

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

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Witnesses

Mr R. Hulme, deputy senior public defender; and
Mr R. Button, public defender, Public Defenders Office, New South Wales.

The CHAIR — Robert and Richard, thank you for coming to spend some time with us today. Our committee operates under the Victorian Parliamentary Committees Act. The proceedings will be taken down verbatim. Anything you say to this inquiry is subject to parliamentary privilege. You can make a decision subsequently as to whether or not you want your evidence made public. You will be given an opportunity to correct the transcript. We will send you a copy of that and you can inform us whether or not you are willing for it to be published as evidence on our web site and for you to be quoted in any reports that we produce. Perhaps if we kick off by your telling us a little bit about the role that you play in the judicial system here in New South Wales and your experience with warrant powers and procedures and any issues that you think might be of interest to the committee.

Mr HULME — I am Robert Hulme and my colleague beside me is Richard Button. We are both with the New South Wales Public Defenders Office. I have been there for a little over 12 months. Richard has been there for a lot longer. I will let him fill you in a little bit more on his background. Prior to coming to the Public Defenders Office I was a crown prosecutor for 13 years, previously a solicitor with the New South Wales Director of Public Prosecutions, previously a solicitor with the New South Wales Legal Aid Commission and previously working with various courts throughout the state. Just generally in relation to the Public Defenders Office, there are about 24 of us, most based in the Sydney region, some based in country areas, predominantly doing trial work in the New South Wales Supreme Court and appeals in relation to convictions and sentences in the New South Wales Court of Criminal Appeal. The latter is my main area of work in recent times. My trial experience has been in my former life as a Crown prosecutor and as a solicitor.

Mr BUTTON — I have been a specialist criminal defence lawyer for about 18 years, I came to the bar in 1989 and I was appointed a public defender in 1991. From 1996–98 I was the director of criminal law within the Attorney-General's department which is the body that is responsible for criminal law reform. At an earlier stage of my career I focused exclusively on District Court or County Court trials and now I basically do Court of Criminal Appeal appeals like Robert, and also a few murder cases.

I guess that I would have three areas that I would want to emphasise. One is that the trend towards videotaping all police procedures starting with interviews but extending to the execution of search warrants and forensic procedures and just about everything else is one of the most constructive things that has happened since I have been practising. There has been — I think it would not be too strong to say — a revolution in the way criminal trials are conducted, and it has had all sorts of other positive flow-on effects. My suggestion to the committee would be that that process should be continued and if at all possible accelerated, and that the requirements for videotaping and execution of search warrants and other warrant procedures should be made more and more rigorous — of course in a sensible way — in terms of cost, time and so forth. The second thing is that it is useful to have procedures spelt out, again to a reasonable degree, in legislation. We have done that in our detention-after-arrest legislation, and that has worked pretty well over the past five or six years. I think there is a need to avoid micro-management and putting in legislation things that really should be part of police internal training. Basically, I think that trend is also a very useful one. Finally, I think generally police powers should be written down clearly in legislation where they can be accessed by police, courts, lawyers and citizens. A situation where the police for example, have the power to arrest someone for a breach of the peace, and in order to determine what exactly is a breach of the peace, one has to dig out an 18th century decision of the English Court of Appeal. I just think that is unsatisfactory and really undemocratic, because it does not permit citizens to conveniently know the law. That trend is continued in New South Wales as well with the Law Enforcement (Powers and Responsibilities) Act, which passed through Parliament in 2002, but is yet to commence I understand because of concerns about making sure that everyone is familiar with what it contains. Those would be the three themes that come to me in discussing the area of search warrants. I am not really in the position to discuss nitty-gritty, nuts-and-bolts

problems with the New South Wales legislation. Those, however, are the three general ideas that I am seeking to impress upon the committee today.

Mr HULME — I will just continue with some specific matters that I have picked up in the discussion paper and make some comments. There is reference in one particular passage on pages 38 and 39 — and I notice similar points are raised elsewhere — about a question of accountability in relation to search warrants — it is a question of accountability, oversight, transparency and the like. The particular point that I am looking at is a suggestion apparently made by Mr Walters, SC, about possibly reporting back to those who authorise the issue of warrants, what the outcome of the process was. I take that to be one suggestion, for there to be some mechanism for a review of some sort as to whether what was sought and the basis upon which it was sought was appropriate in the circumstances which transpired. There are other ways of achieving that. It may or may not be practical, and it may or may not be effective for a justice of the peace or a magistrate who is issuing warrants to have a continual back flow of paperwork and to be reading it all and thinking about whether what has transpired was what was envisaged at the time the warrant was issued.

The CHAIR — You are querying that?

Mr HULME — Yes, I am raising a question as to whether that would be effective. I can understand the rationale, but whether that would be the most effective way of achieving it might not be the case.

The CHAIR — Because of the workload involved?

Mr HULME — Yes, the numbers of warrants issued, I do not know the exact numbers in Victoria.

The CHAIR — Hundreds of thousands — a lot.

Mr HULME — Yes. In terms of just search warrants, which I am focusing on, I envisage the number would be considerable, and I cannot imagine that those who are issuing them in those numbers would have the time to review it.

Mr MAUGHAN — Do you have any suggestions for a more workable proposition?

Mr HULME — An alternative — and I do not think it is any better but I just raise it — is whether there might be some independent body that is a regular source of receipt, a regular body to receive this sort of information and be available to review it. But I wonder also whether a better way might be for those who are the subject of search warrants to have available to them, whether it is immediately or some time down the way when it might be more appropriate, and be provided with the information — subject to concerns about security of sensitive information — with something to inform them of the basis upon which the authority was given to have their premises searched, so that if they envisaged some cause for complaint, it can be a matter for them to raise. At the moment, in the New South Wales environment at least, there is really no mechanism for any sort of independent accountability for the information that is provided in support of applications for search warrants, apart from trusting in the good faith of those who apply for them. And one would hope that in the vast majority of cases, if not all, that is good enough, but experience has told us that it is not always the case. Just one example came to me this afternoon as I was looking at this aspect of it. I had a case last year which involved not a search warrant, but a listening device warrant that was sought by police. It was in a very serious matter — it was a murder. The suspect had flatly declined to be interviewed whilst there was any recording device running, and so the police were hamstrung because of our legislation that places great emphasis on the admissibility of admissions being based upon, *prima facie* at least, there being a recording. The police were somewhat hamstrung.

There were some admissions made in an off-the-record sort of way, which led the police to believe that they were looking at the right target, but getting him on tape was a difficulty for them. They chose to pursue something of a ruse by applying for a listening device and getting themselves wired up. They could not charge the fellow; he had to be released from an earlier arrest because they did not have enough evidence. They went around to his house a week or two later and invited him to 'just come for a drive' with them, to 'go to the local park and have a bit of a chat, if you would like to get some things off your chest that must be really burning on you — come on son, it's just you and us. We could have taken you to the police station, but we haven't; look here we are in the park. Come on, son, we can have a bit of a chat'. By persuading him to think it was an informal conversation of this nature, they secured some admissions from him. It was enough to justify charging him.

The CHAIR — They taped it all?

Mr HULME — They taped it all, yes. He was not to know that until it was too late. But then at the trial or pretrial situation there was much to do about the appropriateness of this police conduct. The trial judge was called upon to rule upon whether there had been impropriety and whether for that reason the evidence should be excluded, and if it was excluded the Crown case would fall by the wayside. The trial judge ruled that there was an impropriety and excluded the evidence. The Crown appealed against that ruling and it was found the trial judge had erred in the way in which he had gone about exercising his discretion. The reasons do not matter for present purposes. But it is a long story to raise this particular point. In the course of that pretrial exercise, in arming herself with all of the available material to attack the evidence of the police — there was evidence called by the police and various police officers involved in the whole exercise — and in mounting that attack the defence counsel subpoenaed all of the material she could get her hands on that was the basis for which the warrant for the listening device was issued.

In that material that she then became aware of, there were claims made by the police to the issuer of the listening device warrants, the Supreme Court judge, which were just not borne out in the evidence. They had overstated the position quite dramatically — they had exaggerated matters and they had changed a word or two here in relation to the oral admissions, unrecorded admissions, that had been earlier made that made them sound more damning, and so forth. This enabled her to make something of an attack on the credibility of the police. But it was only because of that process having been undergone that some impropriety on behalf of the applicant for a warrant came to light; otherwise, it never would have. And it is those sorts of steps that one needs to go to under our present system that brings to light those sorts of things. That is just an example of how, or it is an illustration to me, at least, that there might be more impropriety there that we are completely unaware of.

The CHAIR — So at the moment, in effect, you can complain at court and can say, 'Look, this evidence should be inadmissible on the basis that the warrant was not properly executed' or, 'The police did not conform with the requirements of the warrant' and so on, but you are also suggesting here that there should be another complaint mechanism, where the person who is the subject of the warrant might be able to make a complaint? How would that work in practice? Would it be outside of the court system, or is it only within court proceedings that you see that?

Mr HULME — In court proceedings, criminal proceedings, that is where a person has the most to lose. I would suggest that there should be almost mandatory disclosure of all of that documentation to somebody who has been the subject of a search or a listening device or a whatever — —

The CHAIR — So, mandatory?

Mr HULME — It should be part of the Crown's general duty of disclosure rather than it being something for the defence to dredge up by way of subpoena. There is always the concern of

sensitive material, which is often the case in those sorts of applications for warrants, where police have information from informants and so forth. That can be dealt with in various ways. But it should be disclosed. Outside of criminal proceedings, though, there could be misuse of powers that under present procedures would not come to light and that might give rise to a justification for some civil action in the person. If, for example and hypothetically, the police completely misused their powers to obtain a search warrant on false information to search a person's place and caused great distress through that invasion of privacy, they found nothing and so no charges were laid and no criminal proceedings were brought, the person would have to dig to find whether the police were acting legitimately or in good faith. It should be a matter of regular disclosure of that sort of thing.

Mr DALLA-RIVA — Is it not the case in New South Wales that if an affidavit is made before an authorised officer or magistrate or judge, there is a copy of that affidavit left with that person?

Mr HULME — No, you have to serve a copy of what is called an occupier's notice on the person.

Mr DALLA-RIVA — But if I was to make an application to a magistrate for a search warrant, in Victoria you would leave a copy of the affidavit with the magistrate who authorised the warrant. That does not happen here?

Mr HULME — I am not sure whether it is taken away by the applicant or left with the issuing justice, I do not know that detail. It would mean it is available.

Mr DALLA-RIVA — Yes, because it is in Victoria.

Mr HULME — It is thereby available with the issuing magistrate, judge or justice or with the applicant — someone has to keep it — but making it available to the subject is another matter. Going on from there in relation to when ones gets into a situation at court where there is a challenge to the admissibility of evidence because of an alleged illegality or impropriety, I notice from the discussion in the discussion paper that the Victorian situation seems to be that which has long applied at common law; I am assuming the evidence has been obtained by way of some illegality or impropriety. The common law has had it for a long time that it is then a matter for the defence to persuade the judicial officer that the evidence should be excluded as a result. This is discussed at page 42 and there is reference to the High Court authority of *Bunning v. Cross* which we knew well in New South Wales until our Evidence Act came in 1995, the so-called uniform evidence act which is now in two states and one territory.

Mr BUTTON — And the commonwealth.

Mr HULME — And the commonwealth. The point I wish to make briefly in relation to that is it is desirable in my view that there be a provision such as is in section 138 of the Evidence Act. The effect of it is that if it is established that evidence has been obtained by way of an illegality or impropriety, it is not admissible — the onus is reversed — unless the judicial officer is satisfied by the prosecution that it should be admitted despite the illegality or impropriety. Similar considerations are listed there and the *Bunning v. Cross* reference is taken into account. Section 138 of the act lists similar items and some more that the court must take into account. It puts the onus back on the prosecution, more appropriately in my view, to satisfy the court why evidence which is obtained at that price should be admitted nonetheless. There is further reference to what I was speaking about in relation to what was at pages 38 and 39 and another aspect of it in relation to question 60 on page 58 of the discussion paper is, 'Should supporting affidavits and statements be made available to the defendant and counsel? Under what conditions?'. That is essentially what I have been speaking about.

We have spoken about a fairly limited area of the committee's inquiry but they are the matters which on a practical level public defenders in this state have encountered. I endorse what Richard has said, the introduction of videotaping of confessions has vastly changed the trial experience in New South Wales. The more recent, almost invariable, practice of videotaping search warrants is changing things in a positive way as well. Trials are not bogged down with lengthy evidentiary hearings in order for a judge to make a decision as to whether an admission or a product of a search should be allowed in or rejected, because of the requirement for taping. If it is all being recorded, first, it keeps police aware of their responsibilities, and second, there can be no argument about what has happened.

The CHAIR — What areas of argument are there? If you are videotaping a search — —

Mr BUTTON — I have a copy of an appeal here — —

The CHAIR — There must still be some areas of contest. If you come to search my house, what is videotaped and what is not?

Mr BUTTON — In the appeal in Jiminez — I have a copy of the report here — the police went to a drug dealer's house — —

The CHAIR — 'Jiminez' did you say?

Mr BUTTON — I can give you a copy.

The CHAIR — That would be great.

Mr BUTTON — The facts of that matter is the police went to a drug dealer's apartment in Kings Cross. Jiminez was there, they had a video camera and they recorded very many aspects of the search. The one thing they did not record was the alleged finding of heroin on Jiminez, which was of a sufficient quantity to bring into play our onus reversal deeming provision of supply. I understand from the barrister who appeared for him in the trial that Jiminez sought a trial by judge alone because he felt, I think correctly, that in the current climate no judge would have convicted him in those extremely suspicious circumstances. The Crown did not consent to that, the trial was run, which I think took three or four days, and he was convicted. The trial judge was very unhappy about it and said something about it in her remarks on sentence. He appealed — I appeared for him — and to cut a long story short, the Court of Criminal Appeal just would not accept that as a way of proceeding anymore.

The CHAIR — The allegation was that he had been fitted up by the police.

Mr BUTTON — Yes, that is it — that he had been loaded up. There were a number of reasons given why the most crucial part of the whole proceedings had not been videoed. Who knows where the truth lies but I think it is fair to say that in the climate in New South Wales the three judges in the Court of Criminal Appeal said they were going to quash the conviction.

Leaving aside, as I have said, the rights and wrongs of it, that matter which involved a four-day trial in front of 12 jurors and a judge, proceedings on sentence and an appeal to the Court of Criminal Appeal that went for a day must have cost the community tens if not hundreds of thousands of dollars, but if that search had been videotaped, that would have been the end of it. I think that in New South Wales we should be moving toward a situation similar to the situation with interviews where they are automatically videotaped. It is not an absolute rule of exclusion that if they are not videotaped they are not admissible. There is a basis upon which non-videoed admissions can be admitted but it is reasonably small, and I think that should be the position with regard to searches as well. I am not 100 per cent familiar with it, but I think the new Law Enforcement (Powers and Responsibilities) Act contains something to that effect. The people from

the criminal law review division, who are coming to speak to you I understand, will describe the ins and outs of that system.

There is a perfect example in a case that occurred reasonably recently, where the guy spent a number of months in prison before he got bailed pending an appeal. It is the kind of thing that calls into question the community's trust in the police and the judge. In her remarks on sentencing, the judge pretty openly said that she just did not accept the verdict but she would have no choice but to sentence the guy. All of that could have been avoided if that 10 seconds had been recorded and the police had known that if it were not recorded it would have been inadmissible. One might have expected those 10 seconds to have been recorded, so I just put that forward to the committee as an example from my own experience of how things used to be and how far removed from it we are now. It is not uncommon for us now to have trials where every single important thing that the police do is videotaped, which is fantastic. There is just no room for debate. Of course it is not just the question of the judge having to determine whether there has been an illegality; it is also a question of 12 jurors being called upon to determine where the truth lies in circumstances where that is very difficult to determine. If things are videotaped that is the end of that controversy. I am not sure of the position in Victoria with regard to a mandatory regime of videotaping searches. I know Victoria was one of the first to have a regime of ERISP — electronically recorded interviews with suspected persons — so maybe that is the next step. I think it is a great step forward.

Mr MAUGHAN — To what degree do you think that that has shortened trials in New South Wales?

Mr BUTTON — I think it shortens trials, but even more importantly it means that there are a lot more pleas of guilty that would have been trials before. It has all sorts of secondary good effects. I do not think it is good for society generally if police or anyone else are constantly being accused of perjury. I am not saying that that should not happen if it is true, but as a social phenomenon how much better it is to have a comfortable sense of satisfaction that people who are going to jail are guilty because you can say, 'There is the heroin hidden behind the refrigerator!' and that is the end of it.

Mr MAUGHAN — I agree with that, but it is necessary to persuade the government that there are some economic benefits. It would appear that there are some from having it videotaped because you are lessening the cost to the community in running those lengthy trials.

Mr BUTTON — When the recording of interviews came in in 1992 it was after a High Court case and it was after years of controversy in New South Wales about verballing. I would be very surprised if any person from the police ministry came down and spoke to your committee and said, 'Look, that was not worth it and we should go back to the old way. We should not be bearing that cost'. I would have thought even people who you might expect to be resistant to it would be now fully in favour of it. Looking at the matter of Jiminez, as an example, the police said that one of the reasons why they had not used it was that they did not have a spare video battery when the thing conked out. Well, I mean, how much do they cost compared to the cost of those proceedings?

The CHAIR — So are you saying it is mandatory under the Search Warrants Act or it will be mandatory under LEPR?

Mr BUTTON — I think there is a more rigorous regime under the early powers and responsibilities legislation, which was passed in 2002. It has not commenced yet though, and I confess I have not looked at it closely, but at the moment there is no provision about the admissibility of unvideod searches. Of course if you have seven police officers searching your house, we are not at the stage of having seven video cameras attached to each officer's shoulder,

but having said that there are ways that things can be done with one or two video cameras, in an intelligent way.

The CHAIR — That is one of the requirements that you are suggesting would be an advance. You said in your second point — and you did not have an opportunity to elaborate on it — that there should be a spelling out of more of the requirements for warrants. Did you have particular things in mind?

Mr BUTTON — I did not really have anything particular in mind in relation to warrants, but up here the detention-after-arrest regime commenced in 1998 and the forensic procedures regime commenced in 2000 or 2001. Both are amendments to the Crimes Act and both have extremely detailed provisions about how precisely the police are supposed to go about their jobs and what records they are supposed to keep and all the rest of it. When you sit down and read that legislation the first impression is, ‘My goodness, do we really need 80 sections to spell all this out? Isn’t some of this more for training for police?’. But on reflection it has been good, and everyone in the system knows what the police are called upon to do. One can cross-check the documents and the processes that have been adopted by the police as against the legislation and see whether there has been a failure or not. So I have changed a little in terms of thinking that so long as you get it right and are not constantly changing it, more should be in legislation. Previously I thought it should have been in the background and in the police training regime. In terms of search warrants, I am a little like Mr Hulme in that we are not right at the coalface as legal aid solicitors who people might ring up in the course of a search warrant and say, ‘Quick, the police are at my house, what do I do?’. We come into the matter months down the track when the matter is listed for trial, or maybe years down the track when the matter is listed for an appeal, and I do not have particular thoughts about the execution of search warrants in that way except as general ideas about the other acts that have commenced.

The CHAIR — In terms of LEPPRA itself, it seems to be a stronger codification of the legislative requirements upon police, and what they are required to do as a matter of procedure will now be part of the law instead of the police procedures.

Mr BUTTON — Yes. The first idea was to get all the legislation pertaining to police powers or as much of it as was practicable into one place where everyone, including police, can know exactly what they can or cannot do. That is a huge job but it is a pretty mechanistic job — you are just moving provisions from other acts and putting them all in one. The second idea was to, as much as possible, review and consider existing common-law powers that police have, determine whether they are appropriate to the new century, and if they are, write them down as much as we can so that everyone can know where they are, what they are and what the policing can and cannot do. I do not know that the new act really does much to change police powers by increasing or decreasing them. I think that the majority of it are those two mechanistic processes, but like I said, I understand that with regard to search warrants they are moving towards a more rigorous regime where if certain things are not videoed then the police run the risk of exclusion.

Mr MAUGHAN — Do you support a similar concept with regard to search warrants and provisions — only concentrating them all in one piece of this legislation rather than scattered through a variety of acts?

Mr BUTTON — It is always the problem of, let us say, wildlife officers have a certain power to get a search warrant of some kind. It is a question of the balance of convenience for the people who are actually using the legislation. I have to say as a matter of thought, philosophy, I think it is good to have everything in one spot, but I am not really familiar enough with Victoria to know how much stuff is scattered around. My own experience down at CLRD is that there is so much useful law reform that could be done in New South Wales just tidying up or renovating or knocking down old buildings, if I can put it that way, and building new ones. Because of the political pressure with regard to law and order it is very hard for anyone to get the time to actually

do them. So I would have thought if Victoria has got the chance to sit down and sensibly determine where we can put things in a way that is convenient for everyone but also makes sense in a structural way, it would be fantastic. If you had that opportunity, I recommend it to you, if I may.

Mr DALLA-RIVA — That is a question I was going to ask. The act that you are talking about was introduced in 2002 and we are now two years down the track. What is it that is occurring that is stopping the process. You may not wish to answer, or you may wish to answer but have the answer excluded, but we have had other witnesses give evidence and I still have not got a satisfactory answer to why this is not knocking down the old buildings and creating something new but has been sitting there. Is it the Police Association? Is it community concern? I am curious.

Mr BUTTON — I do not know. I am pretty much out of the loop. I do not know. It is pretty unusual for a piece of criminal legislation to sit there for two years without being commenced.

Mr MAUGHAN — Is there pressure in the legal profession to — — ?

Mr BUTTON — I do not think so. I think there would probably be a big need for training of police to know, 'Look, there is not a Search Warrants Act any more, and all those sections that you know off by heart no longer exist'. There would probably be a big bureaucratic thing about redoing all the forms and bits and pieces. But we have — —

The CHAIR — It is also question I think of whether or not you introduce new powers. For example, there was a whole set of issues around telephone warrants, whether you change the urgent and practicable or whether it just becomes urgent. Anyway, perhaps we will — —

Mr DALLA-RIVA — Obviously it is a political decision because it has not been enacted, but I do not fully get where the pressures are coming.

Mr BUTTON — I do not fully understand it myself. It is harmful, because let us say there is something that needs to be amended now. You have got to start amending an act that has not commenced. You do not go back. It starts to get very confusing and problematic. From what I have heard I think there is pressure to get it going finally. I would be amazed if the legal profession was against it, or the community. There has been over the past five or six years structural reform in New South Wales, topics I will not bore you with but actually some quite difficult jobs. For instance, procedures of the local court were rationalised in quite a good way. That was a big job. That got through Parliament and got proclaimed and commenced without difficulty, so I do not fully understand it myself.

The CHAIR — Could I perhaps head off on another tack and ask you whether you have had any experience in relation to penalty or PERIN-type fine enforcement warrants, or whether you have any comments on how that system operates?

Mr HULME — No I was involved at the very beginning of what we call self-enforcing infringement notices in about 1984–85. No, it was earlier than that — in 1982–83 I think it was. We went from the situation where if you did not pay your infringement notice within 21 days it automatically defaulted to a court appearance. I think your system is something the same. We now have to elect to go to court; otherwise it is just a fine, a debt to the state and it has ramifications for your drivers licence or whatever if you do not pay and things like that. But no, I have no direct involvement in the scheme or knowledge of its operation.

Mr BUTTON — The same for me.

The CHAIR — Have you got any comments at all you would like to make in relationship to arrest warrants, the legislative framework that exists or concerns that have arisen out of your practice?

Mr HULME — It is not something we would have involvement with and not something we have heard of. I speak for myself. It is not something I have heard of — any controversy about it. The procedures seem to be complied with without any drama.

Mr BUTTON — I would agree with that.

Mr MAUGHAN - Do you think it impacts unfairly on various disadvantaged members of the community, unemployed, lower socioeconomic groups, or those with drug and alcohol problems, those sorts of people?

Mr HULME — In terms of arrest without warrants?

Mr MAUGHAN - Yes.

The CHAIR — Or search warrants, yes.

Mr HULME — I think it came through with those local court amendments that Richard was speaking of earlier where we have gone to a system where there is greater emphasis on the issue of court attendance notices by police rather than arrest, police station and the question of bail. There is much more emphasis now on a person being provided with a court attendance notice if their identity is known and the matter is not too severe in terms of its nature. In effect for a police officer it acts like a summons to issue a court attendance notice and the person appears in court on the appointed dates in days or weeks hence. It would be fair to describe it as a greater emphasis on that procedure rather than on what used to be almost always the case — an arrest without warrant, the person being taken to the police station, bailed or not bailed and court to follow.

Mr BUTTON — There has been an interesting development in New South Wales. Robert will correct me if I have got the facts wrong. It was a young Aboriginal guy who got into an altercation with the police out in Dubbo in the north-west of the state. It ended with him being arrested, and because he was arrested or the police said they were arresting him the whole situation got more and more inflamed. He allegedly committed some more offences after that. So it was sort of a street problem that grew like topsy, which I think is pretty common. What he argued in court — pursuant to the statutory version of *Bunning v. Cross* that we have — was, ‘Look the police behaved improperly by arresting me and the evidence of my offences was obtained by way of their impropriety’. That was a very unusual application of the discretion to exclude evidence on the basis of police impropriety. He was sort of arguing, ‘I would never have committed these offences were it not for that impropriety’. That decision found favour with the magistrate and also with the Supreme Court judge who heard it on appeal. That was the decision of Carr, which is reported in the Australian Criminal Reports. I think it was handed down in about 2000 or 2001.

Mr HULME — That would be right — Justice Smart.

Mr BUTTON — After that there was another decision which read it down. I am almost sure it was Coe, and I appeared in that one. Justice Adams discussed that approach to section 138 and the power of arrest, and that would also be in the ACrimRs. I think it would be fair to say that that idea was a reaction to the feeling that the use of the power to arrest can make things that were minor street problems just far worse than they would have otherwise been. That has been a common complaint for years in New South Wales. In terms of my own direct experience of it, I have not really had that much for many years. That case of Carr would give you a bit of the flavour of how a Supreme Court judge reacted to the background of that particular case. That was

an interesting approach to the *Bunning v. Cross* discretion and how inappropriate arrest could actually lead to exclusion of evidence of the offences committed by the defendant after that arrest.

Mr HULME — I will correct Richard: he was wrong. It was Wellington and not Dubbo — a smaller town. In Carr the primary point was that this man was drunk and behaving, as some people thought, or the police thought, in an offensive manner. He was calling out, swearing and so forth at about midnight. The police knew him; they knew where he lived. There was no problem with them recording the event and later on issuing a summons for him to attend court at some later date, but they chose, notwithstanding the availability of that procedure, to arrest him for the offensive language, which led to the offences of resisting arrest and assaulting police — the trifecta they call it. That concern about the overuse of arrest powers, particularly in western New South Wales, was probably the impetus for the greater emphasis now on the use of the court attendance notice, as opposed to arrest.

The CHAIR — Are there any other areas you would like to comment on before we conclude?

Mr HULME — No.

Mr BUTTON — No, thanks.

The CHAIR — Thank you very much for your time and for coming to talk to us. It has been most helpful.

Committee adjourned.