

Guidelines as to the execution of search warrants

(3 May 1995)

Policy – search warrants

The policy relating to the execution of search warrants on the premises of solicitors or the Law Society of New South Wales was adopted by the Council of the Law Society of New South Wales on 29 September 1994 and was the subject of agreement with the Commissioner of Police for New South Wales on 3 May 1995.

The policy comprises:

1. A protocol which states:
 - 1.1 the principles of New South Wales law governing the issue and execution of search warrants; and
 - 1.2 the principles attaching to claims that particular communications, documents or things may be the subject of the common law right of a client's legal professional privilege.
2. A statement of general guidelines to be observed in relation to the execution of search warrants on the premises of solicitors or the Law Society.

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

Search Warrants Protocol by the Law Society of New South Wales and the Commissioner of Police for New South Wales

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

- 2.1 The issue of search warrants under New South Wales law is authorised and regulated by the Search Warrants Act 1985 ("the Act") and the Search Warrants Regulation 1986 ("the Regulation").
- 2.2 Search warrants may be issued under Pt 2 of the Act in respect of an indictable offence, a firearms offence, a narcotics offence or a thing stolen or otherwise unlawfully obtained or under certain Acts specified in Pt 3, s 10 of the Act.
- 2.3 An authorised justice, being a Magistrate, or a Justice of the Peace who is the clerk of a Local Court or one employed in the Department of Courts Administration declared by the Minister administering the Act to be an authorised justice, may issue a search warrant:
 - upon consideration of an application in the prescribed form;
 - verified before the justice on oath or affirmation or by affidavit; and

- in the case of Pt 2 search warrant stating that the applicant has reasonable grounds for believing that there are, or within 72 hours will be, in or on any premises certain stated things connected with a stated indictable offence/firearms offence/narcotics offence or which were stolen or otherwise unlawfully obtained and setting out the grounds relied upon; and
- in the case of other search warrants, specifying the section and Act under which the search warrant is sought, stating that the applicant has reasonable grounds for believing stated matters which justify the application for the search warrant and specifying the specific functions sought to be performed on entry.

2.4 Provision is made in s 12 of the Act for the issue of a telephone search warrant where the authorised justice 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

3.1 It has been recognised judicially that the power to enter, search and seize is an invasion of a strongly protected liberty of the subject and that the court will construe such statutory powers strictly, resolving ambiguities in favour of the person concerned, 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 *Crawly v Murphy* (1981) 52 FLR 123.

3.2 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 confidential consultation with his or her solicitor in which legal advice is given and received. 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 sufficient indication of legislative intent.

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

- communications between a client and his or her lawyer, if the communications are for the sole purpose of enabling the client to obtain, or the lawyer to give, legal advice: *Grant v Downs* (1976) 135 CLR 674; and to
- documents and things brought into existence for the sole purpose of being used in actual or contemplated litigation or administrative proceedings: *Baker v Campbell* (1983) 153 CLR 52.

3.4 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: *Attorney General for Northern Territory v Kearney* (1985) 61 ALR 55; or
- before the client contemplates obtaining, or the solicitor contemplated giving legal advice; 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.

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

4. *General*

4.1 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.

4.2 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 this 3rd day of May 1995

ACCEPTED on behalf of the
LAW SOCIETY OF NEW SOUTH WALES

PRESIDENT

ACCEPTED by the
COMMISSIONER OF POLICE
FOR NEW SOUTH WALES
COMMISSIONER

Statement of General Guidelines as to the Execution of Search Warrants on the Premises of Solicitors or the Law Society made by the Commissioner of Police for New South Wales and the Law Society of New South Wales

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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 solicitor or the Law Society upon whose premises the search warrant is to be executed may want to take legal advice as to those matters.

2. Upon attendance at the premises of the solicitor or the Law Society, the officer-in-charge should explain the purposes of the search and should invite the solicitor or the Law Society to co-operate with the police in the conduct of the search. The solicitor or the Law Society 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 solicitor or a representative of the Law Society. The search team should be kept to the lowest number of persons reasonably necessary in all the circumstances.

3. If no solicitor or representative of the Law Society is in attendance at the premises which are 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 officer-in-charge in his or her discretion considers reasonable in all the circumstances to enable any solicitor or responsible person connected with the premises to attend or, if that is not practicable, to enable arrangements to be made for another person to attend the premises.

4. The solicitor concerned or the Law Society should be provided with a copy of the search warrant in addition to being shown the original warrant, if production is demanded by them.

5. A reasonable time should be allowed to the solicitor, to enable him or her to consult with the client(s) concerned, or to the Law Society, to enable it to consult with the legal representatives of the persons to whose affairs the documents relate, and/or for the solicitor or Law Society to obtain legal advice. 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 solicitor or the Law Society wish to contact the client(s) concerned or the legal representative of the persons to whose affairs such documents relate, or for either the solicitor or the Law Society to take legal advice.

6. The solicitors having informed the client(s) of the position or the Law Society having informed the legal representatives of the persons to whose affairs the documents relate of the position, and/or either having obtained legal advice, the solicitor or the Law Society should, consistent with the solicitor's obligations to all clients of the practice and the instructions of the persons to whose affairs the documents relate, or their legal representatives, 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 solicitor or the Law Society should assist if necessary by explaining the index system to them.

7. Where the solicitor or the Law Society agrees to assist the search team the procedures set out below should be followed:

7.1 in respect of all documents identified by the solicitor or the Law Society and/or further identified by the police as potentially within the warrant, the officer-in-charge should, before proceeding to further execute the warrant (by inspection or otherwise) and to seize the documents, give the solicitor or the Law Society the opportunity to claim legal professional privilege on behalf of the client(s) in respect of any of those documents. If the solicitor or the Law Society asserts a claim of legal professional privilege in relation to any of those documents then the solicitor or the Law Society should be prepared to indicate to the police officer the grounds upon which the claim is made and in whose name the claim is made;

7.2 in respect of those documents which the solicitor or the Law Society 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 solicitor or the Law Society claims are subject to legal professional privilege shall, under the supervision of the officer-in-charge, be placed in a container by the solicitor and/or his or her staff, or the Law Society and/or its representatives. The container shall then be sealed. In the event that the solicitor or the Law Society desires to take photocopies of any of those documents he or she or the Law Society shall be permitted to so do, under the

supervision of the police officers and at the expense of the solicitor or the Law Society, before they are placed in the container.

9. A list of the documents shall be prepared by the search team, in co-operation with the solicitor or the Law Society, 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 solicitor or the Law Society and the officer-in-charge, and having regard to the claims of legal professional privilege made by the solicitor on behalf of his or her client(s) or the Law Society on behalf of the persons to whose affairs these 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 clerk to the authorised justice who issued the warrant or other independent party (referred to below as the "third party") agreed upon by the solicitor or the Law Society 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 solicitor or a representative of the Law Society.

12. The officer-in-charge and the solicitor 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.

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 solicitor or the Law Society has informed 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 solicitor claimed the privilege, or from the person 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:

13.1 a further period of one clear working day (or such further period as may reasonably be agreed) elapses without such proceedings having been instituted; or

13.2 proceedings to establish the privilege have failed; or

13.2 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 are not instituted within three clear working days (or such further period as may have been agreed between the parties) 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 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 of 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 solicitor or the Law Society 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 office systems of the solicitor or the Law Society, this may entail a search of all files and documents in the solicitor's or the Law Society's offices in order to give full effect to the authority conferred by the warrant. The solicitor or the Law Society 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 to a solicitor who is properly and professionally attending to the clients' affairs or to the Law Society in respect of persons to whom such documents relate. The officer in charge shall properly instruct all police involved in the search on the correct procedures rights of the solicitors 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 solicitor or representative of the Law Society 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. The personal and professional assurance of the solicitor will not apply where it is suspected that the solicitor is involved in the commission of the offence being investigated under the search warrant. In particular the methodology employed should not constitute a negative search and should have sensitive regard to the filing systems employed in that office.

DATED this 3rd day of May 1995

ACCEPTED on behalf of the
LAW SOCIETY OF
NEW SOUTH WALES by:

PRESIDENT

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COMMISSIONER OF POLICE
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