

GENERAL GUIDELINES BETWEEN THE AUSTRALIAN FEDERAL POLICE AND THE LAW COUNCIL OF AUSTRALIA AS TO THE EXECUTION OF SEARCH WARRANTS ON LAWYERS' PREMISES, LAW SOCIETIES AND LIKE INSTITUTIONS IN CIRCUMSTANCES WHERE A CLAIM OF LEGAL PROFESSIONAL PRIVILEGE IS MADE

Preliminary

1. For the purpose of these guidelines, 'Law Society' means a Law Society, a Bar Association, a Law Institute and any similar professional body of lawyers, and includes a body or tribunal established for the purpose of receiving or investigating complaints involving issues of professional standards or relating to the delivery of professional legal services against barristers and solicitors or for the purpose of disciplining barristers or solicitors.

Background

2. Difficulties are sometimes experienced on the occasions that it becomes necessary for an AFP officer to obtain and execute a search warrant directed at the office of a solicitor, the chambers of a barrister, or the premises of a Law Society.

3. In *Baker v. Campbell* (1983) 153 CLR 52 the question posed in the case stated was:-

"In the event that legal professional privilege attaches to and is maintained in respect of ... documents held by (a lawyer) can those documents be properly made the subject of a search warrant issued under s. 10¹ of the Crimes Act"

The question was answered 'No'.

Legislation

4. The Crimes Act 1914 provides that:

- (a) an issuing officer may issue a warrant to search premises if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises [section 3E(1)];
- (b) an issuing officer may issue a warrant authorising an ordinary search or a frisk search of a person if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that the person has in his or her possession, or will within the next 72 hours have in his or her possession, any evidential material [section 3E(2)]; and
- (c) Part 1AA of the Crimes Act does not affect the law relating to legal professional privilege (section 3ZX).

Overview

5. It is seen as desirable that an agreed procedure should be laid down which, if followed, will negate or reduce the risks of documents which may be subject of legal professional privilege being seized pursuant to section 3E search warrants.

6. Accordingly, and subject to the provisions of the Crimes Act 1914 (Cth), these general guidelines have been agreed between the Commissioner of the Australian Federal Police on the one hand and the Law Council of Australia on the other.

7. While focussing on search warrants issued pursuant to the Crimes Act, the guidelines are to be interpreted as applying to search warrants issued under other Commonwealth legislation on lawyers' premises or Law Societies where a claim of legal professional privilege is made.

¹ Section 10 has now been replaced by section 3E Crimes Act 1914

8. The Law Council through its constituent bodies, the Bar Associations and the Law Societies in all of the Australian States and internal Territories, represents the great majority of Australia's practising lawyers.

9. The discussions which led to the initial guidelines relating to lawyers' premises were convened by the Commonwealth Director of Public Prosecutions (DPP) and representatives of the Office of the DPP have been involved in the subsequent discussions.

Professional Privilege.

10. The matter of legal professional privilege (ie concerning communications passing between a lawyer and his/her client/s, and, in some circumstances, a third party, for the purpose of the lawyer providing legal advice to the client/s) is subject to various statutory provisions [eg the Evidence Act 1995 (Cth)², the Evidence Act 1995 (NSW)] and the common law.

11. As indicated in the footnote, the common law rules apply before the commencement of court proceedings. From a Commonwealth perspective, the common law rules will apply prior to the start of proceedings, but also during proceedings if those proceedings are conducted in a State court which is not subject to legislation similar to the Commonwealth and NSW Evidence Acts.

Effect of Guidelines

12. The effect of these guidelines, in summary, is that, where the lawyer or Law Society is prepared to co-operate with the police search team, no member of that team will inspect any document identified as potentially within the warrant until the lawyer or Law Society has been given the opportunity to claim legal professional privilege in respect of any of the documents so identified.

13. Where a claim is made in such circumstances, no member of the police search team will inspect any document the subject of the claim until either (a) the claim is abandoned or (b) the claim is dismissed by a court.

14. It is agreed that application for a search warrant shall only be made after consultation with the Office of the DPP.

15. These guidelines proceed on the assumption that any particular warrant to which they relate has been duly issued and is good on its face. It is recognised that a lawyer or Law Society upon whose premises the search warrant is to be executed may want to take legal advice as to those matters.

Procedures in detail

16. Upon attendance at the premises of the lawyer or Law Society, the executing officer should explain the purposes of the search and invite the lawyer or representative of the Law Society to co-operate in the conduct of the search. If the lawyer, a partner or employee, or the Law Society or an employee, is suspected of involvement in the commission of the alleged offence the executing officer should say so.

² The privilege provided by s.118, and the privileges provided by ss.119 and 120 [of the Commonwealth Evidence Act] only apply in relation to proceedings in a federal court or ACT court (s.4(1)). The common law rules of legal professional privilege [Grant v. *Downs* (1976) 135 CLR 6741 continue to apply in relation to, among other things, the exercise of investigative powers under Commonwealth or ACT law. Thus the range of communications protected by the privilege at the stage of an investigation (by the common law sole purpose test) may be narrower than that protected in subsequent, related, proceedings (by the dominant purpose test in the Act). **[Commonwealth Evidence Law** - commentary by G Bellamy and P Meibusch, Civil Law Division, Attorney-General's Department 1995 (para 118.14)]

17. Identification of the executing officer and all other members of the search team should be provided to the lawyer or representative of the Law Society. The search team should be kept to the lowest number of persons reasonably necessary in all the circumstances.

18. If no lawyer, or representative of the Law Society, is in attendance at the premises the subject of the search warrant then, if practicable, the premises or relevant part of the premises should be sealed and execution of the warrant deferred for a period which the executing officer in his/her discretion considers reasonable in all the circumstances to enable any lawyer or responsible person connected with the premises to attend or, if that is not practicable, to enable arrangements for another person to attend the premises.

19. The executing officer or Constable/s assisting must be mindful of and comply with the relevant statutory and/or common law obligations attaching to the execution of the search warrant/s in question, and to the provisions of Part 1AA of the Crimes Act 1914 in particular in respect to search warrants issued pursuant to that Act.

20. A reasonable time should be allowed to the lawyer to enable him/her to consult with his/her client/s or to the Law Society to enable it to consult with the legal representatives of the person/s to whose affairs the documents relate, and/or for the lawyer or Law Society to obtain legal advice.

21. For this reason, it is desirable that warrants be executed only during normal working hours. However, when warrants are executed outside normal working hours, allowances should be made for delays should the lawyer wish to contact his/her client or the Law Society to contact legal representatives, or for either the lawyer or Law Society to take legal advice.

22. Having informed his/her client/s of the position or the Law Society having informed the legal representative/s of the person/s to whose -affairs the documents relate of the position, and/or either having obtained legal advice, the lawyer or Law Society should, consistent with his/her client's/clients' instructions or the instructions of the legal representatives of the person/s to whose affairs the documents relate, cooperate with the police officers by assisting them in locating all documents which may be within the warrant.

23. If the executing officer requires access to the office records systems the lawyer or Law Society should assist if necessary by explaining the records system to the police officer.

24. Where the lawyer or Law Society agrees to assist the search team the procedures set out below should be followed:-

- (a) in respect of all documents identified by the lawyer or Law Society and/or further identified by the executing officer as potentially within the warrant, the executing officer should, before proceeding to further execute the warrant (by inspection or otherwise) and to seize the documents, give the lawyer or Law Society the opportunity to claim legal professional privilege in respect of any of those documents;
- (b) if the lawyer or Law Society asserts a claim of legal professional privilege in relation to any of those documents then the lawyer or Law Society should be prepared to indicate to the executing officer the grounds upon which the claim is made and in whose name the claim is made; and
- (c) in respect of those documents which the lawyer or Law Society claim are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines as follows. In respect of the remaining documents, the search team may then proceed to complete the execution of warrant.

25. All documents which the lawyer or Law Society claims are subject to legal professional privilege shall under the supervision of the executing officer be placed by the lawyer and/or his/her staff, or the Law Society and/or its representatives, in a container which shall then be sealed.

26. In the event that the lawyer or Law Society desires to take photocopies of any of those documents the lawyer or Law Society shall be permitted to do so under the supervision of the executing officer and at the expense of the lawyer or Law Society before they are placed in the container.

27. A list of the documents shall be prepared by the search team, in co-operation with the lawyer or Law Society, on which is shown general information as to the nature of the documents.

28. That list and the container/s in which the documents have been placed shall then be endorsed to the effect that pursuant to an agreement reached between the lawyer or Law Society and the search team, and having regard to the claims of legal professional privilege made by the lawyer on behalf of his/her client/s or the Law Society on behalf of the person/s to whose affairs the documents relate, the warrant has not been executed in respect of the documents set out in the list but that those documents have been sealed in the container, which documents are to be given forthwith into the custody of the magistrate or justice who issued the warrant or other independent party (referred to below as the 'third party') agreed upon by the lawyer or Law Society and the executing officer pending resolution of the disputed claims.

29. The list and the container/s in which the documents have been sealed shall then be signed by the executing officer and the lawyer or a representative of the Law Society.

30. The executing officer and the lawyer or representative of the Law Society shall together deliver the container forthwith, along with a copy of the list of the documents, into the possession of the third party, who shall hold the same pending resolution of the disputed claims.

31. If within 3 clear working days (or such longer period as is reasonable which may be agreed by the parties) of the delivery of the documents into the possession of the third party, the lawyer or Law Society has informed the executing officer or his/her agent and the third party or his/her agent that instructions to institute proceedings forthwith to establish the privilege claimed have been received from the client/s on whose behalf the lawyer asserted the privilege, or from the person or person/s on whose behalf the claim has been made by the Law Society, then no further steps shall be taken in relation to the execution of the warrant until either:

- (a) a further period of 1 clear working day (or such further period as may reasonably be agreed) elapses without such proceedings having been instituted; or
- (b) proceedings to establish the privilege have failed; or
- (c) an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege.

32. Where proceedings to establish the privilege claimed have been instituted, arrangements shall forthwith be made to deliver the documents held by the third party into the possession of the Registrar of the Court in which the said proceedings have been commenced. The document shall be held by the Registrar pending the order of the Court.

33. Where proceedings to establish the privilege claimed are not instituted within 3 clear working days (or such further period as may have been agreed) of the delivery of the documents into the possession of the third party, or where an agreement is reached between the parties as to the disclosure of some or all of the documents, then the parties shall attend upon the third party and shall advise him/her as to the happening of those matters and shall request him/her, by consent, to release into the possession of the executing officer all the documents being held by the third party or, where the parties have agreed that only some of the documents held by him/her should be released, those documents.

34. In those cases where the lawyer or Law Society refuses to give co-operation, the executing officer should advise that the search will proceed in any event and that, because the search team is not familiar with the office systems of the lawyer or Law Society, this may entail a search of all files and documents in the lawyer's or Law Society's office in order to give full effect to the authority conferred by the warrant.

35. The lawyer or Law Society should also be advised that a document will not be seized if, on inspection, the executing officer considers that the document is either not within the warrant or privileged from seizure. The search team should then proceed forthwith to execute the warrant.

36. These guidelines, which replace those last agreed between the Australian Federal Police and the Law Council of Australia in June 1990, commence with effect from 3 March 1997.

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