

GUIDELINES AS TO THE EXECUTION OF SEARCH WARRANTS

Contents

There are two documents that Police need to be aware of in regard to the execution of search warrants on barrister's chambers. They are:

1. Search Warrants Protocol by the Bar Association of New South Wales and the Commissioner of the New South Wales Police Force

The purpose of the protocol is to state in broad terms the principles of law in force in the State of New South Wales governing the issue and execution of search warrants and the principles governing the exercise of the common law right of a client's legal professional privilege.

2. Statement of General Guidelines as to the Execution of Search Warrants on Barristers' Chambers Made by the Commissioner of the New South Wales Police Force and the Bar Association of New South Wales

The general guidelines are the standard operating procedure relevant to the execution of search warrants on barristers' chambers.

These documents may be reviewed from time to time and take into consideration new issues, legislation and case law and to provide additional information if required or necessary.

Search Warrants Protocol by the Bar Association of New South Wales and the Commissioner of the New South Wales Police Force

1. Introduction

The purpose of this protocol is to state in broad terms the principles of law in force in the State of New South Wales governing the issue and execution of search warrants and the principles governing the exercise of the common law right of a client's legal professional privilege.

2. Legislation

1. The issue of search warrants under New South Wales law is authorised and regulated by the *Law Enforcement (Powers and Responsibilities) Act 2002* ("the Act") and the *Law Enforcement (Powers and Responsibilities) Regulation 2005* ("the Regulation").

2. Search Warrants may be issued under Pt. 5 of the Act in respect of "searchable offences". These include: an indictable offence, a firearms offence, a narcotics offence, a child abuse material offence or an offence involving a thing stolen or otherwise unlawfully obtained (s. 46A). "Covert

search warrants" may be issued in respect of certain offences which are prescribed in s. 46A as "serious offences" and "criminal organisation warrants" in respect of "serious indictable offences" (punishable by 5 years imprisonment or more- s. 3) which are planned, organised, structured or otherwise carried out in such a manner as to indicate that the activity is carried out on more than one occasion and involves more than one participant, and is carried out for profit or gain (s. 46A).

3. An "eligible issuing officer", defined in s. 46 as an "authorised officer" being a Magistrate or a Children's Magistrate, a Registrar of the Local Court, or an employee of the Attorney General's Department authorised by the Attorney General either personally or by virtue of being the holder of a particular office (s. 3) or (in the case of a covert or criminal organisation search warrant) an "eligible Judge" (as defined in s. 46B) may issue a search warrant:

- upon consideration of an application in the prescribed form;
- which is verified before the eligible issuing officer on oath or affirmation or by affidavit; and which
- specifies the matters set out in s. 62 of the Act as applicable to that type of warrant.

4. Section 61 of the Act allows for the issue of a telephone search warrant where the eligible issuing officer is satisfied that the warrant is required urgently and that it is not practicable for the application to be made in person.

3. Case Law

1. It has been recognised judicially that the power to enter, search and seize is an invasion of a strongly protected liberty of the subject. Accordingly, a court will construe such statutory powers strictly resolving ambiguities in favour of the subject, and will insist on strict compliance with the statute and the conditions on which the warrant is authorised: *Tran Nominees Pty Ltd v Scheffler, Raven and the State of South Australia* (1985) 20 A Crim R 287; *Inland Revenue Commissioners; Ex parte Rossminster* [1980] 2 WLR 1 and *Crowly v Murphy* (1981) 52 FLR 123.

2. Adequate protection of the privacy and liberty of the individual has been stated to be the "essential mark of a free society": per Wilson J in *Baker v Campbell* (1983) 153 CLR 52 at 95. That case restated in clear terms the fundamental common law right of an individual to make various confidential communications with his or her legal representative. This common law right is properly called a client's legal professional privilege, which is not to be abrogated except in the clearest terms or by clear indication of legislative intent *Daniels Corporation International Pty Limited v ACCC* [2002] HCA 49.

3. Stated briefly, the client's legal professional privilege attaches to:

- confidential communications between a client and his or her lawyer: *Ritz Hotel Ltd v Charles of the Ritz Ltd* [No 22] (1988) 14 NSWLR 132;

- which are referable to the professional relationship of legal advisor and client: *Somerville v Australian Securities Commn* (1995) 131 ALR 517; 13 ACLC 1,527;
- which are made for the dominant purpose of enabling the client to obtain, or the lawyer to give, legal advice: or of being used in actual or contemplated litigation: *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49.

4. It is acknowledged that the client's legal professional privilege does not apply:

- to communications made pursuant to, or to facilitate the commission of, a fraud, crime or illegal purpose: *A-G for Northern Territory v Kearney* (1985) 61 ALR 55; or
- to communications made before the client contemplates obtaining, or the legal representative contemplated giving, legal advice or before litigation has commenced or is anticipated; or
- to protect things lodged with a solicitor simply for the purpose of obtaining immunity from prosecution; or to physical objects, eg cash or bullion contained in a safety deposit box.

5. The legal professional privilege, being that of the client, may be waived by the client.

4. General

1. It is agreed that the principles stated herein do not claim to be an exhaustive statement of relevant legal principle, which may from time to time be affected by legislation or by relevant binding judicial decisions. Any such change shall be acknowledged by supplemental agreement.

2. The practice agreed to be followed in the execution of search warrants is set out in the general guidelines, which are attached to this protocol and signed by the parties.

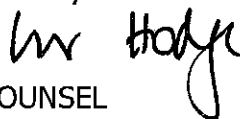
Dated: 21 January 2013

ACCEPTED on behalf of the BAR ASSOCIATION OF NEW SOUTH WALES by:



PRESIDENT

ACCEPTED on behalf of the COMMISSIONER OF THE NEW SOUTH WALES POLICE FORCE by:



GENERAL COUNSEL

Clair Hodge
General Counsel
NSW Police Force

Statement of General Guidelines as to the Execution of Search Warrants on Barrister's Chambers by the Commissioner of Police for New South Wales and the Bar Association of New South Wales

1. 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 barrister upon whose chambers the search warrant is to be executed may want to take legal advice as to those matters.

1A. These guidelines do not apply to "covert search warrants" issued pursuant to s. 47(3) of the Act.

2. Upon attendance at the barrister's chambers, the officer-in-charge of executing the warrant should explain the purposes of the search and should invite the barrister (or any responsible person attending on behalf of the barrister) to co-operate with the police in the conduct of the search. The barrister/responsible person should also be advised that a document will not be seized if, on inspection, the officer-in-charge considers that it is not within the warrant or is subject to legal professional privilege. Identification of the senior officer and all other members of the search team should be provided to the barrister or other responsible person. The search team should be kept to the lowest number of persons reasonably necessary in all the circumstances.

3. If the barrister is not in attendance at the chambers then, if practicable, the chambers should be sealed and execution of the warrant deferred for a period which the officer-in-charge in his or her discretion considers reasonable in all the circumstances to enable any barrister, or responsible person connected with the premises (for example, the clerk of the floor on which the barrister's chambers are located) to attend or, if that is not practicable, to enable arrangements to be made for another person to attend.

4. If the barrister/responsible person requests a copy of the search warrant in addition to being shown the original warrant, this should be provided.

5. The barrister (or the responsible person on the barrister's behalf) should be given a reasonable period of time to enable him or her: (i) to consult with his or her instructing solicitor and/or client, and: (ii) to obtain legal advice. Where the barrister is not in attendance, the responsible person should be given a reasonable period of time to consult with the barrister and relay instructions to the officer-in-charge on the barrister's behalf. 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 reasonable delays to allow the relevant consultation to take place and for any advice to be provided.

6. After the barrister/responsible person has consulted with the persons specified above and has obtained any legal advice sought, the barrister/responsible person should, consistent with the instructions of the

client(s)/instructing solicitors), co-operate with the police officers by assisting them in locating all documents which may be within the warrant. If the police officers in attendance require access to the office index systems the barrister/responsible person should assist if necessary by explaining the index system to them.

7. Where the barrister or responsible person on the barrister's behalf agrees to assist the search team the procedures set out below should be followed:

1. in respect of any documents identified as potentially within the warrant, the officer-in-charge should, before proceeding to further execute the warrant (by inspection or otherwise), give the barrister the opportunity to claim legal professional privilege on behalf of his or her client(s). If the barrister makes a claim of legal professional privilege, he or she should indicate to the officer-in-charge the ground upon which the claim is made and in whose name the claim is made;

1A. a pseudonym may be used to identify documents over which a claim of legal professional privilege is made, but only if the disclosure of the client's name would in itself disclose a confidential communication, made for the dominant purpose of obtaining legal advice. A claim for Legal Professional Privilege under a pseudonym may be justified where the barrister is specifically retained for the purpose of providing legal advice as to the passing of that information to a third party, without disclosing the name of the client (see for example: *Z v New South Wales Crime Commission* [2007] HCA 7).

2. in respect to those documents which the barrister claims are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines set out below. In respect of the remaining documents, the search team may then proceed to complete the execution of the warrant.

8. All documents which the barrister claims are subject to legal professional privilege shall, under the supervision of the officer-in-charge, be placed in a container by the barrister/responsible person or his or her agent. The container shall then be sealed. In the event that the barrister/responsible person desires to take photographs of any of those documents, he or she shall be permitted to so do, under the supervision of the police officers and at his or her expense, before the documents are placed in the container.

9. A list of the documents shall be prepared by the search team, in co-operation with the barrister, on which is shown general information as to the nature of the documents.

10. That list and the container in which the documents have been placed shall then be endorsed to the effect that, pursuant to an agreement reached between the barrister and the officer-in charge, and having regard to the

claims of legal professional privilege made, 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 clerk to the eligible issuing officer who issued the warrant or other independent party (referred to below as the "third party") agreed upon by the barrister and the officer-in-charge pending resolution of the disputed claims.

11. The list and the container in which the documents have been sealed shall then be signed by the officer-in-charge and the barrister (or, if the barrister is not present, the responsible person on his or her behalf).

12. The officer-in-charge and the barrister/responsible person or agent, 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.

13. If within three clear working days (or such longer period as may reasonably be agreed by the parties) of the delivery of the documents into the possession of the third party, the barrister/any instructing solicitors inform the officer-in-charge or his or her agent and the third party or his or her agent that instructions to institute proceedings forthwith to establish the privilege have been received from the client on whose behalf the barrister claimed the privilege, then no further steps shall be taken in relation to the execution of the warrant until either:

1. a further period of one clear working day or such further period as may reasonably be agreed elapses without such proceedings having been instituted; and/or
2. proceedings to establish the privilege have failed; or
3. 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.

14. 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 documents shall be held by the Registrar pending the Order of the Court.

15. Where proceedings to establish the privilege claimed have not been instituted in accordance with the time periods specified in cl. 13 above, or an agreement to release some or all of the documents has been reached, the parties shall attend upon the third party and shall advise him or her as to the happening of those matters and shall request, by consent, release into the possession of the officer-in-charge of all the documents being held by the third party or, where the parties have agreed that only some of the documents held by him or her should be released, those documents.

16. In those cases where the barrister/responsible person refuses to give co-operation, the officer-in-charge should politely but firmly advise that the search will proceed in any event and that because the search team is not familiar with the filing systems of the barrister, this may entail a search of all files and documents in the barrister's chambers in order to give full effect to the authority conferred by the warrant. The barrister/responsible person should also be advised that a document will not be seized if, on inspection, the officer-in-charge 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.

17. In all cases, the officer-in-charge shall be conscious of the confidential nature of the documents in client files and the likelihood that they contain the private disclosures by innocent clients. The officer in charge shall properly instruct all police involved in the search on the correct procedures rights of the legal representatives and their clients' privilege, and the lawful extent of police powers.

18. Subject to any claim of the client's legal professional privilege, if the barrister gives the officer-in-charge his or her personal and professional assurance that all the files or records of the named client are in a particular location or recorded under a particular client identifier, the officer-in-charge should respect that assurance and ensure that search is confined accordingly. This will not apply where it is suspected that the barrister is involved in the commission of the offence being investigated under the search warrant or has some other motive for being untruthful.

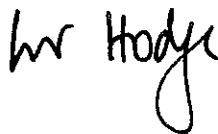
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