

LAW REFORM COMMITTEE
Warrant Powers and Procedures Subcommittee
Inquiry into warrant powers and procedures
Sydney — 1 September 2004

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Mr D. Noll, Principal Policy Officer, Criminal Law Review Division, Attorney General's Department, New South Wales.

The CHAIR — Thank you, Daniel, for coming along today. As you probably know, our work as the parliamentary Law Reform Committee is governed by the Victorian Parliamentary Committees Act, which means that the evidence you give to us today is governed by parliamentary privilege. However, unlike what we say in the Parliament, you will have the opportunity to correct and delete anything you do not wish to remain on the record. While we would love to make public your evidence on our web site, and obviously quote from it as appropriate in our report, whether we are able to do that is entirely up to you. You will get an opportunity to review the transcript and indicate what deletions or amendments you would like and whether or not you would like it to be public.

Thank you for taking the time to talk to us. New South Wales is unique in having a Search Warrants Act. Can you tell us a little bit about the review of that act and what the major conclusions of that review have been in terms of the future development of law in this area?

Mr NOLL — Sure. There actually has been, as you probably know, a general review, which has been under way since 2000, of the Search Warrants Act. That has been somewhat delayed because of other developments in the area, and most particularly the development and enactment of the LEPR, which is the Law Enforcement (Powers and Responsibilities) Act, which basically re-enacted the entirety of the Search Warrants Act but with some other provisions of law enforcement powers. So there has been a delay in completing the review of the actual Search Warrants Act in trying to coordinate amendment not only of the Search Warrants Act but getting the LEPR started, which is a major undertaking because it involves the retraining of about 15 000 police officers.

That review itself started in 2000, as I said, and it was based on a working party which was convened by the Criminal Law Review Division, of which I am the principal policy officer. To give you an idea of the representation on that committee, there were officers from the Legislation And Policy Division of the Attorney General's Department, which is a similar unit in the Attorney General's Department to the CLRD, the unit I am from, but deals more with civil law rather than criminal law; we had Privacy New South Wales, the legal services of the New South Wales Police; the Crime Agencies, which is the New South Wales Crime Commission; Local Courts; the New South Wales Bar Association; the Ministry For Police; the Legal Aid Commission; the office of the Director of Public Prosecutions; and the Law Society of New South Wales. From that working party we produced a discussion paper basically asking all of these major stakeholders in the use of search warrants in New South Wales to raise any issues they had. The discussion paper was produced, and I am not entirely sure whether it was made — —

Mr CINA — We have copies.

Mr NOLL — You have copies, so it was made public. Sometimes these things are not made public; they are just for the use internally of the working party.

Mr CINA — We were provided a copy on the condition that it was confidential.

Mr NOLL — That would make sense. The discussion paper produced raised a number of issues and then submissions were sought from all the stakeholders in answer to the issues raised in the discussion paper. That is about the stage that the review has reached. The review has actually been drafted, and I have a copy here, but it has not been finalised or released, and any legislative proposals arising from it have not even been considered by the minister's office yet.

If you have had a chance to look at the discussion paper, because of the broad representation of people on it and the different roles the stakeholders play you can imagine the differing types of submissions that were received. Generally from police and law enforcement agencies obviously you will receive submissions which try to make the warrant powers broader or easier to apply for or less prohibitive. From other stakeholders, such as Privacy New South Wales and from the Legal Aid Commission, you get submissions which will probably not say they should be more restrictive

but just to hold the line and say everything is working as it should, and it should just be reinforced and re-enacted as it is. I am not entirely sure how much detail I can go into about the results of the review itself.

The CHAIR — Do you want to talk a little bit about the issues that were in contest in terms of the review?

Mr NOLL — I can do that.

The CHAIR — And the extent to which the working party reached resolution on some of those issues.

Mr NOLL — The working party actually reached a lot of consensus and some interesting matters arose out of bringing those sorts of people together. Some of the proposals which were made by, for instance, the law enforcement agencies were, at that stage, quite predictable. What they were looking for is extensions of the time periods which were available under the Search Warrants Act. Under the New South Wales Search Warrants Act there is a 72-hour period in which you have to execute the search warrant. The law enforcement agencies pointed to other search warrant schemes and warrant schemes, particularly the Commonwealth scheme, which had longer periods of time. They based their submissions on operational arguments, saying that three days is often too short a time to apply for the warrant and then to be in a position to get the operational police out into the field to execute it. They argue that longer periods — for instance, the seven days, which is available under the Commonwealth regime — were more appropriate from an operational point of view in order to organise the necessary personnel to execute the search warrants.

Mr MAUGHAN — What are the arguments against that? That seems to me to be perfectly reasonable. What are the arguments that can be put against it?

Mr NOLL — The main underlying policy reason is the actual basis of the test. The basis of the test is that there is a reasonable belief that there are things there which have to be seized which are evidence of an offence or a planned offence. By putting a shorter time limit on it you are actually in a sense increasing the power of that argument, that there is evidence or there is the strength of the belief that the thing is there. I do not think there is terribly much difference between 3, 4 or 5 days. Once you get above that level — they might be asking for a month — it really does detract from the underlying principle that you should have a reasonable belief that what you are after is actually in the premises at the time you execute the warrant.

Mr MAUGHAN — It is obviously a fishing expedition.

Mr NOLL — That is exactly right, so somewhere between the 72 hours we have and the extended period there is less and less strength to the assertion that you have a reasonable belief that the thing is going to be there. That is the reason why the time limit was imposed in the first place. There are strong arguments, as I say, for operational reasons to perhaps increase it a little bit. Once it gets beyond a certain point it loses its point about the validity of the argument.

The CHAIR — Can you talk about some of those operational arguments so that I understand it.

Mr NOLL — It really does get down to things like industrial awards, employment conditions and rostering. The police are rostered onto 12-hour shifts in New South Wales, and they are rostered on for a certain period in advance. For operational reasons in Local Area Commands the number of people who are available to execute a search warrant, given the standard operating procedures which are in place for police, means you only have a limited number of people who can do search warrants at any one time. Because the standard operating procedures of the police require things like videorecording of the execution of the search warrant and the attendance of an independent officer, you are talking about a team of four or five people

who are going to be executing the search warrant at any one time, which could be a great drain on the resources of the local area command.

Mr DALLA-RIVA — So they are videotaping now. Is that what you are saying.

Mr NOLL — Yes, it has been the general practice of New South Wales police to videotape the execution of search warrants.

Mr DALLA-RIVA — It does not matter what the search warrant is? It could be a shoplifter who is arrested and the usual practice is that the police may go back to the home with a search warrant. Would that be the case?

Mr NOLL — That is the case, yes. As I said, it is a standard operating procedure so it is ideal practice. I could not assert that that occurred in every single case without fail, but I know that it is a standard operating procedure, so it is what they will do if they can do it.

The CHAIR — We know there are judicial consequences if you do not.

Mr NOLL — That is exactly right. It makes me lead into something which has been developed in the Law Enforcement (Powers and Responsibilities) Act (LEPRA) — that is, the rewriting of part 3A, which is the ability to keep an arrested person at the site of the execution of a search warrant. New South Wales has had some problems with that from the point of view that there have been some ramifications in prosecutions at the Court of Criminal Appeal level where evidence has been ruled inadmissible because of certain practices and assertions, so we have tried to address that legislatively by allowing people who have been arrested at the execution of a search warrant and who usually would have to be conveyed directly back to the police station to be given what we in New South Wales call their Part 10A rights, which are the rights of an arrested person. Part 10A rights only apply to people who are in police stations. That is one of the reasons why once a person had been arrested at the site of a search warrant, they generally were conveyed directly back. It had problems from the point of view that once the person or the occupier is gone there is the possibility at a later stage during prosecutions for there to be some suggestion of impropriety or of things that were found after the person had been removed from the premises. That particularly occurred in a number of cases, so in order to remedy this situation we have tried to develop a scheme where a person who has been arrested can be kept at the site whilst the search warrant is executed, but afforded similar rights to the ones which they will get under Part 10A.

Mr DALLA-RIVA — Part 10A was introduced to ensure that the person arrested was transported as soon as practicable to the police station?

Mr NOLL — Not so much — —

The CHAIR — ‘You have the right to remain silent.’

Mr DALLA-RIVA — I could not understand why you cannot get those rights at the search — —

Mr NOLL — The part 10A scheme is built around being at a police station. For instance, it is built around being taken to the charge room and being signed in by an independent custody manager. All of these just are not unavailable in the field.

Mr DALLA-RIVA — So the consequence of actually trying to do it actually created the problem, because I would have thought it would have been more feasible to have the suspect or the offender present at the site when the search is conducted, and therefore questions could be directed or guidance given.

Mr NOLL — That was exactly the problem — that is, it was ideal that you would want the person to be there.

The CHAIR — And, ‘You have not had a chance to contact your lawyer, been told exactly what your rights are’ in that circumstance or been able to ring anyone, so you have the police questioning you at the site of the search without having gone through the formal procedure of being told what your part 10A rights are?

Mr DALLA-RIVA — We do not have that in Victoria. We issue the caution at the scene or wherever the arrest is made, so it is not an issue that we propose we ought to create. It is a consequential concern as I am hearing it, and that is why I am exploring it. If you create one issue, you then create another problem which the courts have then to adjudicate on, which means the legislators have to come back and fix it up. I wanted to get some clarity on that.

The CHAIR — You can be cautioned at the scene, but if you are going to undergo formal questioning, you are usually taken back to the police station, and you are usually put through a procedure which would allow that questioning to take place. The equivalent here is the part 10A. That is what you are saying, is it not?

Mr NOLL — That is right. The equivalent was derived from PACE in England, and the Part 10A provisions were derived from the Commonwealth provisions. The Commonwealth has a similar scheme. The trouble is that it had a knock-on effect because the part 10A rights are all based on times. You are only allowed to be held for a certain amount of time and questioned for a certain amount of time. If you kept the person, a search warrant —

Mr DALLA-RIVA — We had that, but I thought we got rid of it.

The CHAIR — No, it is still — —

Mr DALLA-RIVA — We had time limits, but — —

The CHAIR — There are still time limits.

Mr NOLL — The trouble was that if you arrested a person at the site of a search warrant and then decided to keep them at the search warrant, all of your time which could otherwise have been taken up in questioning may have been taken up by executing a search warrant. By the time you actually got them back to the police station you did not have any time left in your Part 10A to conduct proper questioning or to comply with the safeguards which are in place. But that has not commenced, so it is part of LEPR which I might talk about a little bit later.

The CHAIR — To clarify, we have two issues.

Mr NOLL — Yes.

The CHAIR — One was the question of the time within which you can execute a search warrant, and there was this debate about three to seven days. You are saying it defaulted back to the original position, which was three days.

Mr NOLL — As I said, the result is still unclear from the point of view that the law enforcement agencies have made submissions that it should be longer.

The CHAIR — That is one of the issues to be resolved?

Mr NOLL — That is right.

The CHAIR — The other question here under LEPR is the capacity to go through the Part 10A procedure at the scene. Is that actually now in practice, or is it still awaiting enactment?

Mr NOLL — It is not in practice. It has been passed by Parliament and it is waiting commencement, but as I alluded to before there are lots — —

Mr MAUGHAN — As part of LEPR

Mr NOLL — LEPR remains uncommenced which is not that great a problem given that the majority of it actually just re-enacted the major law enforcement investigation powers. There are, however, a number of points in LEPR where we have codified the common law or these new schemes which we have developed, like the ability to keep an arrested person at the site of the execution of a search warrant, which are not being practised, and also crime scenes and things like that which are not in practice at the moment but will be when LEPR commences.

The CHAIR — So you are just going through the other issues?

Mr NOLL — Lots of them are really quite operational so the issues in relation to re-entry, for instance, that under the New South Wales act if you came to a place and had to leave there was no power of re-entry so you had to go and seek a new warrant. There were issues about the extension — —

The CHAIR — What was the recommendation of the working party on that?

Mr NOLL — I think that we are going to be looking at that. I think that with the appropriate safeguards it is a sensible provision to have. Of course you have to balance against that, the right to some sort of finality, because you cannot be having the police just popping back whenever they like in any set period. There is some suggestion about safeguards like one's right of re-entry or a power of re-entry which is authorised by telephone to the authorising officer of the search warrant, with some sort of safeguard to ensure that there is some finality that once the police leave, as the occupier, you know that they are not going to be knocking on the door in an hour's time interrupting you. You have your own piece of privacy again.

Mr DALLA-RIVA — How do you balance that though, if in the interview there comes out that one place that you did not expect to find a huge quantity of drugs, he says, 'Oh well, you have got me Mr Copper, there is a kilogram of heroin stashed in the roof somewhere'? Are you saying that you need another warrant to go back, even though he has been arrested under the same drug — —

Mr NOLL — Well, it is not so much a question of arrest, it is that a warrant in New South Wales is only good for one go so once you execute it, you can stay, but if you leave you will need another warrant to re-enter. There are a number of operational reasons why you might want to re-enter. For instance, if you find some sort of electronic equipment which you need an expert to operate you might want to say, 'We do not want to touch the computer because if we do, we might destroy evidence'. 'We have to go away and get someone who is available', which might take time or there might be a delay — if we go away and come back to operate the equipment — I mean there are other operational reasons why you might want to go away and come back again.

The CHAIR — It all makes sense. So you are saying even by telephone by going back to it and authorising — —

Mr NOLL — The authorising magistrate or justice. There are other issues about powers when you are executing search warrants which have become more apparent, and also some of the powers that have been transferred into things like the drug premises and fortified premises legislation. This is about what things you can do before you enter the premises. I am talking about cutting alarms or, to use one of the terms used by the police, 'pacifying dogs'. They mean nobbling them.

There is also this issue about what can be done before you execute a warrant, and this I suppose is specifically directed to major drug operations, where they operate in fortified premises or some

examples were given of the bikie club houses which have security measures specifically designed to thwart police and law enforcement officers coming in. There is some question about what sort of authorisation should be required in a warrant to allow the police to do these sorts of things, like cut off power. Another issue which I never would have thought of is the diversion of sewerage pipes, because in drug premises often the first thing they will do is to flush evidence. So the proposal is: can search warrants allow you to stop, say, the water flow or the sewerage pipes at some premises which you are going to execute a search warrant on?

The CHAIR — Then collect the evidence at the other end?

Mr NOLL — That is right. How would you like that job?

The CHAIR — Was there an agreement that that should be allowed but in particular circumstances?

Mr NOLL — Again, I think that it is something that is well worth considering because it is quite reasonable on operational grounds, but again, I think there have to be reasonable safeguards in place, because what you are talking about is damaging private property in essence. One of the main purposes of the warrant system is to ensure that you balance the powers of law enforcement against the powers of a private person with interests and property also remembering that the property you might be damaging might not even belong to the person who may turn out in the long run to be the offender. If they are in a leased house or a rented house, you are actually damaging the property of the landlord rather than the actual occupier. You are interested in the occupier from a law enforcement point of view but the rights you are impinging are another person's who has no knowledge of all of this criminal activity.

Mr DALLA-RIVA — Is it not the role of an independent person to correct that damage? Do you have that process in New South Wales?

Mr NOLL — I would not like to talk for the police administration but I do know that they have a preference of rather than having established compensation schemes in legislation, they prefer to deal with things in ex gratia claims. I know that that is the way they prefer it but I would not be able to talk to you about the policy behind that. They actually prefer to settle a lot of these things by having the people who have their rights affected, making their claim and settling it ex gratia rather than having any established statutory scheme of saying, 'Any damage caused by law enforcement will be' — —

The CHAIR — Some people might have trouble coming forth if they might have knowingly profited from use of the premises.

Mr NOLL — I think this is in part what they rely on; that there are some sorts of inhibitions in some cases for people making claims against the State.

There is also the issue of the extension of the time of service. There is a limit in New South Wales on the time in which a search warrant can be executed and that is between the times of 6.00 a.m. and 9.00 p.m. Again this is an operational argument. You can get authority to execute a search warrant if you have good reason outside those hours, but a more prevalent problem which has come to light is the time that a search warrant will take to actually execute.

So if you execute a search warrant at 5 o'clock in the evening, it is not beyond the realms of possibility that you will actually hit the 9 o'clock mark and under the provisions you will have to stop your search. The operational issue which had to be dealt with was what do you do? Do you stop the search? If you stop the search and have to come back the next morning, you have to get another warrant. Is there some way that we can put some sort of provision in where you can either seek pre-authority to go past that 9 o'clock time limit, or make a telephone call to extend the time.

Against this is the policy that you will see in a lot of the case law, that because of the search warrant's intrusive powers, they should not be exercised at odd times adding to the stress of the people or the occupants of the house as well as the inconvenience of having 10 police officers going over your house at 11 o'clock at night.

Mr DALLA-RIVA — You would not want to upset drug dealers at 11 o'clock at night so it is probably a fair call, with the greatest of respect.

The CHAIR — You can envisage situations where a suspect who may have committed offences is living in a place where others are — —

Mr NOLL — You have group houses, you have multiple-use properties — —

Mr DALLA-RIVA — It was just an interesting assertion, given you said the operational concerns of the police mean it is difficult to get numerous police. And yet there is a restriction of 9 o'clock, which goes against what we are saying because there are clearly not going to be many operational police after 9 o'clock at night anyway. It would have to be a fairly serious offence in the first place. I could not imagine the police knocking down the door of a shoplifter who was arrested during the day. I guess that is our discussion for down the track. We are just trying to work out the reasons for it.

The CHAIR — How was it resolved?

Mr NOLL — I think this is one of the issues which will possibly have to be resolved at ministerial level because there is such strong case law about a prohibition on exercising these sorts of enforcement powers. I personally find it a little bit peculiar because I would think having a search warrant executed on you at 6 o'clock in the morning could be just as shocking and disturbing.

Mr MAUGHAN — Probably more so if you have been out all night burglarising homes!

Mr NOLL — Most people are in bed. There is a little bit of inconsistency in the policy as it now stands in the Act — that, as opposed to having five police knock down your door at 1 o'clock in the morning. I believe there is a great policy difference. However, as I say, there are grey areas.

The CHAIR — And there would be a difference between starting at 5 o'clock and not being completed and starting at 8.59 p.m.

Mr NOLL — That is exactly right. I think this is where there is perhaps room to move if it is an operational reason. If for some reason your operation is going to go over the 9 o'clock limit you can say to the authorising justice that you are going to go over by an hour or two; I think that is something that could be accommodated. However, there is also the issue of, as you say, executing it at 8 o'clock at night and saying you are going to be there for the next 10 hours, which is not beyond the realms of possibility in a large drug operation. Again, we are dealing with that in other ways which are taking it out of the province of search warrants and putting it into the province of things like crime scenes.

Mr DALLA-RIVA — I am glad because I was going to lead into crime scenes. I was going to ask the question when does a search warrant executed then become a crime scene? How do you define that? I was going through the crime scene suggestions in the proposed act. You may not wish to respond, but it would seem to me to be very restrictive on police capacity to conduct a proper investigation of a crime scene when they are given only 10 or 24 hours — I cannot remember the exact time.

Mr NOLL — Is this the New South Wales scheme?

Mr DALLA-RIVA — Yes.

Mr NOLL — This is not my area, but I believe there is an initial crime scene emergency declaration which can be obtained by telephone and there is provision to extend the crime scene by a further 72 hours after the emergency 24 hours have expired — you are actually talking about four days.

Mr DALLA-RIVA — I was thinking of a murder scene where there is no way you would complete the process in 24 hours; it may go for days.

Mr NOLL — I think the extension is up to 72 hours after the emergency application via telephone.

The CHAIR — Can you talk about that a little bit? Telephone warrants are obviously somewhat controversial. I think the act refers to it being urgent and not practicable.

Mr NOLL — That is right. That is another issue that was raised in the working party. The issue was what are the bases on which a telephone warrant should be made. It was argued by law enforcement agencies that ‘practicable to appear in person’ should be removed and it should just be an issue of urgency. Against that was the counterargument of the status quo that the two prongs are a safeguard — that if the ability is there to get a search warrant whenever it is urgent and operationally you left it to the last minute to get a warrant, then all search warrants could be urgent and that would circumvent the safeguards which are in place if you have to seek a warrant in person and in front of an authorised justice.

The CHAIR — That is still obviously pending the proclamation of LEPR, but it sounds like the prongs were maintained.

Mr NOLL — They were, yes.

Mr DALLA-RIVA — In terms of authorised officers, there was some discussion previously about getting access to some of these people after hours and the need to have a duty magistrate who is on stand-by. It may be government policy or whatever, I do not want to go down that path. What is your view on how we should deal with that in a way which actually responds to the changes that are proposed weighed against having easy access to a justice when you need one?

Mr NOLL — In New South Wales the definition of ‘local court’ is quite broad. During business hours you will have a magistrate, as in a judicial officer. After hours we actually have an established after-hours registry which deals specifically with applications of this type; it is based at Parramatta. The after-hours registry is open from the end of business hours at 5 o’clock until 11 o’clock at night. During that time there are very senior court registry staff — the clerk of the court, the deputy registrar of the court of Parramatta — who for the purposes of the Search Warrants Act are authorised justices who can issue search warrants and other warrants just as a magistrate would be able to.

Mr DALLA-RIVA — That is on the phone?

Mr NOLL — If you are in the Parramatta area you can go to them personally, but generally in every other part of the state it will be via phone and faxing of the application. After the after-hours registry shuts there is a roster of authorised justices who are available in 2-hour lots throughout the night. That, again, operates on a very senior officer level in the Local Court administration. They are always available during the rostered period via phone and access to fax. I think it goes through to 5 o’clock or 6 o’clock in the morning and then the after-hours registry — the Parramatta registry — opens up again.

Mr MAUGHAN — Given that the new act will repeal the Search Warrants Act, why are you proceeding with the review?

Mr NOLL — The review will have to be completed and any amendments which arise out of the review will be dealt with in a process where we amend two acts at once — we will amend the not yet commenced LEPR and the operating Search Warrants Act so that when the Search Warrants Act is repealed when LEPR starts we will actually have all of the amendments made to the Search Warrants Act already in existence in LEPR. It will have the effect of statutory review, but will have to be a little bit more complex in the amending stage.

Mr MAUGHAN — You will be amending an act that has not even commenced.

Mr NOLL — LEPR has already been amended a number of times.

Mr MAUGHAN — Has it?

Mr NOLL — It has.

Mr DALLA-RIVA — It is bizarre. It is two years since it was passed and nobody can tell me why that is the case. Is it because of political pressures externally? Again, you do not have to answer, but it just seems that maybe there are some competing interests from other powerful lobby groups which are perhaps putting pressure on. You do not have to answer, but I am curious in the sense that as a committee we may propose certain outcomes. It all looks good on paper, but when it goes to the relevant stakeholders who have to reply or deal with it, it may be those forces that are applied elsewhere that are restrictive.

The CHAIR — What are the reasons, in your view, for the delay in the proclamation of the LEPR legislation?

Mr MAUGHAN — Let us cut to the chase!

Mr NOLL — I could give you the answers, but then I think my evidence would have to be privileged; because there are political reasons why it has not commenced and also budgetary reasons.

The CHAIR — I think that is all pretty normal. We could deal with this off the record for the moment. We will not record this part.

Mr NOLL — If that is possible, I am happy to tell you.

Discussion off record.

The CHAIR — We are back on the record now. In terms of costs of implementing the new act, what have been some of the issues in relation to the videotaping of searches?

Mr NOLL — The main assertion is that two videos rather than one will be required at the execution of a search warrant; meaning that if a person is arrested at any stage during the execution of a search warrant the ideal would be that there would be one camera videoing the search and one on the arrested person being questioned in the same way as if they were taken back to a police station. They would be subjected to Electronically Recorded Interview of a Suspect Room (ERISP) and any body search or frisk search would be videoed as well, because one of the main case law problems which arose out of this situation was an assertion by a person that they had been 'arrested and loaded up'. So that was one of the cases which precipitated these amendments to the legislation, to try and counter those sorts of problems.

Mr MAUGHAN — The other side of that is that the costs of running court cases will be substantially reduced because there is not the challenging of evidence. Therefore looking at it from a whole-of-government point of view, while the cost to police of the video staff and so on will

undoubtedly increase, one would presume that the cost to justice will decrease by maybe a similar amount.

Mr NOLL — I absolutely agree, and this is our main argument. Like all major changes there is a little bit of hesitancy. I think back to other schemes and there was the same sort of hesitancy and fear in law enforcement agencies — for instance, the ERISP scheme had perceived problems when it was introduced. It was thought that it was going to be disaster. But there was a transition period and now ERISP — where a person who has been arrested and interviewed by police is videoed in their interviewing — works very well. The video of the interviewing is available to the defence, the prosecution and the court. It solves all of the problems of people being verballed during the police interview stage. It had such a good flow-on effect and police love it now. But when it was proposed there was great resistance. LEPR will probably go through a similar process.

Mr MAUGHAN — It seems to me that there is an even more important element because justice delayed is justice denied, and if you can speed up the rulings of some of these cases, as I presume it will, it must be good for delivering justice.

Mr NOLL — Hopefully all of these things will become apparent to people once the scheme starts to be used. It is just natural to be uncertain about the unknown. Once people are trained in it they will see the real benefits. They will get better results, and their integrity and rights will be protected as well.

The CHAIR — Is it on the public record what the estimated costs of implementing the videotaping of searches is?

Mr NOLL — No, it is not.

Mr MAUGHAN — Could you have a guess at it?

Mr NOLL — The police make operational estimations and I am in no position to gain insight into it, but from commonsense I would point out that two video cameras will not be required in every single case. I am not entirely sure of the percentage, but there is not a person arrested at every single execution of a search warrant. The two videos and the rights which flow from the person being arrested will only be required when that occurs.

LEPR does not say that if it cannot be done then it cannot be done. All it does is set up a system which is an ideal, which preferably should be adhered to, but if it cannot be, then like all the other schemes, there are always outs provided for in the legislation. In the same way that when we introduced ERISP there were always outs.

If you were arrested and taken to a police station that did not have videoing equipment available, or the batteries were flat or it was broken, or there was only one interview room and it had someone in it, they fell back on the old procedures where people were taped or in the worst case scenario it was done by hand. Similarly, there will have to be a transition period where, operationally, police come to terms with this, so that procedures are put in place where it is not possible to adhere to the principles set out in LEPR, and the second best principles will be adhered to.

One of the issues that was brought to our attention yesterday was the whole question of forum shopping for search warrants. If you are refused a warrant by one magistrate is it possible to go to another officer?

Mr NOLL — Yes, it is.

The CHAIR — And seek the same warrant. Should there be only particular grounds on which you can, if you like, on appeal go and seek a warrant?

Mr NOLL — I do not think it would be an appeal; I think it would be just a reapplication. I do not know who actually raised that issue. I think there is a bit of a furphy about how many search warrants are actually rejected because the percentage is extremely, extremely low.

The CHAIR — Is it?

Mr NOLL — Yes, it is. You are talking about single digit figures.

The CHAIR — Less than 10 per cent?

Mr NOLL — Much less than 10 per cent are rejected. Although I can see there are points of principle here, in practicality very few search warrant applications are rejected. On my advice, specifically from consulting with the after-hours registry at Parramatta in particular, the ones which are rejected are generally rejected because of form rather than substance. Literally the registrar has said to me, ‘Police officers from Goondiwindi will ring up and say, “How do I apply for a search warrant?”’. It is their inability to fill out a search warrant application form that is the problem rather than the actual substance of the application. Often the registrar has said to me that the first application may be rejected, but that once the fault in the form is pointed out and it is corrected the subsequent application will be approved.

Mr DALLA-RIVA — Some argument has been put to suggest that affidavits or evidence have been given to receive search warrants that have been doctored to a subsequent justice. What you are saying is that those cases would be only a handful of the thousands which might be applied for? I guess there is some argument, you could say, to not introduce a regulatory regime which would impose on the courts, the justices and the police — the whole lot — on the basis of what appear to be more administrative rather than other concerns.

Mr NOLL — I think there is no prohibition under — —

This is the thing. I do not think an appeal mechanism is necessary under the Search Warrants Act because there is nothing preventing you from making as many applications as you would like under the Search Warrants Act, with the only proviso being that you have to inform whatever magistrate or authorised justice you are applying to that you have made the previous applications. That is the only thing they have to know about. So if you try 10 times and you want to try an 11th time, the only thing you have to tell the 11th person is that you have tried 10 times before.

The CHAIR — That is a deterrent, really.

Mr NOLL — The thing is that you have tried a couple of times and a couple of people have said no, and that obviously says something about the substance of the evidence which you are putting to the authorised magistrate or justice.

The CHAIR — Yes.

Mr NOLL — I would think if you have tried once and there was nothing wrong with your form and it was rejected on substance, what you would need to do is go away and gather evidence to base your reasonable belief on. I think that is just an operational issue. That is the way the test should work in the Search Warrants Act.

Mr DALLA-RIVA — Because it is a reasonable belief?

Mr NOLL — Yes, it is a reasonable belief.

Mr DALLA-RIVA — The evidence is not beyond reasonable doubt?

Mr NOLL — No, it is a relatively low threshold.

Mr DALLA-RIVA — I think there is some conjecture from some of the legal circles who have the view that it has got to be beyond reasonable doubt to obtain a warrant. It is really only just a reasonable belief on the person, or the applicant?

Mr NOLL — That is correct.

Mr DALLA-RIVA — There is a substantial difference — —

Mr NOLL — A substantial difference.

Mr DALLA-RIVA — In the weighting of the substance to get the warrant?

Mr NOLL — Yes. I think this was an issue that was considered by the working party, and I think the facts which I put to you of where it came to were that there is no prohibition to make further applications. In light of the fact that only a very small amount are rejected, there is really no point in having some sort of review. I think the proposal was that if an authorised justice rejected it you could go to a magistrate, which has all sorts of operational problems, given that magistrates only sit in business hours. There is no such thing as an after-hours magistrate in New South Wales. Magistrates are listed for matters, so that generally if you go to a Local Court you will not be shown to a magistrate; you will be shown to an authorised justice, who will generally be the clerk of the court, who is quite a senior registry official, rather than a magistrate. So there are all these operational issues which would count against the whole idea of some sort of appeal or review mechanism.

The CHAIR — Sure.

Mr DALLA-RIVA — There was a proposal that suggested it ought to be magistrate and above. So you are saying that operationally that would be a very difficult outcome, from your understanding of the operations?

Mr NOLL — I think so. The thing is that during business hours search warrant applications can come from anywhere and at any time. I do not think that, for budgetary reasons and for just normal planning reasons, you could have a magistrate sitting around waiting for applications for search warrants to come in, nor could you expect a magistrate who is in the middle of a matter to say, ‘Look, I am adjourning this matter just to hear this urgent search warrant application’. There are operational issues for police and law enforcement agencies to be able to get search warrants when they need them, and not all the time, but sometimes they need them immediately, and to have the extra factor that they might have to sit around waiting for a magistrate to become available is something that may impact on their investigation.

Mr DALLA-RIVA — It was put to us that some of the authorised officers are perhaps not as gifted as magistrates in reviewing search warrants — to the point of suggesting that maybe training was lacking and that there was a lack of understanding about what they are actually signing? How do you respond to those sorts of comments?

Mr NOLL — I think that could be true. But it is just like in all large organisations, where you will find a variation of skill and ability. From the point of view of our after-hours registry, probably the most experienced people in issuing search warrants and emergency search warrants in New South Wales are authorised justices rather than magistrates, because after 5 o’clock it is these guys and women out in Parramatta who are not magistrates who do all the authorisations of the search warrants. So just as there might be varying abilities within authorised justices, I think you might find that, similarly, there would be varying abilities in magistrates.

The CHAIR — Were those issues or concerns expressed during the course of the review?

Mr NOLL — They were, yes.

The CHAIR — And the recommendations for the — —

Mr NOLL — I think the recommendation is that if there are identified problems there has to be further training of and some sort of system in choosing or designating the person who can act as an authorised — —

The CHAIR — So a level of authorisation?

Mr NOLL — Yes.

The CHAIR — Is any distinction made between the seniority of officers of the court in that respect?

Mr NOLL — Yes, there are. There certainly are from the point of view of the after-hours registry. Generally if you are talking about local courts which operate in country areas, which will only operate during business hours, then you are talking about the clerk of the court, which sometimes in a very small registry can be a relatively lowly graded person, but because of their rank in the registry per se they will be a person of great experience. But nothing can be guaranteed. There are so many variables in these sorts of set-ups.

The CHAIR — Yes, indeed. Were there other issues arising out of the review that you wanted to raise with us?

Mr NOLL — A lot of issues were raised by the Crime Commission. It was submitted that a number of the abilities and powers in the commonwealth scheme should be imported into the New South Wales scheme.

The CHAIR — Such as?

Mr NOLL — Such as the commonwealth has the ability to search boxes and containers in vessels, so you can actually seek a search warrant to search a vessel or a box, which is quite helpful from the point of view of drug importation operations because, unlike search warrants where you would want to search a premises, the actual transfer of the drugs may well be by a box which is being moved from premise to premise. It has been difficult to get a search warrant at the time when the box or the identified parcel is at the premises. Basically you have to make it coincide, so there is a suggestion that there is a need for a search warrant which is directed at the container itself rather than at an address, for instance. That is something which will be addressed, but there are problems with that because there is the need to be able to adequately identify the thing which is the subject of the warrant. That probably would be the main issue with that proposal. There are other things like the ability to lock and seal areas in premises which have been searched. The example might be a basement which you want to preserve to be investigated by experts. There have been some cases in New South Wales about that because it was done and it was ruled to be an invalid exercise of power under a search warrant, so there was a proposal that that should be something which could be done under the Search Warrants Act. But that is a little bit moribund now that we have the crime scene legislation.

Mr DALLA-RIVA — Can I just go back to the crime scene? Where does part 7 come from. Was it created by you guys?

Mr NOLL — Yes, I think it was.

Mr DALLA-RIVA — So it did not emanate from another state, from overseas or the United States of America?

Mr NOLL — It was not my area, but as far as I understand it we developed it ourselves.

Mr DALLA-RIVA — So it is not out of commonwealth legislation?

Mr NOLL — I do not think so, no. The officer who did that part of LEPRa has consequently left CLRD, but I can contact her and give you a written answer if you would like.

Mr DALLA-RIVA — That would be good. Did that come out of that particular case, or was it just a variety of cases?

Mr NOLL — I think it was a variety of cases. I do not think it particularly came out of that circumstance.

Mr DALLA-RIVA — Is this to give some assurance to the law enforcement officers that once they establish a crime scene that it is contained within legislation it therefore enables some certainty that the facility, the house or the building is under police control until such time as they have collected all the evidence necessary and then they can move on?

Mr NOLL — That is right. In effect what the crime scene section did was give a legislative basis for things which were standard operating procedures that police were engaging in anyway. As you can imagine, this is not in force now, and police will always as a matter of course put up their tape, seal off areas and exercise these powers. The question is: where did these powers emanate from? Some of them might be based in common-law powers and the ability to preserve evidence. All of these things were being done, and what part 7 did was say — —

Mr DALLA-RIVA — It is just codifying it.

Mr NOLL — That is exactly right. You are doing it, so let us give it a legislative basis.

Mr DALLA-RIVA — I personally have some issues with some of the content in the time lines, but now that I understand the principles that are attached to it, it makes sense.

Mr MAUGHAN — During the review was there any concern expressed about the effects of warrants on ‘disadvantaged’ people — that is, the homeless, the unemployed, those who were physically or mentally impaired and that sort of group?

Mr NOLL — Some of those issues were raised in relation to the occupier’s notice from the point of view of the ability of a person to understand the process or even read the process — for instance, they could be totally compos mentis, but simply not read English and not understand what the police officer is saying to them. Or they might not be able to read the occupier’s notice, which is in English. The submission from the police administration was that its officers are trained to recognise these sorts of circumstances in all matters, so similarly there are safeguards or standing operating procedures in place to deal with those situations as they arise. Certainly in the Part 10A rights and the Part 3A rights, which we have tried to implement and take across, there are all those sorts of safeguards where if a person is recognised as being mentally ill, has an intellectual disability or does not speak English there are provisions for calling the person’s guardian or in their absence an independent responsible person, or if the person is a foreign national, calling in a translator or a person from the foreign national’s embassy or consulate. There are all those sorts of rights, but they only flow when a person has been arrested. In between there is another grey area where you have to rely on the standing operating procedures of police, and they are trained to recognise these situations because it is in their best interests to recognise them at an early stage and deal with them.

The CHAIR — One of the other issues raised with us yesterday was the question of the review of how warrants are executed and whether it is practicable or feasible to have a quality assurance check, if you like, on the execution of a warrant, whether that is something you leave to the court or whether there should be some other system in place. Do you have any views on that?

Mr NOLL — There are some safeguards in place from the point of view of the property officer. There is a requirement that a person independent to the search be present and to act in the same sort of way a custody manager might, to see that the powers are exercised in the way they

are supposed to be exercised. As you have alluded to, the main checks on these sorts of transgressions are at the end in terms of what the court is going to do because a search warrant is only as useful as the evidence and the admissible evidence which you can gain from it. It will be the court's rulings on the admissibility of the evidence and how it was gained that will go a long way to ensuring that proper procedures are adhered to. We are in no way in the league of, say, the United States of America where they have those principles of illegally obtained evidence. We have much broader provisions which will allow illegally obtained evidence to be admissible in court, so there is a little bit of I would not say flexibility, but it is much broader than the black-and-white approach that the American courts take.

Mr DALLA-RIVA — That was one of my questions. A warrant may be executed for, say, a computer fraud or a white-collar crime and whilst officers are there they find a quantity of drugs or stolen property. Is there anything within the act which prevents those items from being ruled inadmissible because they were not specified on a warrant?

Mr NOLL — No. The act specifically allows it.

Mr DALLA-RIVA — Is there anywhere that is addressed?

Mr NOLL — I will tell you where it is. Section 7(1) of the Search Warrants Act 1985 states:

A member of the police force executing a search warrant issued under this Part:

- (a) may seize a thing mentioned in the warrant, and
- (b) may, in addition, seize any other thing:
 - (i) that the member of the police force finds in the course of executing the warrant, and
 - (ii) that the member of the police force has reasonable grounds for believing is connected with any offence.

That is a codification of common law — that is, if you are executing a warrant or executing any police or law enforcement power and you come across incidental criminality, it is not possible for a police officer to ignore it.

Mr DALLA-RIVA — Yes, so that has been codified?

Mr NOLL — It has. I will just finish reviewing the issues which were raised. The other issue which is quite contentious and which has not been resolved is the proposal for a covert search warrant scheme. It was proposed specifically by the Crime Commission. Our Crime Commission has been set up with additional law enforcement powers which are much broader than the general policing powers. They are designed to investigate organised crime and large scale drug manufacture and dealing. The proposed scheme is based more on investigative powers rather than the finding of evidence.

The example given is that covert search warrants would be granted and the whole aim is to go in and search a person's property without their knowledge, leaving no occupier's notice. In essence it is to go into the house to see what evidence is lying around. The Crime Commission has said this will be useful in the example of the manufacture of drugs because it involves the bringing together of things which may not be illegal, depending on whether they are classed as precursors to drug production or not, but which at some stage will be put together and caused to become an illegal substance. The argument is that covert search warrants would allow undercover operatives to go in and see what stage the drug manufacturing process was up to, so some operational decisions could be made about when a normal search warrant could be exercised to seize evidence of the drug manufacture. Although this has sound operational bases, it has quite profound conceptual problems in that you are going into the realms of secret policing powers where your not serving an

occupier's notice and you are doing it without the knowledge of the person, albeit that they may be engaged in criminal activity.

The CHAIR — The obvious point would be that if they are continuously manufacturing drugs at various points, they would be up to a stage in the process. Given the huge number of ecstasy or other tablets or drugs produced, presumably at any one point, either the equipment or the process of manufacture would be in place.

Mr NOLL — This is where the operational arguments come in. The trouble is that if you use a normal search warrant then you go in and that is it. Whatever stage it is at you would get them for whatever manufacturing is going on, but it is not helpful in fully breaking rings because, for instance, the distribution strata of the drug operation will not become involved in the actual manufacturing process until a certain point. Therefore if you are wanting to break entire rings and get Mr Big and all this sort of thing it is better to have some sort of idea of when is the optimum time to go in.

The CHAIR — Is that a matter of search at that point or surveillance?

Mr NOLL — This is the thing. Surveillance is obviously something they will engage in, but to actually know what stage they are at and to gauge the collection of evidence about what stage the manufacture is at and other things like the plans which probably would be derived from listening devices anyway, that is the hard part.

Mr DALLA-RIVA — Yes, I would have thought the listening device would give you that effect anyway.

Mr NOLL — Yes. So this is one of the proposals being considered by the review. I do note that Victoria has introduced a covert search warrant scheme for terrorism, so really it would be looking at something similar to what you have in your terrorist act but for programs perhaps limited to large drug operations. That is still to be resolved. It is quite a substantial proposal. It is something that has to be thought about quite seriously before it is implemented. One thing that may be good or bad that came out of the review is that police operationally can use the current search warrants system as covert search warrants anyway. The argument is that if they are doing it anyway, we should really be designing a scheme which adequately puts strong safeguards in place rather than just leaving it to the ad hoc use of the normal scheme. The way they do it is they get a normal search warrant, they survey the place, they wait until no-one is on the premises, they break down the door — as they are entitled to do if there is no-one there — executing the search warrant. There is no occupier so they do not need to serve an occupier's notice. They do their investigation and they leave, making sure that there is no evidence that they have been there.

The CHAIR — Making sure there is no evidence after breaking down the door!

Mr NOLL — They repair the door. It is not against the provisions of the Search Warrants Act but it is certainly against the spirit of it. Once this came to light there was some question that if this was actually occurring under the current scheme, then perhaps we really should be implementing a scheme which properly regulates it and puts it in the same category as, say, listening devices, because they are such intrusive surveillance devices, and then having it approved by Supreme Court judges with report backs and all these other safeguards which adequately protect the citizen's rights, rather than just leaving it to the — —

Mr DALLA-RIVA — It would probably be a fair call if it is done at that level, and it is done along the same lines as supreme courts, because they are not going to want to give a warrant just on a whim. There is some merit in that.

The CHAIR — Are there any other jurisdictions in which this operates, and what is the experience of those jurisdictions with covert search warrants?

Mr NOLL — There are no jurisdictions in Australia that have covert search warrants. I think there are some examples in the United Kingdom, but really the model which we were looking at was something which was in the minds of the crime commission, and strangely enough was close to the model which was produced by Victoria and implemented in the terrorist legislation, except I think the one thing that was proposed was that at some stage there has to be some sort of an occupier's notice. The proposal is that an occupier's notice has to be served at some stage, but in the instance of a covert search warrant it would be delayed and there would be a limit so that it could not be delayed any more.

If you are investigating a person, you have been poking around in their house for the last year or 18 months and you go back to a judge and say you want another, there has to be a point where they say, 'Look, your investigation is going nowhere; you must serve your occupier's notice on these people', who are going to be very angry I am sure at the end of this investigation if they have not done anything wrong. You have to serve an occupier's notice informing them of your surveillance activities, which would be a major safeguard to prevent police from undertaking frivolous or fishing expeditions. You would hope for operational reasons and police intelligence reasons that if this sort of scheme were introduced it would only be used in the most extreme cases and where most investigations would result in a charge and a prosecution, and that there would be no examples of innocent people being the subject of these really strong investigation powers.

Mr MAUGHAN — You would hope so, but there are always a few rogue cops in the system.

Mr DALLA-RIVA — But if it went before a Supreme Court judge, I find it very hard to believe that he would allow a warrant. There would need to be safeguards.

The CHAIR — What else do you wish to say, Daniel?

Mr NOLL — We discussed legal professional privilege. I think most jurisdictions in New South Wales have a set-up where there is a memorandum of understanding between the law enforcement agency and the police and the local law society, and that is certainly the case here in New South Wales. It is not legislated in any way, it is just an agreement between those two bodies about the way that documents — —

The CHAIR — Between the law society and police?

Mr NOLL — And the New South Wales police.

The CHAIR — Which basically says?

Mr NOLL — Which basically says if there is an assertion of legal professional client privilege that the documents would be separated, they would be sealed and delivered to the court for the usual determination by an independent judicial officer about whether the assertion of privilege was right or not. I think the set-up we have now has been operating quite well. There has been no complaint about the way it has been operating.

Mr DALLA-RIVA — So it is not codified?

Mr NOLL — It is not codified, no. I think they are the main issues that were raised. There was a suggestion from the police administration that consideration should be given to circumstances where searches without warrant could be done, but I think that was fairly well resisted from the point of view that there are adequate provisions for telephone and emergency warrants in the actual Search Warrants Act currently, and I think there has also been some codification of the warrantless entry for other reasons in the LEPR, which I think were powers which existed in common law anyway and have just been put in there to make it clear that they do exist. I am talking about things like there was always common-law power of warrantless entry for hot pursuit and in the case where a person's life was in serious danger.

Mr DALLA-RIVA — Breaches of the peace and those sorts of things?

Mr NOLL — All those sorts of things.

Mr DALLA-RIVA — I have done that before, gone into houses without a warrant.

Mr NOLL — It is just a simple emergency power. There are lots of emergency powers.

Mr DALLA-RIVA — Is that codified now?

Mr NOLL — It is in LEPR now. It was common law but we have put it in LEPR because the whole idea of LEPR was to have a law enforcement document which could be one reference for general policing powers. There are emergency powers which are codified in our State Emergency and Rescue Management Act and which relate to those sorts of things such as saving people's lives where there is warrantless entry if a building is falling down or burning down, that sort of thing, and that has been codified for many years.

Mr DALLA-RIVA — There is just the other issue about search of persons and premises, and I have just gone through it. I am thinking of things that come under the Mental Health Act and where there is a warrant issued for that person, and I am thinking of the Adult Parole Board or even child protection. Is there anything in this act or does it only relate to the search and seizure of things, not persons?

Mr NOLL — The warrants for apprehension will actually be under other acts.

Mr DALLA-RIVA — Not to apprehend but to search, to enter into a premises to search for a person — in other words, if there is a reasonable belief that a child is at risk in ABC house in Smith Street, are there warrant provisions? If it is not immediate, if it is not hot pursuit, is there anything in this act that covers that or does that still operate within its own parameters?

Mr NOLL — No, there is nothing in this act. If you look at the provisions of this act you would think it is quite a limited act, but because of the way other acts are drafted it actually has wide application. You would think that these warrants all relate to indictable offences, weapons and narcotics and stolen property, which are the things enunciated in section 5. Other acts, and there are hundreds of regulatory acts, say that, 'A warrant is available for the purpose of this act under the provisions of the Search Warrants Act'. For instance, if I were operating under the Fair Trading Act and I had some view that there was property or goods which were dangerous to children or something like that, which was something irregular, I would be able to seek under the power of the Fair Trading Act a search warrant under the Search Warrants Act, and that does not appear anywhere in the Search Warrants Act; it is actually in the Fair Trading Act.

Mr DALLA-RIVA — How will that be addressed?

Mr NOLL — That is just the way it is drafted. There are many pieces of New South Wales legislation.

The CHAIR — Which refer to the Search Warrants Act?

Mr NOLL — That is right, and under the provisions of that act you can get a search warrant.

Mr DALLA-RIVA — I just want to get some clarity. The LEPR act does not apply to those examples I have just given?

Mr NOLL — I do not think so.

Mr DALLA-RIVA — They still have to operate as their own search and arrest provisions?

The CHAIR — LEPRAs applies to police powers and procedures, as I understand it. The Search Warrants Act nominally refers to the range of purposes for seeking a warrant that you just enunciated, but it is given broader scope because you have other acts of Parliament that authorise the execution of warrants under the Search Warrants Act.

Mr NOLL — Even though they do not fall into those five categories?

Mr DALLA-RIVA — I am looking at division 2, section 47, under the new LEPRAs, and it talks about those things: indictable offences, firearms offences, prohibited weapons, narcotics, child pornography and things stolen or otherwise unlawfully obtained. But it does not talk specifically about those other matters that may relate to searching a premise or a premises for a person, not a thing, that is related to these matters. I am trying to get some clarity about how those other matters apply, or is it that you still intend the Mental Health Act, or whatever its equivalent in New South Wales is, to still operate with its own search and seizure procedures and then the child protection act would still operate within its own procedures?

The CHAIR — How encompassing is it?

Mr DALLA-RIVA — So the 40 other acts that are out there with their individual procedures — —

Mr NOLL — I think they will continue to operate independently of these, which are just designed for law enforcement powers, apart from, as I have said, other administrative provisions which use the machinery of the Search Warrants Act in order to issue their search warrants. I think what you are referring to are warrants where you are looking for someone rather than some thing. Is that right?

Mr DALLA-RIVA — Yes, that is right.

Mr NOLL — So something like bench warrants?

Mr DALLA-RIVA — You are putting a regulatory framework over the police but there is not the same regulatory process over non-police.

Mr NOLL — Yes. This is actually a problem that is starting to arise.

Mr DALLA-RIVA — I am trying to work out why there is a differentiation and why the dominance on regulating the coppers while you still have the non-police who are not regulated to that extent.

Mr NOLL — I understand now what you are saying. Since the enactment of the LEPRAs act, our standard response on behalf of the Attorney General when there has been any discussion of new powers of any type in relation to any department has been that LEPRAs now sets the benchmark and standard for law enforcement powers for all government agencies and bodies, and that is what our standard response is. What we try to say is, for example, if you go around for the local council making sure people do not water their footpaths and you want the right of warrantless entry you are asking for powers which are greater than those of police officers, and we refer to LEPRAs as the sort of benchmark which we are setting. We ask if there is a possibility to use administrative provisions in the same way as the ones we have set up currently for search warrants. If there is not, then the powers which will be reproduced in that act should be consistent with LEPRAs. We are trying to use LEPRAs as a benchmark and standard to set all powers for government agencies.

The CHAIR — And the safeguards that go with them?

Mr NOLL — Yes, that is right.

Mr DALLA-RIVA — It is interesting there has been legislation introduced where there are no requirements for what they call ‘authorised officers’ to enter, search and seize. That has been a Victorian policy decision by the current government.

Mr NOLL — There are a lot of other powers which are totally unrelated to regulatory powers and which diverge for whatever reason on policy grounds from other law enforcement powers. I am not going to say there are not inconsistencies, because there are and it is part of the job that we do at the CLRD to point out these inconsistencies and say, ‘Look, we have set up these standards. These are the standards that should be adhered to’. I mean, they exist in legislation. For instance, the Prevention of Cruelty to Animals Act actually gives power to people for warrantless entry if they believe or have a reasonable belief there is a vicious dog.

Mr DALLA-RIVA — If they have a reasonable belief, that is right.

Mr NOLL — That is right.

Mr DALLA-RIVA — And yet there is all this fight to not allow police to have same access which could relate to a murder.

Mr NOLL — I know.

Mr DALLA-RIVA — It is just interesting that there is that difference.

Mr NOLL — There are inconsistencies, yes.

Mr DALLA-RIVA — That is right, and it is the same here in Victoria.

Mr NOLL — By the same token, the police can utilise those powers under the Prevention of Cruelty to Animals Act. There is nothing underneath that act that says so, but in fact the police are probably the agency that would be called in to enforce those powers.

Mr DALLA-RIVA — Would that apply in Victoria?

The CHAIR — I am not sure.

Mr MAUGHAN — I do not think the police are an authorised agency under that act.

Mr DALLA-RIVA — Following the line that perhaps we are reviewing warrants in their entirety, should the warrants in the various acts be looked at? If you had the choice to go back and look at warrants right across the whole spectrum, would you look at setting the regulatory framework to apply to all warrants, and even specify the framework for warrantless entry? Or is that beyond the realm of trying to consolidate 300 acts?

Mr NOLL — When our Search Warrants Act was first drafted it tried to do exactly what you are saying, but it tried to do it only from the point of view of warrants where you had the power to enter and search for things. So it left out of the scheme the warrants where you are looking for a person with the power to arrest them, or detain them for some reason.

Mr DALLA-RIVA — Similar to looking for a dog or something — it is along the same lines?

Mr NOLL — All I can say is that generally where there is warrantless entry the power will reside in its own legislation. Where there is a warranted entry to search for something, generally we will just reference our Search Warrants Act and use the administrative machinery in that act to get the warrant. So it does actually standardise it, as you are suggesting, but there are a number of exceptions, they being: where there is warrantless entry generally it will be a power which is in whatever particular act, such as the Prevention of Cruelty to Animals Act, which has all these other peculiar powers which exist; or it will be a warrant to arrest someone which will

reside in the District Court Act, the Supreme Court Act, the Mental Health Act or something like that.

The CHAIR — Just pursuing Mr Dalla-Riva's line in relationship to persons, do you think it would be desirable to have that consolidated into a single search warrants act in the same way that you do for things?

Mr NOLL — I have never turned my mind to it, but I suppose it would just operate in the same way. That would probably be a good thing in order to standardise, but as I say, I have never turned my mind to it really and do not know how a warrant to arrest a person would vary. The obvious ones, which are the bench warrants and the warrants for arrest, probably all share exactly the same sorts of attributes, but there might be different reasons for detaining a person.

Mr DALLA-RIVA — It may be for searching for a person.

Mr NOLL — I do not quite know what you mean by 'searching for a person'.

Mr DALLA-RIVA — You might have evidence that a child is at risk at a home. You have no real authority to go in there other than by warrant under the child protection legislation, for example, or you have reasonable grounds to believe because you have received information that a person who is insane is at this address. It is a grey area. I am just trying to work out why you have excluded people out of this, but I can see we are starting to get into a grey area, so that is probably the reason why.

Mr NOLL — I am a criminal lawyer, so you are also straying into that civil-human services area, which I do not know very much about, sorry. I understand what you are saying now about looking at the child protection powers and the state being able to enter people's homes if there is some sort of suspicion that a child is being abused.

Mr DALLA-RIVA — And you want to search.

Mr NOLL — I would argue from that point of view that a police officer could go and get a search warrant if there were a reasonable belief that a child was being abused. They could go and get a search warrant under the Search Warrants Act saying, 'We want to go into that house', but you would not be looking for the kid; you would be looking for evidence that the offence had occurred, which may well be the child because the child may well bear evidence that they had been sexually assaulted. There would be some overlaps there.

The CHAIR — We have come to the end of our time. Is there anything else you want to add at this time?

Mr NOLL — No, that is fine. I will contact the officer who did the crime scene tonight and ask for clarification about whether we used any examples.

Mr DALLA-RIVA — Or where it came from. That is another thing.

The CHAIR — Thank you very much for your attendance today and for your contribution. It was most illuminating and very helpful to us in terms of our inquiry.

Mr NOLL — Thank you. I am glad it has been.

The CHAIR — I am sure we can do some follow-up, if there is any, from the secretariat.

Witness withdrew.