer. It is clearly a very significant review of the Commonwealth legislation and will focus on the wide discretionary powers of most Commonwealth regulators including the AFP. When the opportunity arises RoLIA will be making significant submissions to the Inquiry and RoLIA has already engaged interns from two Universities to assist us in this process. To the extent it can the Committee and the Senate generally may wish to assist in this inquiry by, among other things, referring to the Commission at the appropriate time any matters it thinks should be brought to its attention.

¹² Transcript of Committee hearing on 31 January 2002 pL&C2 and L&C3.

If you require anything further please let us know.

Yours sincerely

Malcolm Stewart
Vice President

APPENDIX A

PROCEEDS OF CRIME ACT 1987 No. 87, 1987 - SECT 71

Search warrant for location etc. of property

71. (1) Where:

- (a) a person has been convicted of an indictable offence and a police officer has reasonable grounds for suspecting that there is upon any land, or upon or in any premises, a property-tracking document in relation to the offence; or
- (b) a police officer has reasonable grounds for suspecting that:
 - (i) a person has committed an indictable offence; and
 - (ii) there is upon any land, or upon or in any premises, a property-tracking document in relation to the offence; the police officer may:
- (c) lay before a Judge of the Supreme Court of:
 - (i) the State or Territory in which the person was convicted of the offence or in which the offence is believed to have been committed; or
 - (ii) the State or Territory in which the document is believed to be located;an information on oath setting out those grounds; and
- (d) apply to the Judge for a search warrant under subsection (4) in respect of the land or premises.

(2) Where a police officer applying for a warrant under this section in respect of an offence includes in the information under subsection (1) information on oath that the officer has reasonable grounds to believe that:

- (a) the person who was convicted of the offence or who is believed to have committed the offence derived a benefit, directly or indirectly, from the commission of the offence; and
- (b) property specified in the information is subject to the effective control of the person; the Judge may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence for the purposes of this section.

- (3) In determining whether to treat a document, under subsection (2), as a property-tracking document in relation to an offence, the Judge may have regard to the matters referred to in subsection 28 (2).
- (4) Where an application is made under subsection (1) for a search warrant in respect of land or premises, the Judge may, subject to subsections (5) and (6) issue a search warrant authorising a police officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable:
 - (a) to enter upon the land or upon or into the premises;
 - (b) to search the land or premises for documents of the kind referred to in subsection (1); and
 - (c) to seize any document found in the course of the search that the police officer believes, on reasonable grounds, to be a document of that kind.
- (5) **A Judge shall not issue a search warrant under subsection (4) unless the Judge is satisfied that:**
 - (a) **the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of the document;**
 - (b) **a production order has been given in respect of the document and has not been complied with;**
 - (c) **a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that such a production order would not be complied with; or**
 - (d) **the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the police officer does not gain immediate access to the document without notice to any person.**
- (6) A Judge shall not issue a search warrant under this section unless:
 - (a) the informant or some other person has given the Judge, either orally or by affidavit, any further information that the Judge requires concerning the grounds on which the search warrant is sought; and
 - (b) the Judge is satisfied that there are reasonable grounds for issuing the search warrant.

- (7) There shall be stated in a search warrant issued under this section:
- (a) a statement of the purpose for which the warrant is issued, including a reference to the nature of the indictable offence that has been or is believed to have been committed;
 - (b) whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night;
 - (c) a description of the kind of documents authorised to be seized; and
 - (d) a date, not being later than one month after the day of issue of the warrant, upon which the warrant ceases to have effect.
- (8) If, in the course of searching, under a warrant issued under this section, for a property-tracking document in relation to a particular offence, a police officer finds:
- (a) any document that the police officer believes, on reasonable grounds, to be:
 - (i) a property-tracking document in relation to the offence, although not of a kind specified in the warrant; or
 - (ii) a property-tracking document in relation to another indictable offence; or
 - (b) any thing that the police officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence; and the police officer believes, on reasonable grounds, that it is necessary to seize that document or thing in order to prevent its concealment, loss or destruction, the warrant shall be deemed to authorise the police officer to seize that document or thing.

APPENDIX B

Proposed amendment to the *Proceeds of Crimes Act 2002*

"225A Documents identifying etc. evidential material etc.

*A magistrate must not issue a *search warrant under such section 225(1) in respect of *evidential material unless:*

- (a) the document cannot be identified or described with sufficient particularity for the purpose of obtaining a *production order; or*
- (b) a production order requiring the document has been given but not complied with; or*
- (c) there are reasonable grounds to suspect that a production order would not be complied with; or*
- (d) the investigation for the purposes of which the warrant is being sought might be seriously prejudiced by seeking a production order if an *authorised officer does not gain immediate access to the document without notice to any person."*