

LAW REFORM COMMITTEE
Warrant Powers and Procedures Subcommittee
Inquiry into warrant powers and procedures
Sydney — 31 August 2004

Members

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Mr T. Lynch, senior solicitor, Legal Aid Commission New South Wales.

The CHAIR — Tony, thanks for coming along. We appreciate having you here. I should perhaps indicate at the outset that our inquiries are governed by the Victorian Parliamentary Committees Act and therefore in taking evidence in this inquiry we are subject to parliamentary privilege. To that extent anything you say is governed by that same privilege in Victoria. You will have an opportunity to review the transcript and may make any amendments at that time before we make public the transcript. If you do not want it to be made public, you can let us know.

Mr LYNCH — I have no problem with that.

The CHAIR — Perhaps you could start by telling us a little bit about your experience of warrants and those powers and procedures in New South Wales, and any comments you might want to make in relation to the terms of reference of this inquiry.

Mr LYNCH — I have the letter that Jon sent me, so I will give you some short background. I am a solicitor employed by the Legal Aid Commission of New South Wales. I have been working there since 1986. Prior to that I was in private practice for four or five years. I have a law degree and also a psychology degree. I spent five years with legal aid working in the mental health area, and then I moved back into crime. At the moment I work in the indictable section, which deals with District Court and Supreme Court matters. The only Local Court appearances I ever make now are in a murder committal.

As you are aware, because I think you may have had access to a March 2001 issues paper prepared by the Attorney-General's department which looked at search warrants, there was a similar inquiry in this state. I came late into that committee so I did not draft the legal aid commission's submissions, but I stepped in because the solicitor who did went to the bar. I suppose that is my background in relation to an immediate interest in search warrants.

I reviewed all the material and the submissions that we had then, and without in any sense trying to tell you how to suck eggs I will be as frank and forthright as I can. Straight up you have to make a decision about what you want the legislation to achieve. In New South Wales the law is simple. As it currently stands the Search Warrants Act enables a warrant to be issued to search for a thing on premises in relation to an offence. It is as simple as that: thing, premises, offence. I thought some of the submissions were a little bit off on a tangent when people wanted to look at what the privacy commissioner has publicly said was a surveillance act, and that is the problem. It is very easy to look at incidental procedures to the execution of a search warrant and go a bit silly and head off on a tangent about empowering all sorts of things which seem to fall into the category of state-sanctioned criminal discovery, state-sanctioned cross-examination and investigation rather than remembering that the Search Warrants Act as it stands is predicated on the probable existence of an offence. So it is not an open slather thing. I suppose the closest legal analogy would be a subpoena. I issue a subpoena on spec. The legal test in New South Wales is simple: if it is on the cards that the subject matter of the subpoena might be relevant then I get my subpoena and it is not objectionable. That sort of logic seemed to come in and is partly in our Search Warrants Act. It does not have to be an offence that has already been charged, but there has to be some reasonable nexus between the warrant and ultimately some sort of criminal proceeding.

I suppose I can only caution you on the basis of experience that if you drift too far from that — if that is the purpose for the legislation that you want — it gets very messy, and that is to do with people's ideologies and competing interests. In this case we had the privacy commissioner, ICAC, legal aid and the police. That is when people really started to find major loggerhead-type issues. We drifted away from the notion of, 'Hang on, it is a search warrant; it is not an act authorising the police to go in and look for anything on spec because you look a bit dodgy', which is where it was heading on some of the submissions. Quite seriously, the philosophical framework has to be pretty settled before you can narrow down the issues to what you want to do. Not that there have been any formal findings, but if I had to gauge the reaction — and it is hard to tell what arises in submissions and committees — I think we got back to the fact that it was a Search Warrants Act,

it was not some sort of police procedures act or something that empowered adjunct powers to arrest and things like that. What has happened with that, so far as I know, is that the ultimate legislative aim in this state is that the Search Warrants Act will be repealed. Effectively it is being reproduced in its entirety within the act which is the subject of another committee running at exactly the same time, the Law Enforcement (Powers and Responsibilities) Act, which I think Jon is aware of because his letter said that.

The CHAIR — Yes, we have some notes on that.

Mr LYNCH — What I understand is the intention of this state is that the findings of the search warrants committee, such that they require legislative amendment, will obviously now amend the Search Warrants Act, but in the context of those sections in this act that were relevant. So that is where we are at.

The CHAIR — Just before you move onto that, perhaps you could give us some general comments about how you think the Search Warrants Act has operated and whether you believe it has been satisfactory or whether there are areas that could be improved.

Mr LYNCH — You want to look at whether it would be helpful to look from go to whoa when we want a search warrant?

The CHAIR — Yes.

Mr LYNCH — And examine the process from start to finish. I will try and give you some practical issues, not just bare philosophical legal issues. Let us assume that the application is made in the normal way where the applicant attends before a justice or an authorised officer in person and provides information. You have no doubt seen our form which requires a specification of the things and the offence in relation to which it is thought that those things relate. The biggest practical issue is this: if in the context of a later trial you need to query the basis on which the warrant was issued, what you discover is that a prudent authorised officer may not have been happy and may have said to Jon — just to use him as the applicant — ‘Well, Jon, I have seen this here, what do you say about this, and what do you say about that?’.

The accuracy of that additional information and the veracity of how it is recorded — and indeed where it is recorded — are moot points. It may be that if the application and the supporting material on its face looked unsatisfactory, then it is going to look that way to me when I come to look at it in the context of a trial. To find out then the further material that the justice was told — because normally it will be because at the time the applicant is making the application they look at it and say, ‘What about this, what about that?’ — to try and get hold of that can be very difficult. It may be something simple that perhaps the justice does not think is worthwhile noting down anywhere, but having heard it goes, ‘Okay, warrant issues’. Perhaps it is additional material. Sometimes it could be an interstate criminal record — I am just trying to think of things that come up — that is not attached to the application. On other occasions it could be that the police officer has shown part of the running sheets, which are go to whoa — that is, you add in little bits as your investigation proceeds — and which are not then later attached. One of the deficiencies that has been identified is that all the material that supports the application may not be with it. That has an immediate, practical consequence if you need to revisit the veracity of the warrant being issued in the first place, which I suppose is my problem primarily. It also has a secondary issue: if the application is knocked back and the applicant reapproaches another justice — because at the moment it does not necessarily move higher in the judicial food chain — then maybe there is additional material that was unknown to the first justice, and again that application is still not complete necessarily when it appears in the file if there is one. So trying to backtrack the full basis on which the warrant is issued can be difficult. The other big issue — —

The CHAIR — Are you talking about the requirements for supporting information?

Mr LYNCH — Yes.

The CHAIR — Or are you talking about the subsequent recording of that by the justice?

Mr LYNCH — No, the requirement for the supporting information might provoke a request for further information or indeed oral questioning. It is the response from the applicant that may not necessarily get appended in the case of, for example, the running sheets or an interstate criminal record, or it may not actually go with the other material, such as a fact sheet for the alleged offence in New South Wales that might be attached. It may be that you are now satisfied, having queried me orally and there is no notation of either the question or the answer, but you then say, 'I am satisfied'. You have discharged your duty, and I am not suggesting it is done improperly. It is just that I cannot get to that later unless you have made a very good note and somehow you keep an ongoing record of all these things.

Mr MAUGHAN — 'You' being the defence counsel?

Mr LYNCH — It works both ways. It can be the case that the Crown may well need access to this as well. If there is some sort of point arising from it, then there is a point arising that both people want to know — one way or another, good, bad or indifferent — how we are going to deal with this in the context of the trial. Then there is the subsequent same error or same issue, the subsequent justice and the same deal. If it is not there, it is not there. I suppose that is the issue in part.

The other issue in part is this issue, which you would have seen in that paper, about the discretion to issue the warrant not being exercised where the justice or magistrate — depending — says, 'You have got enough to charge the person'. That is not clearly a problem for me in the first instance, but it is an issue. It is not explicit at all that that is a requirement. In fact I think it goes counter to logic, with great respect. As I said, if we go back to basics, with searching for things on premises in relation to an offence, the fact that you have enough to charge somebody does not mean that a search is pointless or unwarranted. You may look at the video footage of the bank robbery and a copper has gone, 'Ah! That is Jon Cina. I know him'. That plus some other evidence is enough so that they decide to bring him in and charge him — no problem with that — but it turns out that they saw a knife or a shotgun, or whatever it was, in John's hand and maybe a balaclava sticking out of his pocket. They want to search his premises for those items, which would be some pretty compelling evidence. What is the relevance? A justice says, 'I am sorry. You have got enough to charge him'. The short answer is, 'Yes, but I want to get hold of relevant evidence'. That is the whole point, is it not, of the Search Warrants Act? It is those things, and normally those things are going to end up being relevant or irrelevant in the context of criminal proceedings. Remember that we do not ask for it unless we are about to or have, so I do not really understand why some officers have got this school of thought that a discretionary basis to refuse the issue of a warrant is the already sufficient police case. I just do not understand that at all, particularly as questions defence counsel may ask are:

You were so sure it was Mr Cina? — Yes

You where he lived at that time because he had been reporting for other matters, had he not? — Yes.

Why did you not go and check? You had him in custody within half an hour of the robbery — Yes.

You could have checked his house and premises and vehicle for the gun, could you not? — Yes.

Why didn't you?

Should the answer to that be, 'I tried, but I could not get a warrant?' It is obviously relevant, so I must say that I do not see why.

Mr MAUGHAN — If I understand you correctly you could go to another magistrate or justice who, again from what you have said, may not be familiar with the discussions that have taken place with the previous justice or magistrate and who would look at the thing again and may or may not uphold that decision.

Mr LYNCH — Assuming you can.

The CHAIR — Can you under the New South Wales act?

Mr LYNCH — As a matter of its being in the statute, sure. As a matter of being in the real world, can I? Not if it is after hours or you are out in the country, because there you are it. You are the only justice authorised. Do you see? That is the problem. It is all well and good to have a review right when it can be reviewed. I tend to think I might have heard something somewhere in a similar setting that suggested that there was one magistrate rostered on for the entirety of New South Wales for any after-hours warrant. That is the problem; that is the resource issue.

Mr MAUGHAN — Is it a review of the previous decision or is it a new application?

Mr LYNCH — No. This is my application to Rob? No, there is no difference. There is no requirement that it be different, that it be augmented or that it have anything at all different. It was simply, 'I don't like it', and he said no.

The CHAIR — And I can say yes.

Mr LYNCH — And you can say, 'Yes, I might just give it a shot'.

The CHAIR — You can forum shop, in effect.

Mr LYNCH — Yes.

The CHAIR — Is that desirable?

Mr LYNCH — No.

The CHAIR — You have only got one after hours. Putting that aside — that is a technical problem.

Mr LYNCH — If it is in business hours, no, I think you have got to bite the bullet. I suppose my view is that if you are entrusting somebody with the function — be it a judge, a magistrate, a justice of the peace, whatever — at first instance, then the normal way we look at these matters is that not liking the result normally results in an appeal. It is a review in a strict sense based on normal legal principles — that is, you did not look at all the evidence, you took into account irrelevancies, whatever it is. This is, as you say — and it is a great phrase; I wish I had thought of that when it came up — forum shopping. It is literally, 'Right, he did not give it to me. Maybe he will'. Given the people network you would not have thought it would take you long to figure out who to go to first. I might say, 'Well, I will go to Noel', and then it is, 'Forget it. He was Father Christmas. I am going the other way'. It is as simple as that. I know which judges I would rather be sentenced by, and I suppose the police, in their own way, know the ease or the difficulty with which you would have to satisfy a particular officer.

The CHAIR — So should there be particular grounds of review — grounds for, in a sense, seeking a review in order to successfully be able to do that?

Mr LYNCH — I think it should be in the nature of an appeal — that there has been an error. It should be founded on error because otherwise it is simply a case of, ‘I do not like your decision’. Now that just does not exist anywhere else, and I must say that a first instance error by a magistrate in wrongly convicting has to go through a formal process of appeal where you may be in the can until that happens.

A warrant situation gives lawful permission for intrusion into your private realm. The other thing we tended to forget was that these warrants extended to people who were never going to be the subject of a criminal charge. They are obviously connected in a way, but it is too easy to think of the warrant in terms of the place where you have arrested somebody, and now you want to search his house for the gun. Jon may claim to have been living with his mum, Merrin, who has nothing to do with it, and has not seen him for five years, and you get your warrant. That puts a little more distance into it and brings into focus the privacy aspects. Even if one were unsympathetic — not that I would be — and thinks, ‘Well, he has been nailed for the robbery, it doesn’t matter if things go a bit rough for him and it is not quite by the book’, that is okay, but what about mum? She has nothing to do with it other than, unfortunately, having a son like him. That was the other thing I meant to suggest — that we have to remember that it can permit invasion of the privacy of third parties, people with nothing immediately to do with the criminal.

The CHAIR — And based on the experience of the New South Wales act, how would you balance those things out? Have you struck the right balance in that act?

Mr LYNCH — I think so. If you said to me, ‘What would you like to fix now?’, I would like to clarify the issue of things like computers, personal digital assistance and those sorts of devices which you would have heard mentioned in terms of the manipulation of devices. The act is very much concerned with premises — the shop, house, flat, and it talks about vehicles. It is pretty ancient language. It is based on the Crimes Act of long ago. It used to talk about ‘curtilage’ rather than ‘in or near’. It is pretty ancient thinking. It is things like, ‘What is in that?’ that is the issue now. ‘Things’ is not defined, but I do not necessarily think it needs to be. It actually appeals to me as pretty open, sensible, and ‘If it looks like a camel and it smells like a camel then it is a camel’. It is that sort of sensible legal concept. A thing is a thing.

Mr MAUGHAN — So there is no barrier for someone going in for computer or a laptop or whatever it might be?

Mr LYNCH — That is the issue. What is then being seized? The gun is the gun. It is self-evident. It is the gun. You can take it, fingerprint it, get a DNA sample from it, photograph it, do all sorts of things and fire it. Now to me, the computer hard drive is the gun. It is just a little bit harder to get at. There are privacy concerns such as, ‘What if he has other stuff of his hard drive?’, but he only has the gun in one part of the house. Mum’s smalls, the kids’ toys, and the memories and the photos are elsewhere. Big deal. What is the difference really?.

Mr MAUGHAN — What is the requirement to return anything like that in a reasonable time — a computer, a vehicle, it could be glasses or a hearing aid?

Mr LYNCH — If it is seized and ultimately will be relied upon as an exhibit, then it is bad luck. For the moment it is temporarily forfeited to the state. As it forms part of the prosecution case one way or another at whatever level, once there is a charge it is there for as long as it is required.

The CHAIR — What if it forms part of the defence case as well?

Mr LYNCH — That is where you get issues, but really that is just a matter of trying to arrange access to things in the possession of the Crown. You want to look at it too, but there is only one of them and they are not able to be copied.

The CHAIR — If we just pursue the analogy a little, a gun found in one part of the house is a bit different to a computer with a whole range of files, some of which may be relevant to the defence, but the prosecution has the computer and has access to all the files. How does that get dealt with in the electronic age? How do you deal with, say, some material that is subject to legal professional privilege?

Mr LYNCH — Hopefully not, unless it was his last trial.

The CHAIR — Yes, but I mean — —

Mr LYNCH — I am not being facetious, I know what you are getting at — isn't that the problem? Modern equipment and things can contain more than just what is legitimately of interest. So as well as having his Excel spreadsheet of drug dealings, and a nice little contact group in Outlook — mum, dad, work, retirement fund, whatever — it has other things. The issue is not: 'How do I get access to it because I have just got to fight for it given that it is a Crown exhibit in the same way that I do now, where I have to make arrangements to look at a tape'. It is a matter of trust, is it not? If Officer Bloggs has discovered something that on its face looks like it could be helpful later, and then John bleatingly says, 'I can't wait to get my computer back, Tony, it has this really good thing that is going to help', and it is not there any more, then what do you do? You cannot legislate for dishonesty. We have to do the best we can working on the premise that people will do their job, whatever that is. And that is the issue. What if it has got on it something relevant to the defence which has happened? Then we get access and we copy it. We make appropriate arrangements with the Crown to have somebody there who can establish that it indeed was already there, and it came off at the same time — that it was not put on, that there were no tricks, nothing up my sleeve, but in terms of the precursor issue what do you do? If it is accidentally erased, that is what happens.

The CHAIR — Does the act deal with that issue of how the evidence is dealt with?

Mr LYNCH — You would have to look for some sort of stay argument. If you could establish that it had been there and through some sort of error, it would just be a normal argument based on unavailable evidence; but in terms of your search warrants, seized things normally end up in the custody of the Crown if they are relevant, and they are returned if they are not.

Mr MAUGHAN — Is that appropriate for personal things like glasses and hearing aids? I am aware of somebody who is in the pen right now that has lost both of those, and literally cannot function without either of them.

Mr LYNCH — No, but that would normally be a case of a letter to the OIC saying, 'I act for Mr Maughan, blah, blah. Four months ago you seized a number of items. Here is the exhibit sheet. I note there is a hearing aid and glasses. I have now received your brief, and I cannot see the relevance to you of any of them. On that basis will you please return them?'.

Mr MAUGHAN — But if they were relevant in terms of fingerprints and so on?

Mr LYNCH — If they were relevant, then the police officer would have to justify their retention because I have brought it up and said, 'What is the basis?', and he is now saying, 'Well, this is the basis'.

Mr DALLA-RIVA — I have a couple of questions. In relation to computers, just for the record, my experience is that I was one of the first investigators within the computer crime section, as it was then known. We used to seize computers, and we had the very same problem even back in 1991. The very concept of what is relevant on the hard drive was the problem, but we would seize the whole computer, and if need be we would download the relevant sections that we saw as necessary in terms of the fraud investigation; and then often return the computer. What about the issue about when you do go out and seize items — things, premises and a fence; I like that

analogy, I think it is fundamentally what it is. When the items are seized at the premises, as you said, the Crown then has retention of them. I share your views. There have been cases where there have been requests for return of an item, you see it is not relevant and I found in my experience 9 times out of 10 the item would be returned. It would be photographed or photocopied — so some record was kept and if it needed to be part of the evidence then so be it. In Victoria, as a result of case law out of the fraud squad of all places, we are required to return the documents or items seized or copies or identifying marks back to the Magistrates Court, which then reviews the items seized and then says they were lawfully seized and they are then placed into your custody.

Mr LYNCH — ‘Your custody’ being the police.

Mr DALLA-RIVA — Being the police. There was that process in between. That was a result of a concern where the documents were seized and there was no formalised record of what was seized. It used to drive us nuts, but we would have to itemise every item and that would be checked off by the magistrate and then the magistrate would say, ‘Yes.’ I remember many times going to the Magistrates Court with a bootful of stolen goods and he or she would come out and look at the items — and it gets more detailed when you have a truckload of stolen goods. That process still operates in Victoria. Does that operate in New South Wales?

Mr LYNCH — No. Seizure is entirely up to the police. They normally try to designate an officer to actually keep a running list, I guess. If we were searching here, John might come out and say, ‘Computer — Toshiba laptop X, Y, Z’, and I would put ‘Located in anteroom’. Merrin would say, ‘I found this under the table there X, Y, Z’, or whatever it is. An officer does it at first blush, and it is in their custody. The only report back from a warrant is as to what happened, not what have you got. The obligation to report back about execution of warrant is yes/no, as you have seen. That gets reported back to the court, ‘We executed the warrant and seized things — like what we said — bludgeon, balaclava, gun’. However, the things themselves do not go anywhere near the court until that magic day when our hearing happens and the police walk in with all these exhibits. Between their seizure and that point somebody decides relevance and says, ‘No, no, no, yes’. There is no formal system.

The CHAIR — Is there a public list of what has been seized?

Mr LYNCH — No. Seized items form part of the brief at some point. They would appear in the exhibits book kept at the particular police station or centre where they were taken, but depending on one’s work load — I suppose as an ex-copper you would know — you might just hand up a whole lot of stuff and call it ‘Exhibit A, Crown brief’ or you might itemise each and every statement. It might be ‘Various documents seized from Noel Maughan’s desk’, which could be a box.

The CHAIR — Is that list subject to discovery by the defence?

Mr LYNCH — Yes.

The CHAIR — So through the processes of discovery they can find out what the cops have.

Mr LYNCH — Some things they obviously have and if it is not in the brief you just ask the Crown for it and say, ‘Where is the exhibits list? Officer Dalla-Riva says he was standing there doing a list, where is it? It is not in the brief’. Other things you can figure out just by reading it — things that should be there. And then there is that last group of things which do not currently form part of the brief which you have to go off and subpoena.

Mr DALLA-RIVA — I think from memory a copy of that list is left with the court — I may be wrong — or it is signed off by the magistrate and kept with the police. You raised the right point in relation to that where it might be a whole box. However, that is analogous with the seizing

of a hard drive. You seize a box and out of that there might be three documents that are relevant to the fraud investigation and out of a hard drive there might be one Excel sheet that has the list of the sales of drugs. I think people sometimes get overwhelmed by a PC or a computer when fundamentally, as you indicated, the structural principle stills remain.

Mr LYNCH — It has to.

Mr DALLA-RIVA — What is the latest now — Bluetooth? Some person at IBM is dreaming up some new name, and I think as legislators in trying to maintain that new terminology we would put ourselves in a lot of problems. That is my view.

The CHAIR — So far we have dealt with a number of deficiencies. You have talked about the information that supports the warrant and whether it goes with it to the court, and the review of where a warrant has been refused. We have talked fairly extensively now about electronic devices and whether they should be defined in the act and dealt with under the warrants act. What are the other main issues?

Mr LYNCH — Telephone warrants, just to standardise the applicable test. There is no mystery in it; I do not know why they went on so much. The act seems pretty darn clear to me — it talks about urgent and not practicable. I can live with that. How you weight them is how you weight them. Something might be urgent but you might only have to stroll literally from the cop shop two doors around to get the warrant, which is clearly practicable, so it is a matter of saying, ‘Do not ring me, come around and we can make it up’.

The CHAIR — Just explain the test a little bit more.

Mr LYNCH — The act mentions that telephone warrants can be based on, it is section 14, I think. I will have to look it up. I am confused because all the bits look the same in this legislation.

The CHAIR — You can summarise it.

Mr LYNCH — I have to look at it — I need to make sure I am not misleading you. They are important. Section 12(3) states:

... the warrant is required urgently and that it is not practicable for the application to be made in person’.

I suppose just like, ‘How do I exercise my discretion when I think you can charge him already?’, somebody has looked at that and said, ‘What is the paramount consideration — urgency or practicability?’. The police were pushing hard for urgency, I guess. We were holding out for, saying, ‘What is wrong with how it reads?’, but if forced to pick, practicality has to be the go. There has to be some urgency attaching to the request. Everybody is too busy to muck around with warrants, which have to be reported on later when there is absolutely no reason for their issue. However, there may be an issue about perhaps the process is important and everybody follows it, even the police, so that it should not be as easy as just picking up a phone.

There were cautionary comments in one of the cases we looked at — it might have been the Larsson case — about telephone warrants. Atkinson’s case is the one, which is in your thing. It is basically saying it is an exceptional method and it may be employed only in cases where the authorised justice is satisfied that it is required urgently and it is not practicable. Basically we thought there was nothing wrong with that as a test. You can weight it. There is no need to decide that one or the other should be, it is fine at it is.

The CHAIR — You are not actually suggesting a form but you are saying this has been an area which has caused some confusion among the practitioners?

Mr LYNCH — No, it is an area, do not forget, where you are the justice. You are applying it in the same way that you have your discretion. Some are saying, ‘Well, you have enough to charge him, go ahead, you do not need your warrant’, which does not appear to be what the act is talking about; and others are saying, ‘Yes, I can see why the balaclava and the gun would be useful evidence on top of the video of the bank robbery and all of that’, and use your warrant. There is an issue where I say to you, ‘I want a telephone warrant’. You then need to find out why I am not there in person so it has to be both urgent and not practicable. For some reason, however, it seems that the law enforcement side wants to head down the urgency path as the more major consideration. What we were saying is, ‘Leave it alone’. I am not being negative. We actually agreed on a lot of things, too, by the way, and I am not some one-eyed zealot. I can understand that police have operational issues, but I just thought this was one of those, if you push for urgency, where it is too easy to say it is. It is just not right in the face of a statutory scheme which presumes you apply. This is for once where you as an investigating person have a few little statutory things that you have to do before you get to walk into mum’s house.

The CHAIR — How is that being resolved in relation to LEPR?

Mr LYNCH — Same test, both.

The CHAIR — There has not been a shift?

Mr LYNCH — No. I am trying to work through what happens when you get one of these. I suppose the issuing authority is something that you might want to decide about because I am not sure about judges, magistrates, justices and authorised people, how it really works in Victoria. A number of pieces of New South Wales legislation came up with this notion of ‘authorised officer’ as a concept some years ago and before this act, where it was decided that magistrates were too busy to do everything. Historically, it was great when you had a bench like this with multiple magistrates; it was a little English town and it was all very Somerset Maugham. We have moved on, you see, and the problem is magistrates got too busy to do all these things. We were happy with the notion of an authorised officer being what used to be clerk of court of whatever, as long as they were appropriately trained. We do not want the work experience student. You would be surprised — how can I put this delicately — that good help is sometimes very hard to find. It is nice to know that something as important as authorising a whole bunch of cops to basically announce their appearance — you, police, bang, and we are into it — is going to actually look at it properly. It is a very serious quasi-judicial function.

The CHAIR — In what would otherwise be an unlawful intrusion.

Mr LYNCH — And it is — it is a big one. The whole scheme of the act says, ‘Hang on, you do not just get to do this as a normal operational police measure because you think it is a good idea’. So we wanted authorised officers if that is the lowest level we move to. I think you have to be serious about proper training and some sort of maybe rev-up in the head — the philosophy of it — that this is a serious thing you are doing. The same officers walk out of the chamber magistrate role where somebody says, ‘I have a problem with my neighbour’, puts the suitcase up and then you see the pages are yellow because it has been the same complaint since 1958.

Mr MAUGHAN — Not talking about fences, are you?

Mr LYNCH — Yes. I am talking about that sort of ‘Oh, my God, here we go’ job, and then you are suddenly switched around to the urgent issue of a warrant.

The CHAIR — You started out by referring to the question of who the issuing authority is — —

Mr LYNCH — I still think it is a live issue.

The CHAIR — How is it defined in the current act?

Mr LYNCH — It does permit non-magistrates, so if you look at a magistrate as our lowest judicial officer in the chain, then an authorised officer would normally be a senior clerk of the court who has in fact some sort of training within the Attorney-General's department. You do not want to give them legal training or it will just ruin them.

The CHAIR — Are you saying that — —

Mr LYNCH — All I am saying is that you have a choice. That is what is here.

The CHAIR — Do you think that works well?

Mr LYNCH — Largely it does because the police whinge — and I am not being negative — but they are obviously the applicants. The fact is that they do not like what is happening sometimes and have to shop around for another authorised officer. In their submissions they raised an issue like, 'How come somebody tells me I have enough to charge Jon' and then they are not getting it. You see what I am saying? That is the only way I can gauge the fact that people are looking at it and trying to bring some sort of intellect to bear, because I do not apply for them. The fact that they are asking questions and that we know that it turned out additional information was provided, but it was not attached. Whether you want to make a decision though is another aspect — for example, you might say, 'That is okay for the average search warrant; we might decide that telephone warrants, given case commentaries about how serious they are because it is a greater extent of reliance on the veracity of the applicant in the absence of as much information, would warrant a magistrate or higher. Now you might also say that if you do not like Rob Hudson that you do not go to Noel, you go somewhere else. If an authorised officer has knocked you back, we are going to make it more in the nature of a judicial review than forum shop for the bloke who is going to give us the nod. You might decide in fact that, 'We do not like this; just go to somebody else at the same level'. We want more of a review flavour to this. Logic is simple: if you trust in the person in the first instance where you make the decision, then if you think it is wrong demonstrate its incorrectness. Do not just shop around until you get the right result, which is really what that is.

Mr MAUGHAN — But you are going to have to tighten up on the recording if you are going to have some review process further down the track.

Mr LYNCH — That is where the spin-off would be nice, wouldn't it? If the process was like that magistrates would be quickly going back saying 'Jon, I have another of your applications. The copper is telling me that when he came in here he produced it, well, where the hell is it?', or that you and he spoke about whatever the issue was, and he will say, 'Why did you not write it down; I am looking at this; where is it?'.

That is a nice informal system where a magistrate or, because it would be normally be local, the clerk of that court would be saying, 'Lift your game, mate. If I am reviewing this, this is a joke. I am about to turf it', and he is saying, 'Here is the extra stuff I gave you'. I can live with that and I think it would be better. It would also ensure that any changes in the law would be communicated because I am certain that the magistrates in having access to judicial commission stuff, reviews and formal matters, would be informed earlier if not better than the clerk of the court. That is what I am saying. It depends what you are comfortable with. I guess you can say, 'How important is the result of the exercise of the function, therefore how important do you want the functionary to be'. For example, the police were talking about covert warrants, which is the complete 'Go in, don't tell anybody'. I do not know if that is going to get very far to be honest. Everybody was talking, 'Hang on, hang on'. You are now talking judge. If you are serious about that, you are talking judge and maybe Supreme Court judge, forget district. You are talking Supreme Court judge and up for that sort of warrant. I think you just go where you feel comfortable. As I say, it is up to you. I do not know how entrenched this authorised officer motion is in Victoria, but it is pretty

entrenched here. You can go up to the Local Court counter and do certain bail variations over the counter where they do not increase or decrease your obligation — you know, address changes or reporting station and that sort of thing. This is sensible. You do not need a magistrate for that. If you said to me what does my head feel comfortable with, at worst I could live with authorised officer for a normal search warrant, magistrate for a review of that refusal or telephone warrant and at the moment that is as high as it gets in this food chain. If they introduced covert warrants, or whatever the hell they are talking about, then that would have to be judge and above. I think with all the common-law stuff that goes down that serious road of real big intrusions, it is certainly not talking about authorised officers — you know, clerks of the Local Court.

The CHAIR — Tony, what else did you want to comment on?

Mr LYNCH — I am trying to look around. Reporting back has been a bit slack. That is just a small aside. All I will say about that is I think reporting back is important, not because it says anything about the veracity of the request for the warrant. Because the police kept saying, ‘Yes, but what if the place is empty?’. That goes down as a zero result, therefore the officer might be less inclined to give me a warrant next time. We are saying, ‘No, no, no. You don’t understand’. What we are trying to do is suggest that we have a system that reflects the importance of the whole process for the whole of the time. Our view is that you do not just get a telephone warrant because you say it is urgent, and that there is a formal reporting back of the result, simply so that in a sense the issue, execution and closure of that warrant, and all of them, is properly noted — end of story.

Mr DALLA-RIVA — Does the occupant get a copy of the search warrant?

Mr LYNCH — They get an occupier’s notice, which effectively duplicates what the warrant says.

Mr DALLA-RIVA — They do not get a copy of the affidavit?

Mr LYNCH — No.

Mr DALLA-RIVA — So that is all they get? They do not get any other formal notification?

Mr LYNCH — No, and in some ways — it is issued; I mean, mum knows that it is in relation to an armed robbery — —

Mr DALLA-RIVA — I am more indicating a copy of the affidavit. There is information in there that you would not want the offender, or the suspect, knowing?

Mr LYNCH — Or mum.

Mr DALLA-RIVA — Or mum knowing.

Mr LYNCH — It could work both ways, too, at the end of the day. Mum might be — —

Mr DALLA-RIVA — It might be looking for evidence for a sexual offence or something.

Mr LYNCH — And it is not good that mum knows. Accountability, we have done that; compliance and telephone we have done; justices we have done; the test is right.

The CHAIR — Would the repeal of this act and its incorporation into, I think, schedule 3 of the Law Enforcement (Powers and Responsibilities) Act require any fundamental changes to the nature of the operation of the Search Warrants Act as it now stands?

Mr LYNCH — Only if they act on the committee's recommendations and change it.

The CHAIR — Right.

Mr LYNCH — LEPRa, the Search Warrants Act — straight into it. If the committee that I was on is to recommend changes to the Search Warrants Act, they will appear because that effectively duplicates it. If, for argument's sake, they were going to make it — which they will not; I am confident — urgency only, that would change this unproclaimed piece of legislation, if that is the political will. Because when this starts the Search Warrants Act goes — it is repealed. So they have put all of it as it currently is — they have tidied it up a little bit, but not in content or in substance — in here.

The CHAIR — Basically it has stood the test of time, in the sense that there are not radical changes being suggested to the Search Warrants Act in terms of its incorporation into LEPRa?

Mr LYNCH — No, but, as I said to you, it has misled largely the police, I guess, and the law enforcement side into thinking that maybe there is room to expand its functions. So there were issues that came up — again, you might have seen that in the March document from the Attorney-General's department — and you would have wondered about all this stuff about closing doors and excluding people and coming back later. They are practical issues that you guys will still have to wrestle with. I do not know whether you like the day-night division. Quite frankly I cannot see a problem with a warrant that legitimately commences to be executed at 4.00 p.m. on the basis that dad works on the docks or he is in a trade and they know he is home by then, and naturally he is home when they start, but it will go past 9 o'clock. On one view on New South Wales law you cannot, because the word 'executed' has been defined to include every act in relation to the warrant.

Mr DALLA-RIVA — Not the time of?

Mr LYNCH — No. So that if executing a warrant means you go in, do the occupier's notice and comply with that, look around and go — and if the 'going' is the ending of it — 'executed' has been defined to include that. So we are in the situation that if it takes 6 hours — and nobody is mucking around and it is all above board; they go in at 4 o'clock, rickety-rickety, it just takes that long — strictly speaking, that is not authorised. Now I have to be honest, okay, if you want to stick with that you had better have a really easy system to extend it.

The CHAIR — This is a temporal kind of thing.

Mr LYNCH — Yes. Fair dinkum, mum is sitting there, it is all happening, it is about finished, it is legitimate, she is cool — but you want the police out as soon as you can to get back to your normal life. Are we really that silly that you have to get on the blower to a justice or get it extended and go out and come back?

Mr DALLA-RIVA — Yes, I have never understood day-night warrants.

Mr LYNCH — I understand the philosophy, which is in Kirby's remarks about the intrusion at night, the knocking on doors. That is fine, if you execute it after 9 o'clock when people are in bed, but these days they might not be. I mean, 'night' is an old concept. I bet 50 years ago most people were —

Mr DALLA-RIVA — Most of your druggies are out there doing their business in the early hours.

Mr LYNCH — With the Olympics you would not have thought night started until about 11.00 p.m., would you? Yes, I think you might not want to necessarily make the same division in terms of executing it. You might still want to keep the same division in terms of recognising that

there is a difference between entering somebody's premises in the day, if that has the notion that we are all up and at 'em, and night in the sense that people are literally knocked out of their beds by the kerfuffle. Yes, that is different, it is threatening, it is strange, and people can be naked or in various stages of undress, or, God knows, doing other things. This is where you will have to trust the police again. Now I am not that stupid. If it suits an officer, I would have thought that to go in for what could be a long search at 4 o'clock, they are going to go in at 4. There might be the odd cop who really wants to nail Jon because he has been 'getting on my wick' and who goes in at 8.59 p.m. — if you could run through, if you could. But it just seems to me artificial. You are searching for stuff that could be related to the offence, and you could get an absolute bonus when you open the garage — 'hooley dooley!'. How long will that take? If the warrant was issued — in fact, 'to be commenced' might be the better way to look at it — and if it legitimately takes as long as it takes to execute it, and that puts it from day to night, then I never really had a problem with that.

The CHAIR — Tony, it has been fascinating. You probably have a lot more to give us, and there will be some follow-up with the secretariat. We appreciate your taking the time to come to talk to us, and we may have more questions to put to you either over the phone or in writing. Thank you very much for your time.

Witness withdrew.