



Law Council
OF AUSTRALIA

Office of the President

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Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: pjicis@aph.gov.au

Dear Chair

Supplementary Submission: Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press

The Law Council welcomes the opportunity to provide a supplementary submission to the Parliamentary Joint Committee on Intelligence and Security (**Committee**) in response to the joint supplementary submission (**joint submission**) provided by the Department of Home Affairs and the Australian Federal Police (**AFP**) as part of the Committee's inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.¹

The Law Council notes that the joint submission proposes to establish a Notice to Produce framework in the *Crimes Act 1914* (Cth) (**Crimes Act**) as an additional method for law enforcement agencies to obtain evidence during investigative action in relation to a professional journalist or media organisation. This proposed scheme would be targeted at investigations relating to a professional journalist or media organisation involved in the unauthorised disclosure of material or the obtaining of such material from a current or former Commonwealth officer. According to the joint submission:

This would offer an alternative to executing a search warrant in person, give parties more flexibility to serve and produce material (such as electronically where appropriate), and provide an opportunity for professional journalists and media organisations to put forward any strong, countervailing arguments to not produce material pursuant to such an Notice.²

The proposed Notice to Produce scheme is not intended to replace the existing search warrant processes, however the AFP would be expected to exhaust alternative investigative approaches before applying for the issue of a search warrant, including considering the

¹ Australian Government, Department of Home Affairs and Australian Federal Police, Submission 32, *Supplementary Joint Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*.

² *Ibid*, 5.

proposed Notice to Produce framework which would, in principle, reserve search warrants for all but the most genuinely urgent circumstances.

Contestability of search warrant applications

Given that the Notice to Produce proposal does not seek to amend the current approach to search warrant applications, the Law Council maintains its principal position that an 'up front' review process for a search warrant request should be implemented and is an essential step in determining whether the proposed intrusion of privacy is lawful, necessary and appropriate.

The Law Council therefore maintains that a multifaceted approach to strengthening safeguards within the warrant process concerning journalists is required, and is supportive of moves to create an adversarial environment in which a greater degree of scrutiny is brought to bear on the grounds advanced for seeking a warrant, or a Notice to Produce in the alternative.

Such an approach could be achieved with the introduction of a public interest requirement, which is to be considered by a judge with appropriate expertise and seniority to hear matters of public interest, and the introduction of a Public Interest Advocate (**PIA**) or Public Interest Monitor (**PIM**) scheme as discussed in detail in the previous submissions provided by the Law Council to the Committee.³

Merits of a Notice to produce scheme

While the Law Council considers the proposed Notice to Produce scheme may be worthy of further consideration, it must be critically assessed in relation to the potential adverse impacts on freedom of the press, freedom of speech and the maintenance of a robust and healthy Australian democracy. In particular, the Law Council is cognisant of concerns from the journalism sector that a Notice to Produce has the potential to damage relations between a journalist and their employer through the placing of an onus on a media organisation to investigate a journalist's source.

The Law Council is particularly concerned that the proposed Notice to Produce regime would not limit the ability for law enforcement agencies to apply for a search warrant in circumstances where it can be claimed there is reason to believe material may be destroyed or concealed, there is an allegation of serious criminal wrongdoing by an employee, or where there are urgent operational circumstances. Therefore, while the Law Council welcomes the intention of the scheme, it does not consider that it will effectively address the issues that have previously been raised by the Law Council, and the desirability of a contested warrants regime for investigations concerning journalists and media reporting that could be regarded as being made in the public interest.

The Law Council notes the joint submission makes the criticism that contested warrant 'proceedings may be complex and time consuming and therefore inappropriate in certain operational circumstances'.⁴ Presumably the same concerns may arise in proceedings relating to a Notice to Produce, and the Law Council questions whether, in these circumstances law enforcement agencies will choose to engage the Notice to Produce

³ Law Council of Australia, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press*, Parliamentary Joint Committee on Security and Intelligence (7 August 2019) <<https://www.lawcouncil.asn.au/resources/submissions/inquiry-into-the-impact-of-the-exercise-of-law-enforcement-and-intelligence-powers-on-the-freedom-of-the-press>> and Law Council of Australia, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press*, Parliamentary Joint Committee on Security and Intelligence (23 August 2019).

⁴ Supplementary Joint Submission, 4.

regime, when it may be far easier to apply for a search warrant from the Registrar of the Local Court.

Mandated use of the Notice to Produce

Noting the above concerns, the Law Council recommends that there be a legislative imperative rather than an 'option' for the Notice to Produce regime to be used in all circumstances unless there are certain specified grounds that justify applying immediately for a search warrant. This legislative requirement for restraint in relation to the use of search warrants, could be similar to the approach adopted in the United States federal legislation cited in the joint submission, that requires the law enforcement agency to issue a subpoena and not apply for a search warrant except in those circumstances where:

- there is reasonable suspicion that material may be destroyed or concealed;
- the journalist has committed an offence other than an offence involving the receipt, possession, communication or withholding of national security material or information;
- the information or material sought is necessary to prevent injury or death; and
- the journalist or media organisation has not responded to a subpoena.⁵

Claims for Privilege

Where the target of a Notice to Produce is a journalist, the criteria for the issuance of a notice and for resisting production of documents should allow for consideration of any privilege relating to the identity of an informant as provided by section 126K of the *Evidence Act 1995* (Cth). Whilst the case of *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133 made it clear that journalistic privilege doesn't apply to the execution of a search warrant, it does acknowledge the privilege has application to subpoenas and notices to produce issued in a curial process.⁶

The Law Council notes that in other jurisdictions, such as New South Wales, there are legislative provisions that provide a procedure by which claims for privilege can be determined where such a claim is made in response to a Notice to Produce issued under section 53 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA). Subsection 56(1) of LEPRA provides that where documents that are required to be produced contain communications that may not in subsequent proceedings be adduced under Division 1, 1A or 3 of Part 3.10 of the *Evidence Act 1995* (NSW),⁷ then the police officer is required to apply to a Magistrate for an order for access to the documents and the Magistrate may determine that the third party is not required to be produce the documents.⁸

While the regime in LEPRA is directed towards notices issues to an authorised deposit-taking institution, the Law Council considers that an appropriately experienced judicial officer should be able to determine claims of journalists privilege or legal professional privilege raised in relation to documents sought to be produced by notice.

Appropriate issuing authority

Notices to Produce should be required to be issued by a judge of an appropriate court that can hear and determine arguments in relation to the lawfulness of the Notice to Produce

⁵ *Privacy Protection Act*, 42 USC § 2000aa.

⁶ *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133, [204-206].

⁷ Provisions relating to legal professional privilege, 'professional confidential relationship privilege' and evidence excluded in the public interest within the meaning of section 129-131 of the *Evidence Act 1995* (NSW).

⁸ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), sub s 56(2).

and hear arguments concerning whether compliance with the Notice to Produce is required. It is important that there be a means for an appropriate court to be able to hear arguments concerning public interest factors and make determinations concerning journalist privilege or legal professional privilege referred to above.

The Law Council considers that there should also be a clear right of judicial review against the decision to issue the Notice and decisions about whether the Notice must be complied with.

Scope of jurisdiction and public interest requirement

The legislation establishing the scheme should require some specificity in the both the type of documents to be produced, and the grounds for seeking their production, to avoid a potential 'fishing expedition'. The scheme should provide appropriate timeframes to enable the party served with the Notice to Produce to comply or prepare a case to contest. It should be incumbent for the law enforcement agency to satisfy the court why the Notice to Produce is necessary and clearly specify what is sought to be produced in accordance with the notice.

The Law Council submits that a public interest requirement should be applied when determining whether to issue a Notice to Produce in relation to journalists and media organisations, either as the suspect of an offence or as a third party in possession of information relevant to an investigation. Such a legislative requirement would be a positive development in the proposed scheme and could be further complemented by the introduction of an advocate to assist in the determination of public interest factors.

The introduction of a PIA or PIM regime in the context of the Notice to Produce proposal could also serve to promote an adversarial process in a manner similar to what occurs under the *Telecommunications (Interception and Access) Act 1979* (Cth) for journalists in terms of mandatory data retention.⁹ Such an approach could be valuable where it assists the decision maker to review the information contained in the application for the Notice or in relation to arguments concerning compliance with the Notice more thoroughly and from more than one perspective.

Comparison with existing Notice to Produce schemes

The Law Council notes that the existing Notice to Produce regime in Division 4B of the Crimes Act is directed primarily at terrorism offences and serious non-terrorism offences and therefore operates in such a way that is different to how the proposed Notice to Produce scheme relating to press freedoms should operate. Of concern to the Law Council are the following features of the Notice to Produce framework in Division 4B of the Crimes Act that the Law Council consider problematic and would not support being adopted in any proposed Notice to Produce framework relating to press freedoms. These are:

- that because the notices are issued by a Judge of the Federal Circuit Court of Australia in their personal capacity,¹⁰ this does not provide for a right of judicial review;
- a person is not excused from producing a document on grounds that to do so would disclose material that is protected against disclosure by legal professional privilege

⁹ *Telecommunications (Interception and Access) Act 1979* (Cth), s 180T.

¹⁰ *Crimes Act 1914* (Cth), s 3ZQQ.

or any other duty of confidence¹¹ or would be otherwise contrary to the public interest,¹² excluding presumably, journalist privilege;

- it is an offence to fail to comply with notice under section 3ZQN or 3ZQO;¹³ and
- it is an offence to disclose the existence or nature of notice.¹⁴

The Law Council notes that the existing Notice to Produce regimes in Division 4B of the Crimes Act and section 53 of LEPRA in NSW are directed at evidence held by a third parties. This may justify the above restrictions in the Crimes Act regime on procedural safeguards where the recipients are not themselves the subject of a criminal investigation. However, the Law Council understands that the proposed regime may result in Notices to Produce being served on journalists in circumstances where those journalists themselves may be the subject of a criminal investigation.

In these circumstances it is essential that appropriate procedural and fairness safeguards be afforded to accused journalists to protect the integrity of the evidence gathering process, fundamental rule of law principles such as the right against self-incrimination and ultimately the freedom of the press.

Thank you for the opportunity to provide this supplementary submission. If you have any questions in the first instance please contact Dr Natasha Molt, Director of Policy at Natasha.Molt@lawcouncil.asn.au or on 0406 378 847.

Yours sincerely



Pauline Wright
President

¹¹ Ibid, para 3ZQR(1)(c).

¹² Ibid, para 3ZQR(1)(d).

¹³ Ibid, s 3ZQS.

¹⁴ Ibid, s 3ZQT.