

Memorandum

To: Directors
Section Chairs
Presidents and CEOs of Constituent Bodies

From: Arthur Moses SC, President

Date: 19 December 2019

Search Warrant Guidelines Between the Law Council of Australia and the Australian Federal Police

Action Request

No action required, for noting only.

Key issues

1. The issue of relations between the legal profession and police has assumed greater significance following the revelations of the deliberate, serious breaches of client legal privilege in the 'Lawyer X' case.
2. It is timely to ensure that effective guidelines and protocols are in place to address the intersection between legal professional privilege, a legal practitioner's duty of confidentiality and the process of evidence gathering by investigative and law enforcement agencies.
3. The recent appointment of Mr Reece Kershaw APM, who was sworn in as the eighth Commissioner of the Australian Federal Police (**AFP**) in October 2019, has provided an opportunity to reignite interest in this project which has stalled since October 2017.
4. Following a meeting with Commissioner Kershaw and Ms Alison Macdonald, General Counsel of the AFP on 17 December 2019, the AFP has undertaken to provide the Law Council with its views on updating existing guidelines regarding the execution of search warrants on lawyers' premises, by 31 January 2020 with a meeting to take place in February 2020.

Background

5. In 1997, the Law Council and the AFP developed Guidelines regarding the execution of search warrants on lawyers' premises (**the 1997 Guidelines - Appendix 1**).
6. On 26 April 2016, the AFP provided the Law Council an updated version of the 1997 Guidelines. At that time, the AFP informed the Law Council that the process of revising the 1997 Guidelines was initially undertaken in response to Recommendation 8-19 of the Australian Law Reform Commission's report, '*Privilege*

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in Perspective: Client Legal Privilege in Federal Investigations' (ALRC Report). The AFP provided the Law Council a revised draft of the Guidelines as a starting point for consultation, and indicated that if 'a more comprehensive revision of the Guidelines in their entirety is desirable, [the AFP] would be open to that approach'.

7. On 12 January 2017, The Law Council circulated a memorandum to Constituent Bodies, Sections and Committees, seeking input and comment on the AFP's draft updated Guidelines. Input was received from the Law Council's Taxation Committee, the Queensland Law Society, the Law Society of South Australia, and the Bar Association of New South Wales (**the responding bodies**). Overall, the responding bodies were concerned that the AFP draft Guidelines did not sufficiently protect client legal privilege (also known as legal professional privilege) which must be the 'paramount consideration' when drafting new Guidelines. For example, the Queensland Law Society indicated that it '[could] not support the introduction of the proposed guidelines in the current form' and that 'the draft guidelines erode the fundamental legal right of Legal Professional Privilege'.
8. Given the issues raised by responding bodies, and the unanimous concern as to the lack of suitability of the AFP revised draft Guidelines, it became clear that piecemeal edits by the Secretariat to the Guidelines would not suffice. The Secretariat formed an informal working group, comprised of experts on privilege, legal practice and criminal law (**Working Group**), to advise on the content of the Guidelines and the best approach forward given the difficulties identified by responding bodies.
9. The Working Group determined that the revised draft Guidelines would need to be reconceived, in a way that accounts for lawyers' professional obligations, the current case law around privilege and federal legislation, while remaining sufficiently flexible and general to be useful to the AFP. It was decided that the Guidelines should be based on the Search Warrant Guidelines between Queensland Law Society and the Queensland Police Service for Search Warrants Executed on Solicitors' Premises (**QLS/QPS Guidelines – Appendix 2**), which addressed many of the issues outlined above.
10. After negotiation with Law Council Constituent Bodies, Sections and Committees over a period of approximately six months, revised draft Guidelines were then provided to the AFP on 23 June 2017 (**Appendix 3**), with the intention that they would be the subject of ongoing discussions between the Law Council, AFP and potentially, the Federal Court of Australia. A letter was also sent to the AFP which set out the feedback received from Constituent Bodies and Committees regarding the inadequacy of the draft provided by the AFP (**Appendix 4**).
11. On 13 October 2017, the Law Council met with the AFP to discuss the updating of the Guidelines. The Law Council was represented by the then Co-Chair of the National Criminal Law Committee, Mr Tim Game SC, and Privileges and Immunities Committee Chair, Mr Ian Bloemendal, with support from the Secretariat.
12. At the meeting, both the AFP and Law Council agreed that the principles that should underpin the new draft Guidelines should be those relevant to client legal privilege and Recommendation 8-19 of ALRC Report. The Law Council and AFP also agreed

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that the objectives of the Guidelines should be to preserve the integrity of the process and the evidence.

13. Key issues raised by the AFP in response to the Law Council's draft proposed Guidelines were that it did not sufficiently respond to the operational and practical aspects of executing a warrant and existing AFP protocols, especially regarding the seizure of electronically stored information. For example, the AFP did not consider the storage at the Federal Court registry of material over which a privilege claim has been made to be practical in terms of processing that information for the solicitor's review to determine if material over which a privilege claim has been made is indeed privileged. Nonetheless, the AFP considered that the preservation of privilege and facilitating agreement on privilege claims between the parties without involving the court (if possible) should be key considerations.
14. Despite the above noted views, it appeared that the Law Council and AFP had broad agreement regarding core aspects of the draft Guidelines such that it will be possible to prepare and settle agreed updated Guidelines in the future.
15. The AFP subsequently agreed to prepare the next draft of the Guidelines, based on the Law Council's current draft, and considering concerns raised in the Law Council's letter to the AFP. The AFP indicated that the Law Council could expect to receive a further draft by the end of 2017 or early 2018. This has not occurred to date.
16. The Secretariat has attempted to raise this issue with the AFP on numerous occasions between March and late September 2019. Those responses received from the AFP have indicated capacity constraints in progressing the next draft of the Guidelines.
17. On 1 November 2019, I wrote to Mr Reece Kershaw APM, congratulating him on his appointment as AFP Commissioner, and seeking to schedule a meeting to discuss the Guidelines.
18. On 17 December 2019, together with Chris Brown, Senior Policy Lawyer at the Law Council, I met with Commissioner Kershaw APM and the General Counsel of the AFP, Alison Macdonald. In the course of the meeting the Commissioner directed the General Counsel to prepare a response to the proposed draft guidelines provided by the Law Council by the end of January 2020. It was also agreed there will be a further meeting in February 2020 between the General Counsel and nominated persons from the Law Council.
19. I have requested all Sections be consulted on this project to ensure there is consistency with other projects concerning legal professional privilege including work being undertaken by the Business Law Section with the Australian Taxation Office.

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Contact

In the first instance please contact Christopher Brown, Senior Policy Lawyer, at Christopher.Brown@lawcouncil.asn.au or on 02 6246 3732 if you would like any further information or to provide comment.

A handwritten signature in black ink, appearing to read "A. Moses".

Arthur Moses SC
President