

**LAW REFORM COMMITTEE**  
**Warrant Powers and Procedures Subcommittee**  
**Inquiry into warrant powers and procedures**  
Perth — 2 September 2004

Members

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Mr D. McKenzie, Legal Aid Commission of Western Australia.

**The CHAIR** — David, welcome, and thank you for coming to talk to us. The committee is authorised under the Parliamentary Committees Act, which means the evidence it takes is subject to that act and therefore to parliamentary privilege. That means that once we get your evidence back to Victoria it attracts the usual privileges. You can obviously indicate at any time while you are talking to us, or indeed in reviewing the transcript, which we give you an opportunity to do, what you are happy to have on the public record as public evidence and what you do not wish to be anything other than a confidential contribution. You can amend and delete the record. As is the usual practice, once we have been through that we make the evidence public and we put it on our web site. Obviously it is something we might cite in the preparation of our final report. I just make you aware of that.

**Mr McKENZIE** — Thank you for that.

**The CHAIR** — Perhaps in starting out you could, from the perspective of legal aid, give us a bit of an overview of what you consider to be the most significant warrant powers in Western Australia and how they operate in practice, and the particular issues or policy considerations you think we ought to turn our minds to.

**Mr McKENZIE** — Perhaps if I start with some of the warrant powers that are significant here. As you probably would have heard earlier in the day from other people, section 711 of the Criminal Code is perhaps the most significant warrant power that relates to the seizure of property from individuals or from organisations. The other powers come under section 70 of the Police Act, which again is dealing with confiscation of property from people or seizure from and search of individuals' property. There are, of course, warrant powers under many acts. Some of them are quite specific. There are warrant powers that relate to seizure of things other than property. There are warrant powers in a sense that relate to the taking of DNA and samples from individuals, but I am not sure whether that is a power you are interested in here. There has been recent legislation on that within the last two years.

I am in the criminal law section of legal aid in Western Australia. The criminal law section of legal aid really deals with the more serious charges, so we do trials and pleas of guilty from people who are on quite serious charges. Our contact with warrant powers is only sporadic, but over the last week I have talked to several people from legal aid about all the experiences they have had with warrant powers — both good and bad. We have identified some concerns, one of which is that often when people are exercising warrant powers it is a surprise search, as they usually are, and for our clients their first knowledge of the fact that there is a search warrant is when there are police at the front door. Some of our clients have had bad experiences because the police, understandably, have barged in their front door and exercised some force in searching the premises for either items of property, drugs or other things. It is understandable.

**The CHAIR** — When you say understandably, they do not give them an occupiers notice?

**Mr McKENZIE** — No. When the police arrive at the front door they are bound to show the warrant to the occupiers of the house and they are meant to explain the content of the warrant. The individual is meant to look at the warrant and to understand, firstly, what the alleged offence is and, secondly, what property or other things they are searching for, because the warrant really has to detail it quite specifically.

**Mr DALLA-RIVA** — I find it hard to explain it when you have a 40-pound key as you are barging through the door. I know what you mean!

**Mr McKENZIE** — Perhaps I will say this: sometimes it does not happen; sometimes the warrant is not shown, although the police do have a warrant. I have certainly had experience of clients telling me about problems with warrants. Perhaps I can illustrate it by a story. The police had a search warrant to look for certain stolen property that they thought might be at this premises.

My clients were a father and son. The father had another son who had been at the premises perhaps six years earlier, and unfortunately all the sons had committed stealing and receiving offences over the years — not very serious, but certainly they had done that — but the particular son had long left the premises. The police went to those premises because that was probably the last known address. They were looking for a bicycle — it was not very much. The police arrived at the front door — there were a lot of them — and banged it in. The father was quite ill; he had multiple health problems and was in bed. He was virtually bedridden, but he did have a cane. The police went into the bedroom because they wanted to search the cupboards. He was not well and not in a good state of mind either, and he started hitting the police with the cane. They put him down on the bed, and one of the police officers hooked his neck under his arm. Another son came home, went into the bedroom, saw that his dad's face was looking quite blue and of course started assaulting the police. So what was a search for simply a bicycle became a huge melee. The father and son were charged with assaulting public officers, and it became bigger than *Ben Hur* in the end. That is an example of the police not really exercising search warrants.

**Mr DALLA-RIVA** — Would you put that type of example down to the fact that the police would have had to go to a justice to get the warrant?

**Mr McKENZIE** — Yes.

**Mr DALLA-RIVA** — And obviously they would have had to provide evidence to substantiate a reasonable belief that that bicycle was at that location. We have heard evidence that perhaps some of the justices ought to have better guidelines or protocols, so that when a warrant is requested one of the fundamental issues would be having the police check the veracity of the alleged suspect having resided in an area or in that home so that they would not find a situation where the offender had not lived there for six months or six years. What is your view on that?

**Mr McKENZIE** — Yes, I think there should be guidelines as to that.

**Mr DALLA-RIVA** — Legislated guidelines? What is your view?

**Mr McKENZIE** — Yes, there could be. In WA the Justices Act and the Justices Regulations can set down provisions on that. Perhaps a regulatory provision could set down certain guidelines for justices. Justices of the peace do a difficult job. They are volunteers, and while they undergo quite a lot of training, it really is very difficult. If the guidelines were put down it may make it easier for justices to say no, because it is awfully difficult to say no to police officers in that situation.

**Ms HADDEN** — But it would be easier if you had regulations or criteria that you could tick off?

**Mr McKENZIE** — Yes.

**Ms HADDEN** — And unless they are all satisfied then it is easier to say no, because you have that in front of you.

**Mr McKENZIE** — Very much easier. If those provisions existed, no doubt there would be training on that, and they would know how to apply each of those guidelines.

**Ms HADDEN** — And the police would be trained as to what they needed to do to satisfy those guys.

**Mr McKENZIE** — Of course, so it means that all parties must comply.

**The CHAIR** — In relation to that search that you described and the subsequent charges of assaulting police officers, is there anything in the nature of that search which under Western Australian law would be taken to contravene the procedures that ought to be carried out in

conducting a search so that such a charge would not be sustainable? In other words, have the police acted improperly or illegally under West Australian legislation?

**Mr McKENZIE** — Yes, it is interesting, because section 11 of the Criminal Code used to have a provision that related to the level of force that could be used, and it stated the force was necessary force. It actually said that if necessary police officers would use force. I am not stating that exactly as it was, but it was one way of dealing with that.

**The CHAIR** — It used to?

**Mr McKENZIE** — It used to; it does not now. No doubt any magistrate who is looking at these matters would consider in relation to that section that the police officers could only use reasonable force. But it may be useful to put that in the section, to say that if necessary, police officers may use reasonable force to seize the items. That would be helpful. In this case the police officers were certainly entitled to exercise force to search and to stop the fellow from assaulting them with a cane, and perhaps it was an unfortunate situation because they did not realise how ill he was; but the difficulty is that most people consent to police officers exercising a search warrant, and in the example I used they were not even given the opportunity to consent. It would be helpful if consent was obtained first. All situations will be different, and there may be situations where police officers have to act quickly; but something should be set down where police officers have to seek the consent first before they use force to enter premises and perhaps also to explain the contents of a warrant first.

**The CHAIR** — And that is not a requirement, really? It is a requirement, but you are saying that it is observed in the breach?

**Mr McKENZIE** — Yes.

**The CHAIR** — In effect, as I understand it, the provision requires them to read it out?

**Mr McKENZIE** — Yes.

**The CHAIR** — But it does not happen, just the same?

**Mr McKENZIE** — I am saying that it sometimes does not happen. I cannot say how often it does not happen. It may be that in 99 per cent of cases police officers do exactly the right thing, but it does happen occasionally that they do not.

**The CHAIR** — What other issues does Western Australian legal aid experience in relation to the operation of warrant powers in the state?

**Mr McKENZIE** — We have experience with police officers exceeding the terms of the warrant. For instance, a search warrant might set down the offence as receiving stolen goods and that the stolen goods were a bicycle. They might conduct a search of the premises and find a small amount of cannabis there, the cannabis is seized and the person is arrested for possessing the cannabis. The law on that comes from *Bunning v. Cross*, which I imagine you are aware of. Of course even though the police exceeded their warrant powers, whether the evidence is admissible in court depends on whether the probative value of that evidence exceeds the prejudicial value to the person. In a case like that the probative value might not exceed the prejudicial value because it might only be a very small amount of cannabis. The concern is that it is often happening that police are using the search warrant to go on a fishing expedition at the house to see whether other offences are being committed. Although the warrant is correct in that it is quite specific, the terms of the warrant are being exceeded or not being observed.

**Mr MAUGHAN** — In your experience are there many of those sorts of cases where they find no evidence of what it is they were going in to look for — stolen property or whatever — but

they are using that as a fishing expedition on drugs or whatever else the offence might be? Does it happen very often in your view?

**Mr McKENZIE** — In my view it happens quite often. I know many examples of it. There are obviously two arguments about that. People have committed offences and perhaps one view is that if there are other things at those premises people should be caught for that and they should be charged.

**Mr MAUGHAN** — Are they charged on the basis of that evidence that is found? If so, are most of them convicted or do some of them get off because of *Bunning v. Cross*?

**Mr McKENZIE** — I cannot think of any examples where people have gotten off because of *Bunning v. Cross*.

**Ms HADDEN** — They are encouraged to plead guilty.

**Mr McKENZIE** — Yes.

**The CHAIR** — It raises an interesting dilemma because under the police procedures here if it is a drug-related offence they are meant to videotape the search. There is a potential loophole here where you could have been charged with receiving stolen goods, there is not a requirement to videotape the search, the police go in and conduct the search and there is at least the potential in relation to Jiminez's case where the police were found by the court to have fitted up the person with some drugs while they were there. They claimed that the battery ran out on their video camera at the critical moment when they were searching Jiminez. The point is that there is that potential for abuse in the absence of videotaping. I just wonder whether legal aid has any views about the importance of that and whether you think the current arrangements are adequate or there should be an extension of videotaping arrangements?

**Mr MAUGHAN** — To all searches?

**Mr McKENZIE** — It is an interesting question. I had not thought of it before. I got an example from someone at work which was the same as the example of the bicycle and finding the cannabis. It was only a small amount of cannabis. In that case it is understandable that that has not been videotaped, but I have real concerns where it is a drug offence of a higher level of seriousness and where the eventual charge is possessing a drug with intent to sell or supply. In those cases a videotape is very useful for both sides because it shows exactly what was there; there cannot be any doubt about it. It will either convince the client to plead guilty to something that has been done, or it might provide a defence. If it is not videotaped that is a real concern. Some searches for other items are videotaped here. I know I have seen videotapes of searches for stolen items. I have certainly seen videotapes of that and other things. I do not think it would be a great difficulty for the police to extend the videotaping to all offences. In practice it is being done quite often at the moment.

**Mr MAUGHAN** — You mentioned that police breach the warrant provisions, and you have given one example. Are there other examples of breaching it in other ways — for example, time, going back?

**Mr McKENZIE** — Yes.

**Mr MAUGHAN** — Firstly, does the warrant only allow them to go on the one occasion, or do can they go back.

**The CHAIR** — Or do they go back?

**Mr MAUGHAN** — Firstly, are they authorised to go back multiple times and, if not, do they go back? Secondly, with regard to the time limitations — that is, 6.00 a.m. to 9.00 p.m. — do they ever operate outside of those hours?

**Mr McKENZIE** — Yes, they do. I will take the second part first. I heard an example recently. Police obtained a warrant to search during daylight hours, but that was not done; they went late at night. The client requested a copy of the warrant and was given it, but certain portions were blacked out. He managed to put it up to the light and he saw that it was ‘during daylight hours’.

**Ms HADDEN** — That might get him into more trouble!

**Mr McKENZIE** — Yes. They certainly exceeded the powers there. I doubt that that happens very often, because usually we find that most searches are done during daylight hours and there is no problem. As to going back multiple times, rarely. You can get warrants with the authority to search over a 30-day period, for instance. So yes, I have heard of police going back again and finding nothing there the first time but something there the second time.

**The CHAIR** — The strict interpretation of the code would you say that once the search is conducted and anything is taken back before the court that the warrant is in effect executed and extinguished. Are you saying that if they find nothing the first time that the warrant is still on foot?

**Mr McKENZIE** — That is interesting. I do not think that is clear, but I think perhaps that is the way police are treating it. I am not absolutely certain of the law on it.

**The CHAIR** — When you said they found nothing the first time but did find something the second time were you suggesting any sort of impropriety on behalf of police?

**Mr McKENZIE** — No.

**Ms HADDEN** — They just did not find anything the first time.

**Mr McKENZIE** — I am saying that it is perhaps like a driver going through a Multanova camera. Once they have passed one they think they are safe for a while, so they are free to speed for a while, in the same way some people — for instance, drug-takers — think once the police have been they will be safe for a little while.

**The CHAIR** — Okay, fair enough.

**Mr MAUGHAN** — I am glad you cleared that one up.

**Ms HADDEN** — You are being very generous, David! I do not know whether your clients would take it that way.

**The CHAIR** — Are there other issues with warrants from your point of view?

**Mr McKENZIE** — In the terms of your inquiry one of the matters that you are looking at is vulnerable groups here. At legal aid we represent many vulnerable groups. There are people who would not understand what police powers are and would not understand what powers police have under a search warrant. What I would perhaps suggest is that it should be made very clear or spelt out in great detail what police are required to do when they exercise a search warrant and what information and advice must be given to the occupants of a premises when that happens. For instance, we represent people who are intellectually disabled and have mental illnesses. They are very vulnerable people who need things explained to them. They need explanation for two reasons: they need to know what is happening, and if they do get that information they might be a little bit more relaxed about it. There are not going to be the problems where the police are trying to fight off an occupant of a premises. All people should be first given the option of consenting to entry into a premises. That is important.

**Mr MAUGHAN** — How effective do you believe the courts are in Western Australia in overlooking the execution of warrants? Is there any surveillance of the execution of warrants? Is there any mechanism for checking that warrants issued have in fact been executed, and if so what has been the outcome? Are there any statistics on that?

**Mr McKENZIE** — I doubt that there would be anything. The only time there is ever a look at a search warrant is if it is ever alleged in a hearing or a trial that the evidence should not be admissible because police have not exercised their powers properly. I doubt there would be any statistics kept on it. It is very rare that any defence lawyers would seriously look at a search warrant. I do know that now there are great requirements on the prosecution to disclose all the information they have, and that would include a copy of the search warrant. So it is likely now that all defence lawyers would get a copy of the search warrant and be able to see whether the police powers have been exceeded in any way. Perhaps that is one thing to consider. The disclosure of information from prosecution to defence is a very important thing. I do not think I can take that one any further.

**The CHAIR** — Just out of interest, matters of legal professional privilege where searches might involve the seizure of documents or things that might attract legal professional privilege, how is that dealt with in this state? Are there protocols between the legal profession and police? How is it governed?

**Mr McKENZIE** — There is no legislation on it, but there is an agreement between the Law Society of Western Australia and the police. I have not seen a copy of it, but there are quite good protocols in place to deal with legal professional privilege. I understand the police abide by that, so I do not think there have been any instances of difficulties. I am not sure whether in Victoria there are similar protocols in place. If there are I would not have thought it would be something that needs to be set down in legislation, because of the fact that if the protocols are not abided by there are other mechanisms for dealing with that. Certainly the material gained will not be admissible in court.

**The CHAIR** — Do you have any comments to make in relation to bench warrants?

**Mr McKENZIE** — We see many bench warrants. You might have other information from the police on this matter, but in this state what seems to happen with bench warrants is that if the client does not show at court then always a bench warrant is issued; but police will not necessarily follow it up because in many cases if the charge is not serious they know that the clients will come to police attention somewhere down the track and they will be caught, and invariably that happens. The only time that police will pursue a person under a bench warrant is if the charge is very serious. They will do everything in their power to find the person and bring that person to court, but most of the time if we close a file and a bench warrant is issued, and we cannot contact the client, we then usually close the file. Some way down the track we almost always have to open it again because they are usually caught. I have not heard of any complaints from clients about the way the bench warrant has been exercised. Usually they are caught speeding in a car or driving under suspension. They are caught in some way.

**The CHAIR** — Are you aware of the provisions of the proposed criminal investigation bill?

**Mr McKENZIE** — Yes. Do you mean the provisions relating to searching an individual or the taking of samples from an individual?

**The CHAIR** — Principally in relation to warrants. We are not overly familiar with the bill, but we know there is a new bill. Are there provisions in that impacting on the issuing of warrants that you would like to comment on?

**Mr McKENZIE** — I do not think the bill deals very much with search warrants as to property. It really deals with taking bodily samples from people and a search to that extent or

searching for means of identification of a person. In other words, if somebody will not give their name and address that person can be searched to find out details about them. Also, they might be suspected of having committed an offence, and DNA can be taken from them, fingerprints can be taken from them and things like that. People are meant to be asked for their consent. If they do not give it then any level of force can be used to take samples from a person, to search a person.

**The CHAIR** — And is this just for serious indictable offences?

**Mr McKENZIE** — It is a little while since I have looked at it, but I think it is for any offence.

**Mr MAUGHAN** — So for stealing a bicycle you could take them?

**Mr McKENZIE** — Yes. You could take them.

**The CHAIR** — Sorry we might have some confusion. Merrin Mason has just informed me that the criminal investigation bill we are referring to is still being drafted at this point. You may be referring to the bill in relation to DNA, but apparently there is another bill in the process of being drafted which we have not yet seen in relation to warrant powers.

**Mr McKENZIE** — I am not aware of it. The fact is that this legislation is coming in in stages then, because the first phase related to bodily samples. This one obviously takes it further. So unless you can point me to the sections in it, then I cannot really deal with it.

**The CHAIR** — No, that is fine. I just thought that sometimes stakeholders are consulted about a bill, and that raises particular issues, and you may have had some issues about that bill that you wanted to share with us, but we have not had an opportunity to see a copy of the bill at this stage.

**Mr McKENZIE** — That is very interesting because we often see the bills as they come through, but this one has not even come through, so it might be quite a recent bill.

**Ms MASON** — It is still being drafted. It might not be a bill yet.

**Mr McKENZIE** — Well then that is the difficulty.

**The CHAIR** — Are there other comments that you would like to make at this stage?

**Mr McKENZIE** — There is nothing I have written down that I have not already said, but I would ask one question: people have come to me and said, 'I might have something that I can tell you about search warrants', but I have not yet received the information. As your inquiry is still going on, would you like extra information sent?

**The CHAIR** — Absolutely. Any written submissions would be gladly received.

**Mr McKENZIE** — Thank you for that. So when does your inquiry conclude?

**The CHAIR** — We are meant to report by the end of the autumn sitting next year. We are in the early stages of taking evidence, and the written submissions have to be received by 1 October this year.

**Ms MASON** — But we do receive information after that date.

**Mr McKENZIE** — Yes, so perhaps that is the best thing. If further issues come up and these people raise issues that are very relevant to the inquiry, I will certainly put it in a written form.

**The CHAIR** — We would be very happy to receive them. Obviously we have given that particular date for written submissions but we will be going through the process of developing drafts between then and the end of the year, so any material that you have would be more than welcome.

**Mr McKENZIE** — Thank you for that.

**The CHAIR** — Thank you for taking the time to come and speak to us.

**Committee adjourned.**