

LAW REFORM COMMITTEE
Inquiry into warrant powers and procedures

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Mr DALLA-RIVA – Welcome to the committee.

Mr PALMER – I have read the report and I have read most of the submissions which have been made thus far and which are available on the web site while I was at a conference in Adelaide where, in fact, the issue of warrants did come up, particularly in relation to civil warrants around conducting searches to protect copyright and ownership and I was quite interested in that.

I found the discussion paper quite interesting and it raised some very relevant issues in relation to practices. The first comment I would like to make – and I am happy to expand on it if you want – is that there is a lack of detailed research in Victoria, in Australia and elsewhere on how procedures on warrants operate, the problems that might exist in relation to warrants and also the connection between the use or non-use of warrants and other pre-trial investigation practices. This is in particular about where the police are conducting an investigation and receive consent from a person being investigated where there becomes a necessity for a warrant. To me that is a problem but I am not sure it is a problem that the Committee can deal with directly but we really do need to have more detailed Victorian and Australian research into the use of warrants. I think some of the suggestions made in other submissions raised that in relation to the capacity to actually audit the use of warrants and the suggestion to have a public monitor as is used in Queensland.

The second, which is a partly related issue, concerns police corruption. We have not had a major inquiry into the issue of police corruption in Victoria. We have had a series of ad hoc inquiries but nothing as has occurred in other states recently. What you will see is the issue of warrants and inappropriate use of warrants, inappropriate obtaining of warrants which is raised in each of those inquiries. The most recent one is the Kennedy Royal Commission into the Western Australian police where the issue of warrants was discussed directly, the way police were advocating material that was the basis of obtaining a warrant, false signatures on warrants. Similar issues were raised in the Wood Royal Commission into the New South Wales Police Service where again the whole pre-trial practices and the use of warrants and the consent to investigations was also raised as a major issue for consideration.

The extent to which this is a problem in Victoria is, as I said, unknown because we have not had a major inquiry of recent years. If you go back to previous inquiries that we have had, it has been raised. We go all the way back to bench inquiries, for instances, pre-trial investigation practices was raised as a major issue. The Neeshan Committee of Inquiry also raised these issues and, more recently, the Ombudsman in the reports that relate to the now-disbanded Drug Squad raised a number of issues around pre-trial investigation practices which also involves the issue of warrants.

They are to me the two key issues. I know the Discussion Paper talks about the context upon which this inquiry is happening but it seems to me that warrants need to be even more directly concerned with the lack of knowledge we have about warrant procedures and the concerns currently in Victoria about the way which previous inquiries have identified problems around the issue of warrants.

There has been a previous inquiry into stop and search and search and seizure under consent and I think the warrant discussion has to really connect itself to that. They are not separate. In my view they are fundamentally connected.

A third issue concerns the raising of the question of balance and the need for principles to inform the criminal justice practice. Generally I commend a report for raising the issue of principles, they are fundamental I think in relation to criminal justice and policing reforms. We tend to make ad hoc reforms rather than raise what the principles are, and I think it is welcome that the discussion paper has put the principles up front. However I take a different view of this question of the balance of the scales of justice – if we give a little bit more power over here, we take a little away in terms of the rights or protections that are offered to people. I do not think it has to be such a zero sum calculation. I think that when reforms are made, what we can do is, if it is necessary, provide more powers in certain circumstances but at the same time enable the capacity of citizens to protect their rights against intrusion and invasion of privacy, and the like. I think there can be a tendency to focus too much on things like training, management supervision, and I again refer to the Ombudsman's reports of recent years that have indicated significant problems with management supervision in relation to policing. We need to really talk more about the way in which we can ensure that citizens' rights are protected against invasion of privacy. Again I point to such things as the public interest monitor.

There are some questions to raise in the discussion paper that I can talk to more directly. The first is the issue about the relationship between Victoria Police and vulnerable or disadvantaged groups. There is research that exists in Victoria and elsewhere on this and the research is not that positive in terms of the relationship between police and vulnerable and disadvantaged groups. I think things have improved in recent years in Victoria as Victoria Police have gone about forming committees to receive information, consulting and those sorts of things from vulnerable and disadvantaged groups. Particularly in relation to young people, there does seem to be at least a misunderstanding of what police are trying to achieve and also a view from some groups, in survey work at least, that they believe they are unfairly targeted, receive too much attention from the police and don't feel that there are adequate mechanisms to ensure that police are accountable.

Mr KOCH – Can we expand on the “some groups”? I thought there may be particular groups brought to your attention.

Mr PALMER – Different research covers different groups. They are particularly people from non-English speaking backgrounds. In the main we are talking about young men as well.

The next issue was the question around complaints and accountability mechanisms and we have gone through a period of several reforms over the last several months. One of the issues to raise here partly relates to some work I did some years ago for the Federation of Community Legal Centres where we went through files received from the various legal centres in Victoria, talking about their experiences of their interaction with the police, any concerns they had about inappropriate practice, the views they had about whether they would complain, what perspectives they had about the complaints handling process. This really was within the general literature that said that generally people are very reluctant to complain about mistreatment of practice and the like.

Why is this so? On the one hand they believe there is the potential for some form of retribution. Whether this is right or wrong, it is the perceptions that actually count. Secondly, they do not believe that anything much will potentially come of it in terms of how they might have their case resolved. Thirdly, there is just a general concern about the inadequacy of actually dealing with complaints generally. The survey work we did cut across a number of grids. It was not limited to young people. It was just people who came into legal centres. This is a self-selecting sample, it is not a representative of the broader community but these sorts of concerns are fairly consistent in the literature internationally. There is also a concern about police investigating themselves.

How this relates specifically to the issue of warrants, I think that in this area we are often talking about technical legal knowledge that a lot of people don't have. They don't know or are unsure of what their rights are; the access to legal advice is often quite limited. These sorts of things compound the problems around accountability mechanisms. I would also point to the broader point I made earlier about the possibility of enhancing the accountability through some sort of auditing performance measures in relation to the use of warrants, such as how often warrants are used, what are the outcomes of the warrants in terms of the connection between warrants and arrests and prosecutions and convictions. It seems to me that these kinds of metrics or data sets for measuring the use of warrants and the effectiveness of the use of warrants are not that difficult to do. It is not insurmountable and could be done reasonably easily. There would be some impact but I don't think it would be of such a nature to make it impossible.

Another issue was the issue of videotaping – and I have noted that some submissions have said that it should happen and some have said that it should not happen – my understanding is that there is some video taping going on now. Some have indicated that that is not the case. I have seen some videotapes, but as far as I am aware it is going on. Perhaps it is an ad hoc basis and I recognise it would be an impost in terms of the extra work the police would have but, as I said, they are doing it sometimes now. In terms of that impost it may be that the use of videoing of the use of warrants could actually enhance the protection that is offered to people who are subject to a very intrusive procedure. I believe there could at least be a pilot project that looks at the introduction of video taping of the exercise of warrants and properly evaluates the issues of extra costs, extra burdens placed on the police and the connection between the use of videoing and the resolution of any complaints or issues that might arise in the exercise of the warrant. I am not aware of other pilot projects that have occurred in this area but that is not to say they are not occurring. As I said, on an ad hoc basis they are already occurring in Victoria.

A further issue was the question about the possibility of having one piece of legislation that would consolidate all the warrants that exist under various pieces of legislation identified in the discussion paper. I take the view that that would seem to be a good outcome from an inquiry such as this in terms of clarifying the powers, clarifying the procedures and enhancing the understanding of the broader community in terms of what are the warrant powers, which are held by various agencies. Obviously Victoria Police are a key amongst those agencies but as you have identified, there are a whole lot of other agencies out there that have the power to exercise warrants. I think one piece of legislation could clarify those powers and would be quite a welcome development.

In terms of other safeguards in relation to the exercise of warrants, I have partly covered that in terms of possibilities of a public interest monitor. I do think that more could be done in terms of supervision. I know things have changed but, as I indicated, the Ombudsman in his recent reports about the Drug Squad, did indicate serious concerns with the way in which pre-trial investigation was occurring in Victoria Police and I think with more detailed knowledge about how warrants are being exercised, what problems are arising in the warrant exercise procedure and actively soliciting information from people who have been the subject of warrants and doing that kind of work would inform us much more about the kinds of problems around practice, accountability and around issues such as training and supervision and management of the exercising of warrants. It would also address such things as the capacity of judicial officers to actually be able to properly make decisions in relation to the exercising of warrants. They are highly reliant upon the information provided by police, as I indicated earlier, and that can be open to abuse and previous commissions of inquiry have identified those issues.

The final point I raise is the point of police training. This is an ongoing issue. I don't think we should place too much emphasis on police training. Sometimes it is actually seen to be the Holy Grail, that more training will mean better practices. It can do, but training must occur in context with all those other things I have mentioned. Victoria Police themselves are going through a process of reconfiguring their whole training package. They are currently in a process of establishing a tender to develop a partnership between universities and Victoria Police to deliver a very different training and education package to Victoria Police, from recruiting upwards. I think this offers great possibilities in terms of enhancing things such as cross-cultural awareness, enhancing, for instance, understanding of the principles and importance of human rights in policing which is very much being discussed, particularly in the United Kingdom, as a principle for police focusing on human rights as a right of improving police practice. My understanding is that that will happen somewhere around the middle of next year if things go according to the process,

I think they are the key issues that I wanted to raise. Perhaps it is not as detailed as you might have liked but, as I indicated, the lack of research in this area is a major problem. I think that raising the issues you have raised in the Discussion Paper is extremely important and might lead to further knowledge about this important area of police and other policing agency practices.

Mr DALLA-RIVA –Thank you. I would not discount the fact that it was not comprehensive. In fact you have brought up a couple of issues that haven't been brought before. You mentioned the accountability of warrants. What is your suggestion about where the accountability of the issuing of warrants comes from? Is it from the courts, from the police, or from where?

Mr PALMER – In the full sense of accountability, I don't think it is actually anywhere. That is one of the problems that if you don't have detailed information produced around such things as the number of warrants, the connection between warrants and arrests and prosecutions and convictions, you don't have the overall picture of what is actually happening in this area. Different players are performing different functions, such as police supervisory management of the exercise of warrants. They are providing some form of accountability. The judiciary is providing some form of accountability in terms of approving the use of warrants. I don't think we can say with any clarity what is going to happen with the new position of the Police Integrity Office but it would seem, in the past at least, two things are worth mentioning.

One is the Ombudsman's office, which has been largely reactive rather than proactive, and the indications are that they are going to be more proactive. Secondly, the emphasis tends to be more on such things as corruption and those sorts of issues. As I said before, warrants can be related to corruption but they are also related to a whole lot of other things. I think the problem is that we have dispersed accountability and I think that by having some mechanism that brings it together - and

whether that happens under the Police Integrity Office and maybe that is the most obvious place and they will be given some role in overseeing the monitoring of the use of warrants and the connection between those performance indicators I mentioned before – something needs to bring together the different forms of accountability so we get a much better understanding of what is happening. We are talking about very fundamental rights to invade our privacy.

Mr DALLA-RIVA – Regarding the videotaping, you understand there is a pilot project underway?

Mr PALMER – No, I said my understanding is that certainly videos are being used in different ways in police practice. I don't believe there is a pilot project in relation to the exercise on warrants specifically but I think there could be. That would allay concerns that it is introduced without anticipating the various problems that might exist. For instance, I think in one of the submissions there was a discussion about the concern that if you ask videotaping to be used in the exercising of warrants, what about the serious dangerous situations where perhaps you are asking the videotaping to take place simultaneously to the exercising of warrants. I think a pilot project would actually allay some of those concerns and actually tease how you would actually manage those situations. It may not be that you lead in with a video camera but rather that you do it in slightly different ways so there might be a slight delay in those more contentious or dangerous circumstances that do exist. Again without the detailed research my understanding would be that by far the majority of warrants are not occurring in such circumstances. They are not occurring in circumstances where we have to be concerned about people behind doors arms with guns, and the like. Most warrants are fairly mundane and I would not see videotaping causing any major problems. But again, a pilot project would identify the extent to which there are problems in introducing the use of videotaping.

Mr DALLA-RIVA – We have also heard from previous witnesses about the extent that police do not comply under Section 465 of the Crimes Act with seized items before a Magistrate. Do you have any comments to make on that or do you have any evidence or information on that?

Mr PALMER – No. I guess at the risk of repeating myself, in this whole area of pre-trial investigation there is a real lack of empirical knowledge about what is going on. It seems that from some of the submissions there are some concerns about the requirement to do that but in terms of empirical evidence, I cannot provide that. It is certainly something that needs to be examined as part of that general research into pre-trial investigations.

Mr DALLA-RIVA – In your view, would it make it easier to bring all the acts together into one act?

Mr PALMER – Yes, I believe so.

Mr DALLA-RIVA – Are you aware of the Search Warrants Act 1985 in New South Wales?

Mr PALMER – I have only looked at it briefly but the Act is there and it is a model in terms of trying to achieve these things. Perhaps New South Wales Police or other people would be better placed to give detailed comment on that. Certainly it indicates that it is possible to do.

Mr DALLA-RIVA – Probably an issue that has not been raised is the issue of the arrest of persons by warrant on the street. Do you have any comments about that? We have taken evidence from people who have raised concerns about the fact that people have been picked up on a Friday evening, etc. Do you have any views about the processes involved, in particular with warrants to arrest the person for PERIN court based offences or more criminally based offences?

Mr PALMER – Yes, I do have a comment to make about that. The research that we do have into pre-trial investigation practices indicates that there is great capacity to actually manipulate the system in all sorts of ways. Arrests on the streets and those sorts of things are potentially open to significant abuse. The extent to which that is happening in Victoria, again I cannot give you any data on what is going on there. I will say that the trend has been towards decreasing judicial supervision in relation to the use of warrants and I think that is a major concern as we have more powers being given

to policing agencies with less judicial supervision. As a fundamental underlying principle, that is something that really is of concern.

In the United Kingdom they have extended what is effectively a PERIN system to what is a whole new range of offences of antisocial behaviours and the like, and what is happening is that they are catching up a whole lot of people, and in they are catching increasingly people from marginal backgrounds, long-term unemployed, non-English speaking backgrounds and those sorts of people. What has happened is that as they catch more people and catch more people who are less able to pay their PERIN fines, they are now looking at the way in which these people are then being subjected to further forms of punishment following not being able to pay their fines. I can provide the research for you. It did indicate the need to come up with some serious alternatives rather than looking at things like arrest and custodial sentences, for instance, in relation to unpaid PERIN fines. They suggested there are ranges of alternatives that can be used that meet the needs of these particular groups. It is very interesting research.

Mr DALLA-RIVA – You indicated decreasing judicial supervision. What are some examples that come to light from your experience and research?

Mr PALMER – One of the submissions that I think was from the Law Institute gave some concrete examples of those sorts of problems in relation to new legislation that doesn't allow the police to act without judicial supervision. It was about warrants, for them not to go before the judiciary to get a warrant, to act in a particular way. That is of concern and if a piece of legislation was introduced which covered all warrants, it would certainly be an opportunity to look at the extent to which judicial supervision can be strengthened in relation to the warrant approval process.

Mr DALLA-RIVA – We have also heard evidence from people about some of the time delays allowed for the execution of certain warrants. The expiry is open-ended and should have shorter time lines. How do you think if you had a short warrant stop environment, you would deal with the different diversity of needs for different warrants to address different particular crimes?

Mr PALMER – I think there are a couple of different ways. One is to scale them. One piece of legislation can deal with all warrants but can still provide different conditions around particular types of warrants to cover all the different types of agencies. It would seem to me that the direction should be more on time constraints rather than open-ended processes. Time constraints would seem better to me with mechanisms for renewal with a life on the warrant that would seem to be appropriate. If a warrant is necessary to conduct an investigation then it should be exercised within the time. As long as there is a mechanism for extending it, that should cover any concerns about the need for ongoing investigation.

Mr KOCH – You raised your concern in relation to citizens' rights, can you be more definitive in relation to where you think further protection might be offered or where you see there is a lack of protection currently?

Mr PALMER – The general point about citizens' rights is that we are talking about the capacity to bridge a person's privacy in quite intrusive ways, by going into their home or other places, as well as businesses. When we are engaged in this kind of process I believe it is fundamental to the protection of rights where we have two things operating at the one time. One is the clarity about what the powers are. If there is no clarity about what the powers are and what the authorities are allowed to do, then there is no protection of rights. I am not saying that there is total lack of knowledge but there is limited knowledge.

Secondly, it is the accountability mechanisms, that if a person believes that something has occurred which is inappropriate, to be sure that there are mechanisms to deal with substantive rights in terms of not simply being able to make a complaint some time down the track, but actually being much more empowered as in the suggestion of a public interest monitor which may be able to act in relation to challenging both the warrant itself and conditions in relation to the warrant with things such as seized property, for instance, do much more to enhance the protection of individual rights.

Mr DALLA-RIVA – Thank you for your attendance.

Witness withdrew