

**SPEAKING NOTE FOR AJLS PANEL MEETING ON**  
**28 NOVEMBER 2005.**

**Relationship with the Legal Aid Department**

Let me first of all say, that over the years the Department of Justice and the Legal Aid Department have enjoyed an excellent and harmonious professional relationship.

**The Panel Papers**

Members have seen the paper prepared by the Director of Legal Aid, which included a copy of the joint press statement of the Director and of the Commissioner of Police, made in respect of the judicial review proceedings initiated by the Director and the search warrants issued by the Court on the application of the police in the case in which some members of this panel are interested. Although reference is made in the Director's paper to two search warrants, in fact there was only ever one search warrant in force at any time; the court will not issue a second search warrant for the same premises in respect of the same material whilst another warrant remains in force.

In our paper we deal with the law in respect of Legal Professional Privilege, and when Legal Professional Privilege does not apply in relation to material in the hands of a legal advisor i.e. material which came into existence in furtherance of a crime. Where such material does exist the lawyer either knows that the material is for the furtherance of a crime, and is thus party to it or, having been deceived by his client, he does not know of the criminal nature of that material.

**The Material in this Case**

It has always been our position that the material in this case, which was in the possession of the Legal Aid Department, was material in furtherance of a crime, which that Department possessed without knowledge of the nature of the material. This was pointed out to staff of the LAD, but we accept that LAD

had a duty to their client, to ensure that this was so, before handing the material to the police.

I would like to emphasise that this was not a case where the police merely barged into the Department, without prior notice, demanding that the material be handed over. It is only where there is justifiable concern that the material will be destroyed or hidden by the lawyer that it may be necessary for the police to execute a search warrant without prior notice to the lawyer, but that was certainly not the position here.

Before dealing with events in respect of the issue and execution of the search warrants, I think it is important to remind members of the facts of the criminal cases in which the LAD's client was involved.

#### **Brief facts of the criminal cases**

I am able to say that the defendant in these cases is a thoroughly evil man, who is now serving sentences of imprisonment totalling 10 years. I am not suggesting, however, that he was not thereby entitled to have his legal rights protected by his lawyers, but I merely wish to put this matter in perspective.

In the first case, it was alleged that the defendant had raped his 14 year old daughter on two occasions in 2001. That case was listed for trial in the Court of First Instance in January 2005. At the time that the case was set down for trial none of the family members of the defendant and the victim were to be prosecution witnesses.

On 4 January 2005, the defendant's second son, the brother of the victim, was contacted by the Police Officer in Charge of the Case, to clarify a matter raised by prosecuting counsel. It was then revealed to the police that statements made by the defendant's elder son, daughter-in-law and wife, which supported the position then being advanced by the defendant, that he was not guilty of the rape charges, were false and had been coerced by the defendant by threats of violence. The second son had refused to provide his

father with a false statement, even though his father had threatened him and attacked him with an axe.

Further statements were taken from all those persons, and these were served on the solicitor representing the defendant, who had been assigned to handle this case by the Director of Legal Aid.

Thereafter the defendant pleaded guilty to the first count of rape, and the second charge was left on the Court file. He was sentenced to 6 years and 8 months imprisonment.

The police further investigated the matter of the false statements, and seized from the defendant's home some 21 pages of statements and draft statements, purportedly made by the defendant's elder son, daughter in law and wife. It was suggested that these documents, or some of them, had been faxed by the defendant to his solicitor, to be used in his defence in the rape trial. The fax machine record for the fax machine in the defendant's residence showed that a total of 5 faxes had been sent from that machine to the solicitor's office, but the police were uncertain which papers had been sent, and which had not been sent. This was important evidence in respect of a prospective charge of doing acts tending and intended to pervert the course of public justice.

#### **The search warrants**

This was an unusual situation, because the police were not after the original documents – they had those; they wanted the fax copies bearing the imprint of the sender's telephone number received by the defendant's solicitor, to prove which documents had been sent by the defendant to the solicitor for use in his rape trial, in an attempt the pervert the course of justice.

Acting on legal advice, the Police contacted the solicitor who had handled the rape case on behalf of the defendant. It transpired that the documents had been returned with the relevant file to the Legal Aid Department.

On the 22 February 2005, the case officer telephoned the Legal Aid Department, and explained the position to the person who answered the phone. That person handed the phone to a Ms. LIU, who, after hearing what the case officer required, told the case officer that the police would either need to have the written consent of the defendant or a search warrant to obtain the documents from the Legal Aid Department.

On 10 March, having sought further legal advice, the case officer then applied to a Magistrate at Eastern Magistracy, for a search warrant. The learned Magistrate was not satisfied with the information she received for the warrant, and appreciating that legal professional privilege may be involved, declined to issue the warrant without further information.

On 27 April, having revised the information for the search warrant, providing more details, a Senior Government Counsel appeared before another Magistrate at Eastern – the Magistrate that had declined to issue the earlier warrant was not available on that day. The Magistrate that was on duty, having heard counsel and read the information, issued the search warrant.

The case officer then contacted a Mr. Leung, a Senior Law Clerk at the Legal Aid Department, to inform him that a search warrant had been obtained. Mr. Leung, quite properly, indicated that he was not prepared to accept a faxed copy of the search warrant. The next day, the Case Officer went to visit Mr. Leung. It was indicated by Mr. Leung, that the Department would need one or two days to take legal advice in respect of the matter, and a copy of the search warrant was left with him.

On 29 April, a memo was sent to Mr. Leung, asking him to expedite the matter, as the search warrant was still to be formally executed.

On 3 May at 6.40pm, the Legal Aid Department faxed a letter to the police. Concern was expressed about the issue of Legal Professional Privilege and it was indicated that the Legal Aid Department was uncertain from the terms of the warrant, which documents were required. Further, the police were told that

if they did not withdraw the search warrant by noon on 4 May 2005, then legal proceedings would be commenced.

Having been informed of the letter received by the Police on 4 May, Senior Government Counsel wrote to the Legal Aid Department, asking that the proposed legal proceedings be held in abeyance.

On 5 May 2005, Senior Government Counsel and the Case Officer appeared before the original Magistrate at Eastern i.e. the one who declined to issue the warrant on the first occasion. Two applications were made. The first was to withdraw the warrant the other Magistrate had issued on 27 April, and the second was to issue a new search warrant. In the course of those proceedings, the learned Magistrate was apprised of the whole history of the matter in respect of the search warrants, the allegations and the relevance of the documents. Having now been satisfied as to the information she had received, the Magistrate issued a search warrant, which was more specific in its terms [it had a schedule and a copy of each of the 21 documents seized from the defendant's house, attached to it] and the warrant also bore an endorsement:

*"I note this warrant authorizes the search of chambers of counsel/office of a solicitor and that legal professional privilege may be asserted or claimed. In that event those executing the warrant will seal such items upon which legal professional privilege is asserted or claimed and keep them sealed for 7 days in order that any such aggrieved party may institute legal proceedings to establish their claim of privilege, otherwise at the expiry of 7 days from the date of seizure, the items will be unsealed, examined and seized."*

The Case Officer then telephoned the Legal Aid Department to advise that a new warrant had been issued, and then went to the Department about 1 hour later i.e. at about 4.18pm on 5 May, to execute the warrant.

On arrival at the premises the Case Officer handed a copy of the cancelled warrant and the new warrant and attachments, to Mr. Leung. She was informed by Mr. Leung that the police were free to search the 25<sup>th</sup> Floor of the Legal Aid Department in the company of Mr. Leung, that the Department

would not assist the police by producing the relevant file and documents to the police, and that the office closed at 5.15pm, and if the search was not concluded by then, other arrangements would have to be made. The police left the premises empty handed.

In the meantime, unbeknown to the police, the Legal Aid Department had applied for and obtained an interim injunction, prohibiting the execution of the warrant, and this was served on the police late on 5 May after they had returned from the Legal Aid Office.

Thereafter, negotiations between the two Departments took place, and eventually the search warrant and the judicial review proceedings were withdrawn. In regard to the material in the hands of the Legal Aid Department, as indicated in the press release, it was proposed to issue a witness summons for an officer from the Legal Aid Department to appear and to produce the material at court. This meant that any existing claim of legal professional privilege could be dealt with by the trial Judge. In a spirit of co-operation, counsel from the Legal Aid Department provided the police with a witness statement, for use at the trial, but did not, at that time, provide the documents the police required for the trial.

#### **The outcome of the second criminal case**

In the end, it was not necessary to issue the witness summons, because the defendant on 22 August, pleaded guilty to 4 counts of doing acts tending and intended to pervert the course of public justice, and one count of attempting to wound his second son, with an axe, with intent to cause him serious harm. The summary of the facts admitted by the defendant included that the coerced false statements had been faxed to the defendant's solicitor for use in his rape trial.

On 1 September 2005, the defendant was sentenced to 5 concurrent sentences of 32 months imprisonment, to commence at the end of the sentence of 6 years and 8 months he received for the rape offence. This meant that the total of his sentences of imprisonment was 10 years.

**Conclusion**

As we indicate in our paper circulated to members of the panel, we in the Department of Justice, as well as the police and other law enforcement agencies, are very conscious of the importance of the principle of legal professional privilege and the reasons for it. Even where we believe that material is not subject to legal professional privilege, as was the position here, my Department, the police and the ICAC, have in place, guidelines which ensure that if there is an issue of legal professional privilege, every opportunity is given to the person claiming such privilege to pursue such a claim before the material is inspected.

John Reading SC  
Deputy Director of Public Prosecutions.  
28 November 2005.