

LAW REFORM COMMITTEE
Warrant Powers and Procedures Subcommittee
Inquiry into warrant powers and procedures

Perth — 3 September 2004

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Mr S. Heath, Chief Magistrate, Magistrates Court of Western Australia

The CHAIR — Steven, thank you for taking the time out of what is undoubtedly a very onerous job to come and speak with us. As you are probably aware from the background material, we are empowered under the Parliamentary Committees Act to conduct this inquiry into warrant powers and procedures, and we are governed by the Victorian Parliamentary Committees Act, which means that the evidence we take is subject to parliamentary privilege. You can obviously elect whether or not you want to give your evidence to us in camera or on the public record and you can do that to any part of what you have to say. You do not have to do that immediately. You can do that once you get an opportunity to review the transcripts, because whilst *Hansard* is recording, unlike in Parliament, you will get the opportunity to amend what you say. Subject to those sort of caveats in terms of any restrictions on the material, we generally publicise all the evidence on our web site and we make it available in terms of quoting it selectively in our reports. Are you comfortable with that ?

Mr HEATH — I am very comfortable with that.

The CHAIR — It is particularly pleasing for us to be able to speak to you because it gives us an opportunity to look at the whole question of judicial oversight of warrants. Perhaps you could start by telling us what you see to be the most significant warrant powers in Western Australia from your point of view, and some of the issues that they raised for the courts.

Mr HEATH — I think the warrants really fall into different categories. Obviously there are warrants that are necessary for the investigation of offences. Then we have warrants that arise out of court proceedings, warrants that compel attendance and then we have post-judgment warrants that enforce judgments, so they each have their own place and their own problems. Probably the investigative warrants are the most intrusive, because we are dealing with people who under our system are presumed innocent and we are taking away their basic rights in terms of invasion of their homes or in other ways invading their privacy. From that point of view the search warrant is obviously the most common, but magistrates in Western Australia have very little involvement in those in state offences, unlike the Victorian situation where they can only be issued by a magistrate. The WA legislative history is that we operate under the Justices Act and the references are always to justices — the police practice is to go to justices of the peace to obtain search warrants.

The size of our state and the isolation of some of our areas is often put up as the reason for that, and whilst that may well have been the case in the days when technology was not what it is today, I think it is significant that the royal commission into police conduct in this state included in the final report a recommendation that search warrants should no longer be issued by justices but by magistrates. That appears in chapter 12 at page 307 of the final report, which could be of assistance to you. That was obviously concerned with police corruption, but it involves the whole issue of rubber stamping of warrants.

As I indicated, in WA it is very rare for the police to come to a magistrate for a search warrant as opposed to members of the Federal Police and commonwealth prosecuting agencies, who only come to magistrates. The standard of the documentation of the case that they present is much higher and more comprehensive. Most of it is only hearsay and is from cases I have heard discussed about what has happened in front of justices where an affidavit is not presented. It is quite often given just on a policeman's statement, the justice taking a few notes and then granting the warrant. It is a clear contrast to that.

The only police warrants we see on a regular basis are from the police internal inquiries branch. They make a practice of coming to a magistrate and supporting their applications for warrants with affidavits. While I would say they are not quite to the standard of the federal applications, they are getting there. The only other ones we tend to see are where they are making an application for a covert warrant. That is the opportunity to go in, inspect and leave without leaving any notice of their presence.

The CHAIR — That is possible in Western Australia?

Mr HEATH — Yes.

The CHAIR — Which legislation authorises that?

Mr HEATH — That is a good question. I think it is essentially done under the provisions of the Criminal Code. It is a civil search warrant and they proceed under that section. They do not seize anything.

The CHAIR — It is just a covert search; it is not a search and seizure?

Mr HEATH — It is not a seizure. I correct myself; I think it is under the Misuse of Drugs Act because they use it principally for where they believe there is possibly a manufacturing situation occurring. They go in to see whether the manufacturing is in progress or not, or any signs of it.

Ms HADDEN — What about section 60A of the Police Act? We heard yesterday that there is a power to search premises without a warrant when the person is arrested and in custody for a serious offence, an indictable offence, so would that cover also covert operations?

Mr HEATH — No, because again this is a pre-arrest situation. They tend to be used more on the basis, 'We have arrested you here on this offence; let's go and look at ...'. The common example is they pick up a shoplifter and they say, 'We have caught you with this; let's go back to your place and see what you have in the wardrobe', because it is quite common to have a person charged with a shoplift and either some additional stealing charges from another day, with vague dates, or possessing items reasonably suspected of being stolen. Quite often the police simply say, 'I think we will go back to your place. You do not have any objection to that, do you?'. And off they all trot without the formalities of working out what act they are going to do it under.

The CHAIR — Just on that point, is that a confusion for the average citizen?

Mr HEATH — Yes.

The CHAIR — The average citizen would think, 'If someone is going to search my place they need a warrant'. Do they understand the fine distinction that they have been arrested at which point they are not actually guilty of an offence, but they have been arrested?

Mr HEATH — There is the real confusion both as to when they have rights and when they do not. Again it is anecdotal, but going back to my days as a practitioner and dealing with people, there was certainly the impression that investigating police would push the line as to when they needed a warrant and when they could convince someone to let them in without a warrant. They would say, 'We can get a warrant straightaway if you are going to mess around. You might as well let us in now'. And then, 'It is a search by consent, isn't it? Right, we're in'. That is one of the problems that is identified in your discussion paper, of having little snippets in various pieces of legislation and different triggers, because the average person on the street does not understand the distinction between an indictable offence and a simple offence. Sometimes it is difficult to work out the distinction on any logical basis. An assault is a simple offence in Western Australia, but the assault of a public officer is an indictable offence, or the shoplift of a toothbrush is an indictable offence. So it is difficult for the ordinary citizen to understand where the line is drawn.

I think you are right; where you can search without warrant and where you can search with a warrant is a confusing position. That is one of the benefits of either a warrants act or a criminal investigation act that defines what the rights are and when they are needed, because if it is one set of rules then it is much easier. Again you cannot expect the average citizen to absorb them

immediately, but if there is one place where they can look, then the education of the public generally is much easier.

Groups like the civil liberties council might want to promulgate that information. Then it is very easy to say, 'There are your rights. Unless you fall within these categories, you can do this, that and the other'. It is one place to look. Given the Internet access now it is much easier for people to look up a thing if they know where to look. If there is only one act to go to, it is much more logical for them than knowing they have to look in section 66 of the Police Act and section 711 of the Criminal Code, but if it is a drug warrant they have to go back to the Misuse of Drugs Act. That kind of jumping around just means that you can be thinking you are looking under the wrong one.

The CHAIR — Also I can see some anomalies arising where, say, someone is caught shoplifting and they are a drug user, and the police say, 'Let's go back to your place'. Are we in the realm where they are falling under the Misuse of Drugs Act and therefore there should be a videotape of that search, or are we still in the realm of the original shoplifting offence where there is no videotaping? It is a potentially grey area which is an interesting question.

Mr HEATH — It is the same. It is quite a common occurrence in WA, and I am sure it is probably the same in Victoria: that the police stop a motor vehicle for a traffic offence and that gives rise to a suspicion and they then investigate the car for drugs and, lo and behold, they find a bong or some drugs in the glove box ! Again there is this whole issue of what is the ground of the suspicion, are they really entitled to the search, and do citizens know at what point they can say, 'No, you cannot look through my car'?

Ms HADDEN — How does it affect your laws of evidence in this state if police are going in on a search and acquiring evidentiary material without, you know?

Mr HEATH — One of the real problems is that there is not a great deal of challenge.

Ms HADDEN — Why? Because people cannot afford it, or because the legal system does not cope?

Mr HEATH — I think the real problem perhaps is that the rules in relation to exclusion of evidence are such that the balance at the moment seems to be on admission of the evidence; that while there is a discretion in the court, it is tending to come in. I think that is one of the reasons that the commonwealth is so stringent in its applications for search warrants, that it came across the situation where its warrants were being challenged and evidence was excluded, so as a policy move it said, 'Righto, we will ensure that our warrants are able to be scrutinised without losing cases because we have lost that evidence; we will go and make sure we are up to that — raise the bar'. We have gone up to that level.

That has not happened with state warrants. I was trying to think why that has not happened; because one would have thought, having seen what happened in the federal arena, that the state would take a similar role. I can only conclude that, firstly, it is harder to scrutinise, given the way in which justices issue the warrants in terms of there not being an affidavit, there are just rough notes, and he finds it hard to say, 'Did he have a reasonable suspicion of all the requirements?', and that the general discretion of courts to admit the evidence has been such that it has been felt it is not worth taking the point, because yes, he was clearly committing the offence. So while there were some problems getting the foot in the door, the nature of the offence was so clear that the court was going to admit it in any event..

The CHAIR — At the commonwealth level, is it just engaged in the stricter interpretation of *Bunning v. Cross*, or does it have particular statutory safeguards which mean that it is more likely to exclude evidence? Do the Western Australian courts take a more relaxed approach?

Mr HEATH — It is perhaps that in the commonwealth context there are fewer offences, but they are usually of a greater magnitude. They are usually the very big drug cases, very big corporate fraud and the like. For that reason there have been defences of those matters that take every point because of the significance of the conviction, and that has led to a greater scrutiny of the commonwealth process. As a result the commonwealth has moved to ensure that there will be no problems with such scrutiny because of the high profile nature of the offences. Why that has not carried over on to a state level, I am not sure.

My only assumption is that the commonwealth elected not to because it did not feel it would succeed on that basis. Given some of the anecdotal evidence that is in the community generally about the problems with warrants, that is my only reason for concluding that it has not done it — there is a feeling that it cannot do it successfully for whatever reason.

The CHAIR — In terms of the consent elements that you are talking about, are there any particular requirements of the police to make sure that they have gained consent to a warrantless search?

Mr HEATH — No, there are no legislative requirements for a consensual search.

The CHAIR — If they say, ‘I think we should go back to your place’, and they say, ‘Okay’, that is consent?

Mr HEATH — That is consent. If there is no objection, they are assisting police with their inquiries. It is the same as the whole issue of arrest: when police are talking to someone, they are assisting with the inquiries. Of course they are free to go, but there is no requirement to tell them that they are free to go. They say, ‘I think you should come down to the station, and we can do this the easy way or the hard way’. You can see I watch too much television!

The CHAIR — In this case it reflects reality!

Mr HEATH — I think that is the reality of the situation. I do not know whether, in reality, legislative provisions to protect it make any difference, because again, how difficult do you make it? Do you actually make it more complicated and harder for people to know their rights if there are too many things in place? I am sure the police would say if you make it too difficult for people to know that they do not have to say anything, we will never get any evidence.

The CHAIR — The role of a Magistrates Court in providing oversight of warrant powers, particularly in relation to the bringing of seized goods under section 74 before the court, how does that work?

Mr HEATH — It does not. Essentially there is a requirement to bring the items before the justice. So because the majority of the warrants are issued by justices, they go back to the justices so there is no overriding power in the court to review this. The only time it happens is if they have to come to us for a warrant then they bring that back before the magistrate who has issued the warrant. The general procedure in WA is that you sight the items and endorse the warrant that you have sighted them and release them back to the custody of the officer because obviously they are keeping them for the purposes of the inquiry and there is no facility for justices or courts to maintain a storage facility.

It certainly presents problems sometimes depending on the number of items seized, particularly with warrants executed on commercial premises relating to a commercial matter. They simply have boxes and boxes of papers and computers. It really is almost a meaningless exercise when you go back and come to a room which is full of stuff. Usually they say, ‘We cannot bring it to you, can you come to us?’; down you go and they have a room full of stuff and you do your best to identify the items which are readily identifiable — a computer with a serial number and that

type of stuff — but once you get into a document chase and there are three boxes full of documents it is pretty difficult to realistically see exactly what is there and what is not.

The CHAIR — So in terms of the original warrant which might have said, ‘We want to search for particular things’, in reality when it comes back to the magistrate, the magistrate or the justice is not actually saying, ‘You went beyond the scope of the warrant, you seized a whole lot of additional things which were not relevant to the warrant that was issued’.

Mr HEATH — That is not addressed. It is left to the defendant to take any issue over items seized beyond the warrant.

The CHAIR — How do they do that?

Mr HEATH — The only remedy would be to either wait until trial or to seek an immediate order from the Supreme Court to have the items returned.

Ms HADDEN — What items though? You would not know, in reality.

The CHAIR — A request for return.

Ms HADDEN — I gather from what you are saying that the justices are issuing most of the warrants; are they required to keep records?

Mr HEATH — No. There is no record keeping in terms of any register of that type. We have tried to encourage justices to make sure they keep a record of the evidence that they receive on which to base the warrant. The difficulty with justices is there is really no control over them. They are appointed, they are supposed to complete a training course, but thereafter, unless they do something that brings them to the attention of the Attorney-General and he removes their commission, they remain justices.

Ms HADDEN — They are volunteers, I understand. Is that right?

Mr HEATH — It is entirely voluntary; there is no payment. The concern is, particularly in country towns but not necessarily restricted to that, there is a close relationship between the local police force and the justices. The court is conducted in a police building; they call them in, they conduct the court sittings — they still sit as a court in country locations — and then the police officer can visit them to get search warrants and the like.

Ms HADDEN — We used to do that in Victoria until the mid to late-1970s.

Mr HEATH — We are only 40 years behind over here in the west.

Ms HADDEN — I know exactly how it operated at Lilydale too. It was amazing.

Mr MAUGHAN — Coming back to seizure of property, what is the situation with an independent third party whose, say, motor vehicle has been involved somehow or another in a crime scene — something that is of interest to the court — and the motor vehicle is impounded because of its need as evidence. What rights does that third party to get their motor vehicle back?

Mr HEATH — It becomes an interesting area. We are moving away from an actual search warrant situation to talking about an item which is seized. The police generally issue a seizure notice and people then have an ability to challenge that. It is not something which would ever come before the courts at a magistrate’s level. Without plucking an answer out of the air, my assumption is there would have to be an application to the Supreme Court for the return of that seized property. That is one of the difficulties — you have to go to the very high level.

Ms HADDEN — It would not be an interpleader, would it?

Mr HEATH — No, because it is not a dispute between parties. It probably would be a case where the ownership is acknowledged but the police say they are taking it under a seizure notice. Certainly in relation to drugs they quite often issue seizure notices when they take property as a preliminary step to an application for forfeiture. Of course that relates directly to drug-related property. That is usually the scales and the bundle of banknotes they found with the drugs.

Mr MAUGHAN — It is the defendant then — —

Mr HEATH — They have an obligation to bring a positive application to the courts to have it back.

The CHAIR — What happens if the police seize goods outside of the scope of the warrant but then provide evidence of a suspected other offence? I am thinking of a computer seized because they thought records of drug trafficking or whatever might be kept upon it but then subsequently discover other material.

Mr HEATH — They suddenly discover the child pornography matters on it. That is this whole issue about whether or not that is validly seized. I think that is the issue at the moment about what is the level of discretion of the court to admit that or not. A computer, of course, creates the extra problem in that it is all in the one device. They can say they have validly seized it because it has potential to have evidence of matter X. In all those senses it is a valid seizure, but to what extent can you then use that evidence for offence Y given that it was a valid seizure but only for the purposes of that offence? I think that is where legislative provisions are needed to clearly define when it can and cannot be used. The difficulty, and the reason it is still with judicial discretion, is there are so many different variations and the feeling that perhaps some matters are so serious that once you find the evidence you should be able to use it. If we go back to the example, we thought it was drug importation, but when we get the computer records it is actually a plot to assassinate the Prime Minister. Do we have to turn a blind eye to that because we seized it in a different context?

Perhaps that is why there has been a reluctance to put a black-and-white legislative rule in and to leave it with the court discretion. That means of course that they are looked at on a case-by-case basis, and it is more difficult to make a precise definition because the courts' judgments never find absolutely. They deal with a specific case, so different circumstances leave it open to variation.

Mr MAUGHAN — Can you give us some idea of how often warrants are used to enforce judgments or infringement notices and what statistics, if any, are kept on the outcomes?

Mr HEATH — I had the people from the courts run off some statistics which I can leave with you. In terms of civil judgments that are entered, in Western Australia — just to give you an idea, because obviously we are a much smaller population than Victoria — we would issue about 43 000 Local Court proceedings, which is our civil jurisdiction. At the moment it is limited to claims of \$25 000 and under. A proportion of that is taken up with what we call our residential tenancy issues, whereas I think you have VCAT dealing with those. They are currently still within our Local Court jurisdiction. Out of that we then end up with on an annual basis just over 16 000 judgments from those proceedings being issued. In the enforcement of those, roughly 8000 were by warrant of execution seizing property. There were 560 warrants of possession. They obviously related to claims for possession of land, and there were a bit less than 3000 judgment summonses, which the debtor attends and examines as to their means, and then an order is made for payment by instalment.

The warrant of execution is the main means of enforcing the civil judgment, but unfortunately they have no measure as to the rate of success of the warrant, so quite often — certainly if I go back to my practice days — you would issue a warrant if you believed that the debtor possibly had any property at all, just to see what was there. If that came back unsatisfied, then you would move

to the judgment summons to try and collect by instalments. So there is a doubling up in those figures. I would say that a percentage of the judgment summonses has already been the warrant, but obviously the numbers still show that it would appear the warrants are fairly successful, and that there is a fair success rate of getting payment without it going to any kind of enforcement at all. Obviously there is a fair percentage paid once there is a court decision.

In terms of the enforcement of fines and infringement notices, I have again printed off some material from the fines enforcement register. Infringement notices cannot be enforced by a warrant of execution. The principal means of enforcement is licence suspension and vehicle licence suspension, but in the case of a court-imposed fine if the suspensions do not produce a result, they then can proceed to a warrant. For the 2003-04 year they only issued warrants in relation to 700 fines, and they tell me that was about 3 per cent of their total referral.

The CHAIR — Seven hundred?

Mr HEATH — Seven hundred individual fines were then enforced by a warrant of execution, or at least it was issued. Whether or not they were successful, they have no measure of. There is a chart which shows the history of the results from 1991, when it first came in, through to 2004, and it suggests that warrants of execution were issued in that period in relation to 58 000 fines and represented about 11 per cent of the enforcements. Still by far the majority are done by the suspension of licences, which has had a big impact. In fact they have written off a greater percentage of their fines than they have enforced by warrant of execution.

The CHAIR — How is that decision made?

Mr HEATH — When they introduced the fines enforcement legislation they seem to have removed the whole issue from the courts and placed it into an administrative decision, so when we impose a fine in court we have no discretion on time to pay or anything. The defendant is issued with a notice that says, 'You have 28 days within which to make an arrangement with the court'. If they do not make the arrangement within that time, then the fine is transferred administratively to the fines enforcement register, which handles the matter from there on and we do not see it again.

Mr MAUGHAN — That is a very interesting comment because it would appear from the court's point of view that the matter is finished and the fine has been satisfied, but would I be right in suggesting that for many of those who cannot or do not pay their fines — that is, the groups who are disadvantaged or underprivileged or whatever — the fact of removing their licence or cancelling their registration satisfies the court process but probably creates even more problems for those individuals because they then drive without a licence — —

Mr HEATH — In fact the immediate impact was that initially when it was brought in there was no distinction in the Road Traffic Act between driving under a suspension imposed by reason of non-payment of fine and driving without a licence by reason of a court suspension. The result was that there was suddenly a large number of people being sent to prison because it was their third or fourth driving-under-suspension offence. It resulted in a change in the legislation to create a special offence of driving-under-fine suspension for which the penalties are much less because, firstly, they are often the people who have no capacity, and secondly — which might be a cynical view and perhaps a more compelling reason — because quite often they were middle-class people with a voice who had missed the parking ticket on their car.

They were suddenly driving under suspension, it was the first offence they had ever committed and it is mandatory in Western Australia to lose your licence for an additional nine months on top of any existing suspension if you drive under suspension. For having failed to pay your parking fine you are suddenly fined \$500 and have a nine month suspension. Now for driving under a fine suspension there is the ability to fine and not impose a sentence. It is discretionary as to whether you impose a suspension period.

Ms HADDEN — So, it is nine months for driving under suspension?

Mr HEATH — For driving under a court suspension it is a mandatory nine months cumulative.

Ms HADDEN — But under a fine suspension what is it?

Mr HEATH — For driving under fine suspension the minimum penalty for a first offence is \$200, and I cannot remember the top-end, probably something like \$2000, and you may be disqualified for up to three years. If you do disqualify, it is cumulative on any existing suspension, but there is no obligation to suspend. My practice is to fine a first offender \$300, if there are no mitigating circumstances; tell them to get around to fines enforcement to get there to make arrangements and not suspend their licence. In addition — obviously if they keep driving, saying, ‘Well, I am going to suspend your licence, and that is not even going to run until you have paid your fines off’.

The CHAIR — There is a recommendation in the fines review that it is not automatic licence suspension for non-payment of fines. Is that right?

Mr HEATH — There are a series of notices that go out — that has been since it was introduced for the primary motivator that you get the notice — that unless you pay your fine, your licence will be suspended in 28 days time. I am not aware of that recommendation; I thought that would have been a kind of a certain turnaround in that direction if they were going to look for something else.

Ms HADDEN — I do not think that was the recommendation.

Mr HEATH — There is within that two specific things that are really earmarked for those that could be what you could describe as a disadvantage. One is within the sentencing act. The courts have the ability to issue what is called a fine work and development order (WDO). It means that you still fine them the amount that you were going to, but you mark it ‘Fine WDO’. They then have an obligation to report to a community justice officer and convert the fine to a WDO, in other words unpaid community work and it is at the rate of so many hours per \$150.

Mr MAUGHAN — \$150 a day, is it not?

Mr HEATH — No. It might be 10 hours per \$150 or part thereof. The disadvantages of that are firstly that you have got to go through this examination on oath before you can do it. If you do not either pay the fine or do the hours, you automatically get imprisoned. The default then rolls over the warrant of commitment, so there is a knife edge if you like — if you do not comply, bang, you go straight to jail.

Mr MAUGHAN — Would people before the courts who have not much in terms of assets favour the WDOs? Are they keen to do that?

Mr HEATH — They were introduced specifically with the Aboriginal communities in mind, and they are used quite a lot in those communities because everyone is geared up for them. Everyone knows about them. They are not widely used in other courts because people do not have the necessary information before them, and there is a tendency not to be looking for a more complicated sentence like, ‘I will just take a fine and I am out of here’ more than, the, ‘I am not going to jail’ mentality.

Because of the ‘If you do not do it and do it properly’ aspect, jail is automatic, and there is no coming back to court. I do not think lawyers recommend it. Their tendency is to say, ‘If possible — if you cannot pay it — can we have a community-based order with a requirement to do community work?’. Then if you breach by not reporting or not doing the hours, they have to

bring you back to court. So they have a back-stop even though they may end up with more hours, because the minimum hours you can do are 40. Under a community-based order I think there is a tendency to say, 'Well, at least I have a safer mechanism for me to do', and I can understand that.

There is also within the fines enforcement legislation the ability when you have fines to convert them to WDOs but that is an administrative process again. They are not going to get the money out of you in cash, so they may as well take it in the WDO manner. It used to be originally that people had an option to convert their fines directly to community work just by making an application. That was removed for whatever policy reasons and is now if you have a licence suspension, you have to convince the administrative authorities that they should allow you to convert to a work and development order.

Mr MAUGHAN — Who sets what the work is, and is it from a community perspective? Is there something being achieved like painting the footy oval fence or building something, or is it digging holes and filling in holes?

Mr HEATH — No, it is not digging holes and filling them in. It is the same projects essentially as under the community-based orders for community work, but it does present a problem because there is a shortage of tasks in some places due to the supervision requirement. A lot of volunteer organisations, whilst they would welcome some work done, know that the nature of the people coming is often that they are not going to turn up regularly, and they do not really have their heart and soul into doing the work. That presents problems. In the Aboriginal communities where they are running community development employment programs (CDEP) like work for the dole type systems, they incorporate that generally as part of that, and so they work the morning for the CDEP and they do their afternoon bit of extra work to pay off their fines. So there is a system in place. It works a lot better in those sort of situations, and there is a community return.

Ms HADDEN — And supervision.

Mr HEATH — Because there are already paid supervisors, in some ways it is another source of income for the Aboriginal communities because they are getting the money to supervise the orders.

The CHAIR — Do you have any particular comments to make about the experience of disadvantaged groups in relation to warrant powers? Are there any issues that come to your attention as the chief magistrate that you think warrant further consideration or reform?

Mr HEATH — I think the position of the disadvantaged in relation to warrants is really just another example of the disadvantage within the legal system in terms of not understanding rights, not knowing how to enforce them, and certainly at the investigation stage they would be the most easily convinced that you should let me come in and search your property, otherwise it is only going to be worse for you.

Particularly with the intellectually disabled, figures of authority are generally agreed with; that is one of the characteristics. Aboriginal people have a tendency in cross-examination to say yes to anything, so how much easier it is to say, 'Let us go and search your place; that's okay, isn't it?' and off we go. When you get to the enforcement stage something that someone did in coming in and taking things out of your house to sell up for the outstanding fines or the civil judgment — again there is a feeling of helplessness and where do you go?

The difficulty is I do not know whether the solution is within the warrants or rather it is in a more general concern in terms of giving people a source of assistance within the legal system as a general provision. Certainly in some acts, for example our DNA sampling legislation, the Criminal Investigation (Identifying People) Act, there is a higher standard if you can call it that for the issue of those type of warrants for children and incapable persons in that they have to make an application to a magistrate for those whereas they can apply to a justice of the peace for other

forms of warrants under that act. There seems to be a recognition within that act that these people are entitled to a higher standard.

Mr MAUGHAN — Is that something that could be adopted in the legislation to deal with warrants, do you think?

Mr HEATH — I think realistically given the police royal commission recommendation it should be in relation to all warrants regardless of whether people are suffering from a disadvantage but certainly it seems to me that would be a good distinction if there is not to be a general tightening of the rules, but certainly in relation to the disadvantaged there should be a higher level of scrutiny.

For example, there is the ability in enforcement warrants within the Local Court to bring a stay application pending the setting aside of a judgment. You can understand that perhaps a person with intellectual disability or mental illness may not have responded to a summons that was served before a default judgment was entered, a warrant of execution has been sent; the bailiff arrives to seize goods. A person not suffering that disability says to the bailiff, 'What the hell is going on?' and steams off down to the court and they can bring what we call a stay application to hold the judgment while they then proceed with an application to set judgment aside.

Does a person with an intellectual disability have that ability or knowledge to do those type of things? That is why I say it is a problem that is perhaps not confined to warrants. It is a general issue. How you put it into a warrants act, as opposed to a general act, I am not sure because there may be nothing to identify the person as having a disability when the matter is before the court or being processed, but the plaintiff may well not know that he is dealing with a person who has a disability. It is just someone who came into his shop and did not pay for the goods.

The CHAIR — If the recommendations of the police royal commission are implemented what impact will that have in the area of warrants?

Mr HEATH — It will have a big impact in the area of search warrants because it will then result in a duplication of the current Victorian position that all warrant applications would be before a magistrate. It would not go so far as the current Victorian situation at this stage at least. There is no suggestion that there should be any register or recording of numbers or details of warrants. But certainly the way in which the police have dealt with those matters that they bring before magistrates — currently there would be an increase in the standard of the applications. There would be an expectation for an affidavit in support on each occasion rather than just some form of oral evidence that might be given.

Mr MAUGHAN — On the impact of the criminal investigation bill, what impact will that have on warrants?

Mr HEATH — It depends on exactly how that ends up because it has the potential to clearly define when warrants are required, who will issue them and the like. If it does not take that opportunity and it does not set high standards, it could just essentially duplicate the same kind of situation we have now. Again if I take the Criminal Investigation (Identifying People) Act as an example, apart from the children and incapable persons everything else is to a justice. Even to get intimate warrants, to take imprints of a woman's breasts or a man's penis you just apply to the justice of the peace to get that. So I do not think they took the opportunity with that to set a higher standard, except in those two cases. I do not know whether it is because of that or not but as far as I am aware there has been no application to a magistrate for a warrant in any of those cases.

Ms HADDEN — It really probably needs a total change of thinking in Western Australia to — —

Mr HEATH — I think it does. It needs a real cultural change because it seems to me until we move forward to at least the current Victorian position, the next issue, which your discussion paper raises about what then we do in terms of supervision is impossible, because we are so scattered. You cannot get a consistent examination of, ‘Look, we are getting X thousand warrants issued and only Y thousand ever discover anything’. Is there a problem with the issue of the warrants? Obviously it raises issues. I was trying to think about those sort of issues when I read the discussion paper.

Of itself the fact that the warrant is unsuccessful does not mean that it was not justified. It might just have come a day too late or not looked in the right spot or whatever. But at least we would then have some statistics over gross figures. As chief magistrate I cannot tell you how many warrants were issued in this state in the last year. I do not know if the police service could, because there is no record.

I do not know whether registers, of themselves, are enough, and of course there is the problem with the confidentiality of those registers in terms of the existence of a warrant not indicating to a suspect that they are indeed under suspicion. So, for example, under our Surveillance Devices Act, most of the applications are made to judges, but there are a few tracking devices where you can apply to a magistrate. We have to have a register of those, but it is in terms that ensure that the names of the parties are not disclosed, and we have to keep it locked in a secure place. Again, it is obviously very difficult, but we have the register there in case it is needed.

It does mean that for a realistic review of the registers someone has to come and look at those matters and extract the figures, but in a way that preserves the necessary confidentiality of ongoing inquiries. Thinking about it, I wonder whether there is indeed a role for an independent inspector or perhaps a requirement on a head of jurisdiction, but because it goes across so many jurisdictions, perhaps the answer is with an independent person who could review the figures and, on a random basis, review the use of warrants without it having to be dependent upon a court investigation, because certainly that is one way that a warrant will be examined — if it is brought into dispute in court proceedings, but that is not a common practice.

It is a role similar to the Ombudsman in terms of being able to thoroughly investigate complaints, which would lead to a better ability to pick up abuses of the system. Obviously the role would not involve the capacity to overview every warrant application, but he could say, ‘I am going to take a random sample of these matters and look at the affidavit and the evidence on which this was based. What was the result? What was actually seized? Did the items relate to it?’.

It would be a difficult position because to some degree it involves an assessment of perhaps a quasi-judicial decision in terms of the judicial officer who has issued the warrant. But clearly his role could not go into that, but it would enable them to look at a particular area and the ability to say, ‘Every application here was granted, and they never produced anything’ and to make a general conclusion about the rubber-stamping concern.

Mr MAUGHAN — That is something that in our case the Auditor-General may well look at in terms of a performance review.

Mr HEATH — It seems to me that unless you have someone who can take the step back and look at the whole picture, whilst the individual officer always has the responsibility for the particular warrant before him, he does not know what is going on around him in terms of other applications.

The CHAIR — You have given us a very comprehensive overview of how you see things. Are there other comments you would like to make before we conclude or any other things you would like to contribute that we have not already raised?

Mr HEATH — No, I think I have managed to slip in everything I wanted to say as I went along.

Ms HADDEN — How many magistrates are there in the state?

Mr HEATH — Forty.

Ms HADDEN — And how many justices of the peace are there?

Mr HEATH — In the thousands, because we have a problem with JPs who get appointed and then we never hear from them again. They were simply doing it to get the two letters after their name on the letterhead.

Ms HADDEN — There is no register of JPs?

Mr HEATH — There is a register of JPs, but it is not meaningful.

Ms HADDEN — It is kept by the Attorney-General?

Mr HEATH — It is kept through the Department of Justice. They all have a number and the like but it does not really indicate whether they are active or not. Quite often in country towns they do provide a more active court role. When the active ones leave town the local magistrate says, 'Quick, we need some more JPs' and they write off the letter, and the reply comes back, 'There are 15 justices in your town!' but none of them has been seen doing any court work around the town; that is the problem.

Mr MAUGHAN — Do you have a compulsory retiring age?

Mr HEATH — There is not a compulsory one; but it is about to be introduced into the justices of the peace bill that is before Parliament now. It will see them forced to stop sitting at 70 years of age, but with an ability for the Attorney-General to extend that to 75 in exceptional circumstances, namely in places where they cannot get a replacement. Magistrates are most concerned because they have to retire at 65!

The CHAIR — Thank you for your time. You have a very important and busy job, and we appreciate your contribution today.

Mr HEATH — You are most welcome, thank you.

Committee adjourned.