

LAW REFORM COMMITTEE
Inquiry into warrant powers and procedures

Melbourne – 5 November 2004

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Mr Brian Hardiman, Deputy Ombudsman, Ombudsman

The CHAIR – I welcome Brian Hardiman, the Deputy Ombudsman.

Mr HARDIMAN – This was placed on me at a fairly late stage and it covers a huge range of paper work and I guess that is the problem you are faced with as well.

In terms of the Ombudsman's powers on those sorts of agencies with existing warrant powers, they fall under a number of headings. The Ombudsman's general jurisdiction under the Ombudsman Act covers a range of authorities that exercise enforcement functions including the issue of warrants and searches and inspections. Some of those, for example where the Ombudsman investigates complaints, are against transport and revenue protection officers, fisheries and forestry officers, the RSPCA, as of recently other animal welfare enforcement officers, public and private prison officers, the Department of Human Service officers, VicRoads enforcement officers and local government bylaw officers.

The Ombudsman can, but has rarely done so, investigate complaints relating to the issue of warrant, searches, inspections or seizures by persons and departments. In fact the most significant case that I can recall and obtain from our records was many years ago, in about 1989, to do with the seizure of dingoes from a property at Castlemaine. It was quite a celebrated case at the time and some of the dingo pups were subsequently named after Norm Geschke and other officers of the Ombudsman. Having said that there are very few public complaints about the issue; that is not to say there isn't a problem. Not all problems are revealed by way of public complaint and it is for this reason that the new Ombudsman, George Brouwer, is anxious to increase the number of own motion investigations under the Ombudsman Act.

The Ombudsman has always had own motion powers under the Ombudsman Act but it has been relatively infrequently used. He wants to provide in depth scrutiny of areas of government administration in respect to which the Ombudsman has received few public complaints. Indeed one of the lessons of the whistleblowers legislation is that it has encouraged complaints, which has extended our jurisdiction somewhat, that we haven't hitherto received. That possibly indicates an untapped sourced of complaints. For example a recent own motion investigation has been commenced into VicRoads which I mention to the Committee because it involves, amongst other things, an examination of the accuracy of VicRoads records which are, of course, often the basis of a range of law enforcement activities including identification of persons on whom warrants are served. That is a crucial element of the warrant triangle, if you like, and it is one where we have perceived there to be problems and we are conducting an own motion investigation into that area.

In addition to the Ombudsman's role in investigating individual complaints and conducting own motion investigations, the Ombudsman has had for some time since 1988 specific monitoring and audit roles in relation to telephone intercepts and he will shortly have a monitoring and audit role under the Surveillance Devices (Amendment) Act 2004 and the Crimes Control Operations Act 2004. I will just explain what we do, in very brief terms, what we do under those functions because they are a little dissimilar.

In relation to telecommunications, the Ombudsman's function is to ensure police compliance with the legislative requirements relating to record keeping, use and disclosure of information obtained under the warrants, reporting under the Act and security of the destruction of records. It is in no sense any sort of performance audit. We ensure there is an affidavit; we don't look at the affidavits per se to ensure their accuracy. It is basically keeping track of the records and product generated from telecommunication intercepts. On 28 September 2004 the Ombudsman sent, as required, a report on the exercises and functions to the Minister for Police and Emergency Services with copies to the Attorney-General and the Chief Commissioner of Police.

Under the Surveillance Devices (Amendment) Act 2004, the Ombudsman has been delegated responsibility for monitoring the use of surveillance devices by Victoria Police, the Department of Primary Industries, the Department of Sustainability and Environment. Similarly under the Crimes (Controlled Operations) Act 2004 the Ombudsman has also been given this new responsibility to inspect the Control operation records of Victoria Police. Both of those Acts are awaiting proclamation and it is a regime that covers Australia, it is Australia wide, and is based on model legislation that is proposed to be enacted in every state. I had some input into the Victorian version of the model provisions and have actually got some greater accountability in terms of reporting direct to the Parliament and the Minister than is contained in the model provisions.

The audit function is a slightly different character to the Telecommunications Act in that it is actually an audit of a performance audit. The Chief Commissioner is required every six months to provide a performance audit, essentially to the Minister and that performance audit includes the details of success or otherwise of operations and what might have been obtained by way of evidence under the Crimes Control Operations Act. It is therefore our role to make sure that what the Chief Commissioner or the Secretary of the Department of Primary Industry, or whoever, is giving accurate information to the Minister. That is a slightly different role.

We're not sure what level of resources that will involve until the Act comes into operation and we actually get down and have a look at the type of operations that are being held but because of those very significant powers under those Acts we have determined to appoint an additional two dedicated officers to look at those Acts, in addition to the people we have looking currently at the Telecommunications Act.

That raises the question of what powers the Ombudsman himself currently has and I will talk here about the Ombudsman and the Police Ombudsman, the Ombudsman being now the Ombudsman under the Ombudsman Act and the Police Ombudsman under the Police Regulation Act although that will shortly change with the enactment of the current provisions and he will become the Director of Police Integrity. In order not to confuse you too much I will talk about the Ombudsman and the Police Ombudsman as at the present time.

The Ombudsman under the Ombudsman Act essentially only has powers of entry inspection of the premises of agencies within his jurisdiction under Section 21 of the Ombudsman Act and under Section 22B of entry inspection and copying of records of an agency which holds CityLink records. That is another monitoring audit function we have to ensure the integrity of the records and to ensure they are not dispersed willy-nilly and are only used for specific authorised purposes.

The Police Ombudsman's current warrant powers arise under Division 3 of Part 4A of the Police Regulation Act and under Division 3A of the Whistleblowers Protection Act but in summary, the Police Ombudsman may apply to a Magistrate for the issue of a search warrant in relation to particular premises where the Police Ombudsman believes, on reasonable grounds, that entry of the premises is necessary for the purpose of an investigation. In issuing a warrant the Magistrate must be satisfied in brief terms that there is reasonable grounds that what is sought to be achieved in the investigation will be achieved by entering and searching the premises named and described in the warrant and inspecting any documents or things in those premises. It enables us to make copies of any document relevant to investigations, take possession of any document or thing that the person considers relevant to the investigation. So the search warrant must state the purpose for which the search is required, any conditions to which the warrant is subject, whether entry is authorised at any time of the day or night and during stated hours of the day or night and a date not less than 28 days after the issue of the warrant.

It then goes on to other provisions for executing warrants, which are similar to those in the Section 92 of the Crimes Act. There are equivalent powers under the Whistleblowers Protection Act.

The powers proposed to be given to the Director of Police Integrity continue with some minor modifications, the power of search and entry by a Magistrate, but they also provide for a new regime of issuing a warrant of arrest for contempt. This is quite significant in terms of the powers that the Director of Police Integrity will have. As it stands now, contempt can only be dealt with by a fairly complicated regime of taking a person before the chief law officer, et cetera. A person who is arrested in relation to an arrest warrant, or as it is proposed, will need to be brought before the Supreme Court and dealt with according to law and may be detained in police custody in the meantime. Other than sentenced or remanded prisoners, the standards of accommodation for persons detained must be in accordance with the standards that jurors have to endure. It is quite interesting.

We believe that extension is a major new power for the Ombudsman and will streamline hearings. As you are aware we have some interstate experience with Tony Fitzgerald and Gary Crook who have had extensive experience with Royal Commissions and have given us some advice on the powers we need to make public hearings work properly. Their belief is that without those warrant arrest powers, the work of a crime commission type body like ours can be stymied by undue legal process and stalling of hearings. It can be literally a matter of life and death in some hearings, players are playing for high stakes as we have seen with the gangland killings and you can't afford to be mucked around by lawyers

and technical arguments whilst witnesses are languishing in need of protection. I have a copy of all the new legislation that is going through.

In terms of complaints, as I said the Ombudsman gets so few complaints that they are virtually non-existent in terms of exercises of warrant powers and search and seizure which is quite surprising but is a fact. There is a slightly different situation in the police jurisdiction. Certainly during my time at the Police Complaints Authority in 1986-1988 and in the early years of the appointment of a Deputy Ombudsman, police raids were amongst the most common and serious of complaints made. Indeed police raids, and they were better characterised as raids rather than searches in my view, were one of the Deputy Ombudsman, Barry Perry's, first public interest investigations. From that public interest investigation we made a number of recommendations about how raids were to be carried out. Those recommendations were essentially adopted by the police in a Four-Circular memo issued on 1 August 1989 setting out the procedures to be followed and standardising practices throughout the force. Basically those standing orders have stood the test of time but have been improved over the years in response to the police shootings, for example, and the adoption of a safety first policy by police. It has been very well promulgated but with slight amendments over the years and improvements. It is very comprehensive and probably since 1998 when they were revamped slightly again by Chief Commissioner's instructions there have been relatively few complaints arising from police searches.

In recent years complaints about police searches have averaged about two dozen a year, which compared to the number of searches is quite small. The most common single complaint, which is about half of the number, is alleged entry without warrant or an unsigned warrant. What the police do when they enter a premises is that they are in possession of the signed warrant and they are required to give the occupier a copy of the warrant and they give an unsigned warrant. It is something the Committee might like to turn its mind to because that generates a lot of suspicion or doubt in the minds of the occupier or person present that it is a legitimate warrant because it is not signed. I understand the origins of an unsigned copy being provided is that magistrates don't want themselves to be identified as having issued a particular warrant. The police have also mentioned an argument on other occasions that the crooks take the signed warrants and go and use them to execute a raid on someone else. That is an issue in itself.

The warrants themselves are not an impressive looking document and come in all shapes and forms and so I think that people having had their privacy invaded are expecting something a bit more official looking than a crumpled bit of paper that is drawn out of the pocket of a police member if they are indeed asked to produce it at all. Of course there are often many people under premises under search so one of them sees the warrant and the others don't. The majority of those complaints, or virtually all of them, about there not being a warrant in existence or an unsigned warrant actually turned out to be unfounded. Again I think the system could be improved, and I think that one of the terms of reference should be consistency, simplicity and fairness in the procedure. Perhaps some more formal looking document would assist in that regard.

Other issues raised are the inevitable emotional trauma on people who are subject to searches and damage to property. We very rarely get complaints these days of assault or undue force that occurs during the course of the execution of a search warrant. That was a very common complaint in the early days. That partly reflects not only improved strategies in terms of execution of warrants with a hierarchy of level 1, 2 and 3 but it also reflects a lot of work we have done with what we call an assault complaint reduction strategy. That is an example of a proactive measure the Ombudsman has taken over the years in conjunction with SD.

Assault complaints arose from 1989 to a high of about 1800 in 1995-1996 when the Ethical Standards Department commenced and this just wasn't good enough in our view. We adopted a multi-faceted approach to try and reduce complaints about assault by police. We identified the most common shifts, for example, that the complaints arose on and arranged for greater supervision of those shifts which happened to be Sunday night shifts. You may ask the question of why that was so but lots of domestic situations occurred at that time with children being handed back into custody at police stations and there is generally less supervision on those shifts.

We also required notification to our office and indeed of certain events. They were whenever a police member or a member of the public is injured in the course of any operation and that requires hospitalised injury when they are required to put in a form. We were concerned to find out when a

police officer is injured as well as a member of the public and the reason for the operation going wrong because of the use of undue force, which is a failure in terms of operation. So very often these days we have a contemporaneous account from police because they have to be put in in real time as to how injury is sustained and that gives us something to compare with any complaint that comes in. The police are also required to obtain medical examination by a forensic medical officer of themselves or an injured person. Again that provides an explanation and also contemporaneous evidence. There is also a police ESD duty team on call and because these reports come in real time they can respond and commence an investigation where there might be suspicion that something untoward has happened or it matches up with a member or station at risk which are regularly highlighted by the police research and rescue.

The net result of a range of these measures has been a reduction of assault complaints from 1800 to something like 400 in the last few years and that continues to be a decreasing number.

With our new own motion powers that have recently been granted to the Police Ombudsman, we intend to look at a whole range of other areas in the force and apply some lateral thinking to how we might improve police procedures in those areas. That may well include searches, for example.

Another common complaint related to searches is damage to property, particularly stored cars and computers and in Victoria there is still a tendency for the courts to require production of actual exhibits rather than from photographs and analyses of exhibits which require police to store and keep far too much property. That has led to some of the corruption problems we are seeing in the Drug Squad because the police drug squad in the past has been awash with seized drugs. The length of time for seized property is a really big problem, and it is not just a police problem, it is a court problem as well.

Police failures that are substantiated in recent years have tended to relate to failure of police to give receipts and properly document property at the time and theft, particularly of money. Again, notwithstanding the low level of complaints, the fact is that there have been proven allegations made against former Drug Squad members which weren't reflected in complaints. In January 2001 I asked for a risk assessment to be done of property handling which confirmed earlier findings that most common failure of police during searches was the failure of police to properly record, properly issue receipts at the time and in some rare cases, and I see there has already been evidence given before, of taking property back to Magistrates within a reasonable length of time.

In 2003 I revisited that issue. From 1 July 1999 to 30 January 2003 there were 34 complaints recorded in related to property handling, 10 of those substantiated and those 10 were basically in relation to failure to issue receipts. Even where receipts are issued, police often fail to properly document what is actually seized. They give a generic description of the item – it might be a box of tools. There are particular problems with identifying documents. We have particular problems identifying computer discs – how do you differentiate between computer discs? Given the number of police searches, the number of complaints is probably low but again I am not convinced that we capture all complaints. I am continually reinforcing this with the police and give lectures about the need for proper property handling with police procedures. Operation CEJA abounds with proven and likely evidence of theft, which were not subjects of complaint.

I might outline a theory to you on why we need to be careful about not making the mistakes too high in some situations. I think that one of the reasons why police have been able to get away with theft of very substantial amounts of money in the Drug Squad scenario is partly because of the asset seizure legislation, because the crook has nothing to lose, he knows he is going to lose the assets or money anyway and there is actually an advantage for a crook who is in possession of large amounts of money, for the police to declare a smaller amount of money because it may then bring it within simply possession rather than trafficking. It can be seen by the crook and the police to be a win-win situation, if you like.

To minimise the risk I have been pushing the police for sometime to introduce video recording of searches of premises and they have indeed introduced a pilot project at the Major Drug Investigation Division and in some other areas where they are video recording searches. This is not a simple procedure because sometimes searches have to be conducted in different rooms by different members at the one time so it raises questions of who is in charge of the video. There is a range of issues there. The value of police videotaping has proved its worth. In one complaint we investigated this year the video evidence enabled our investigation to exonerate the police from any wrongdoing. That relates not

so much to the theft of property but the member's conduct in allegedly trashing the house, which just wasn't the case at all. There are real difficulties without video evidence in just assessing what police have done and what the person might have done afterwards. In fact I went to a house that was an incredible mess after a police raid and I was agreeing with the complainant that it was dreadful and in fact they were not the rooms the police went through.

Another aspect we want to get into in terms of own motion investigations of searches. I have concerns that failed searches are possible indicators of corruption, either that the searches have been done for intimidation purposes or for example, there has been leaked information to the occupants of the house, there has been inaccurate intelligence or false or misleading affidavits. The issue of false or misleading affidavits is a vexed one for our office because it affects the question of how far we can go behind the warrant in question and Magistrates' and judges' decision-making in terms of the information in the affidavit. It has been our experience that where we have looked at the details of affidavits that police have viewed affidavits as "a hurdle to be jumped" rather than a safeguard against unwanted intrusion of privacy.

The Tasty nightclub affidavit back in 1994 was an example of where we made that comment. We were critical of the affidavit obtained in the Gerry Mc Hugh case, which has received a lot of publicity, and you may recall he is still a serving member of the Police Force who believes the affidavit was totally falsified. We don't believe that to the case but there were significant problems and the handling of the case was not as good as it might have been. I will say no more about that at the moment.

The CHAIR – Are you able to quantify, based on your experience with investigations, the extent to which you believe there are false or misleading affidavits which might then be used as part of a fishing expedition or to harass particular sections of the community?

Mr HARDIMAN – No, I am not because we get very few complaints. Though when you look at an affidavit or a search warrant there might be a problem you often find that when the police do the search they actually find something. They may not find what they were actually looking for but they often find something that suggests the person is at least involved in a criminal activity. We have had problems with getting access to informers, obviously, and so you cannot question the sources of information in affidavits. It is something we have had suspicions about in the past but because we haven't had own motion powers to date, it is something we haven't been able to look at in depth. It is something we will be looking at in the future.

The CHAIR – You made some reference to the Surveillance Devices Act and based on your experience with that Act, do you think there are any grounds for reforming the provisions that relate to the issuing of warrants to undertake surveillance?

Mr HARDIMAN – I think the Victorian legislation has a number of built in accountability mechanisms that are efficient. I cannot comment at this stage because by and large, once again, people are not going to make complaints about surveillance because usually they are not going to be aware of them. The Gerry Mc Hugh case is an exception, but generally speaking there won't be anything on which people can base a complaint. That is part of the policy problem and that will be overcome, partly by the fact that we will have the ability to monitor and audit the results of those surveillance devices via the Chief Commission, which is an indirect route, but more importantly through our own motion powers.

The CHAIR – The Criminal Bar Association suggested a number of reforms including tightening the grounds justifying an extension of warrants, reducing the life of the warrant, recording of all warrants issued and executed, time limits on the retention of the recorded surveillance product and increasing the penalties for breaches of the Surveillance Devices Act. Have you had the opportunity to see their submission?

Mr HARDIMAN – No, I have not. I have considered it in the context of looking at the model legislation and I think that gathering direct evidence by surveillance devices and telecommunication intercepts is not only a valuable police tool but it gives you direct evidence which is less risky than relying on the evidence of informers and many controlled operations. So there is a trade off, I think between the intrusion on privacy on the one hand and running very risky operations and making it very difficult for police to obtain evidence on the other hand. I spoke before about making the stakes too high for police in getting results and making arrests and detecting crime and I would prefer to allow the

legislation to run, perhaps put a sunset clause on it, and for us to report on its workings and then to make recommendations based on the facts if it needs to be changed. The Policing in many respects is at a cross roads at the moment, extensive new powers have been given both to the Chief Commissioner through the Chief Examiner and our own office and I think the inter-workings of all these pieces of legislation need to be given time to sort out and settle down. Then an assessment should be made of where we go.

The CHAIR – Based on the complaints you have received, which would be the most powerful cases for reform?

Mr HARDIMAN – I think the whole regime of the issue of warrants is spread around a large number of pieces of legislation. It is complex and is not always very transparent or clear. For example, we will have new powers in the Confiscation Act. When you have a piece of legislation like that and part of this legislation relates to the warrant procedures, I think you can see where difficulties arise. I think the public are often confused about what police and other law enforcement officers can do. The police themselves I think find it difficult. I know whenever I get a complaint about the issue of a search warrant, and I am not a lawyer and so I have to go back to the current legislation, and often it is extremely tortuous and is not easily understood. I think clarity of the purposes for which warrants can be obtained needs to be expressed better in the legislation that relates to search warrants.

Mr DALLA-RIVA – You said there are about a dozen complaints a year, half of which relate to unsigned, not seen, et cetera, warrants. What were the others?

Mr HARDIMAN – There are a number of other things about the emotional trauma people suffer, damage to property and a big one is the length of time for which property is held while it is examined forensically. This is particularly in the case of vehicles and vehicles pose particular problems because the whole car might not be stolen but bits and pieces of it may have been. The seizure of computers is a problem and I am not quite sure why but virtually every computer that police seize never works when the people get it back!

Mr DALLA-RIVA – The other question I have is about the video taping of searches. How recent has that been?

Mr HARDIMAN – It has been the last six months or so. It is something we have recommended in annual reports for some time.

Mr DALLA-RIVA – You said there were some issues about the operational problems with it. Is that in terms of the costs?

Mr HARDIMAN – It is more in the practical way. When a house is raided, often rooms are raided and especially if there are multiple occupants the police try and walk down each room and so it may mean multiple video recorders are required. You are often not sure how many people are in the house; prior intelligence should be obtained where possible, so the video operator has the problem of selecting what should actually be videoed.

Mr LUPTON – Would you imagine that the video operator would need to be a police officer?

Mr HARDIMAN – Not necessarily. Police property handling has emerged as a real problem during the Drug Squad investigation and on a whole range of levels there have been some improvements made. Exhibit handling and police information management systems need drastic overhaul.

Mr LUPTON – Do you have any specific recommendations about what you would like to see happen to seized property as opposed to how it is dealt with at the moment

Mr HARDIMAN – Certainly it should not be left up to the informants or the operational members if possible. Police procedures for conducting searches are pretty good and the deficiencies are generally sheeted home to individual members not complying with the provisions rather than the systemic problems. I think that is probably reflected in the fairly low number of complaints we get

these days about the issue and where we do get those complaints we tend to identify deficiencies on the part of individual members rather than systemic problems.

Mr DALLA-RIVA – Do you get complaints relating to search warrants or many complaints relating to issues relating to warrants executed on the person?

Mr HARDIMAN – Warrants of apprehension? We get fewer complaints about those. I must say, contrary to the past, I just cannot remember the last time we got complaints about police going to the wrong premises which used to be a fairly common complaint. That just does not exist any more. I think that partly reflects the operational plan that goes into most searches these days. What once upon a time was seen as routine is now seen for what they are as a reasonably high-risk operation that has to be planned properly.

Mr DALLA-RIVA – Not specific to searching property but more specific to the apprehension of a person who may be in the street, are there high levels of complaints there?

Mr HARDIMAN – No, again I think probably the Tasty nightclub experience where the police were sued has focused the mind of police upon that issue and searches of persons without warrants in the streets, again we get very few complaints about this.

Mr DALLA-RIVA – I just put into context, I had one person who had quite bizarre evidence to suggest that the police were executing warrants to arrest persons at certain points of the day to make it more inconvenient for the offender to acquire legal support or legal aid – Friday nights – and in particular the same witness indicated that there was a type of class of person who was being targeted rather than others. Do you get complaints from particular groups, indigenous groups, or of that nature?

Mr HARDIMAN – Yes, we do on occasion. We have arrangements with the Aboriginal Legal Service for the way we handle complaints from indigenous persons. They are often fearful of retribution and our agreement is that they can report to us confidentially and our undertaking is not to do anything with that complaint until we discuss it with the complainant or the Aboriginal legal service as to how, or if, it might be handled. It may be put on hold, for example, until after particular court cases. We have an Aboriginal investigation liaison officer who goes around the state, regularly meeting with Aboriginal persons, trying to identify problems with particular police stations and possible racist attitudes at those particular police stations.

There is an issue which I have discussed with the Aboriginal Legal Service, that is the notification via the Attendance Register Procedure – I am not sure if you are aware of this, but it is a requirement for police when anyone is formally dealt with at a police station and is to be entered into a book, missing persons to be notified and injuries, etc. to be documented, the reasons for their attendance to be documented. If they are Aboriginal or Torres Strait Islanders, the Aboriginal Legal Service is notified. There have been glitches in that system, not so much with the notification that has occurred but because the Aboriginal Legal Service is only notified by Missing Persons that there is an Aboriginal person in custody at a particular police station.

The glitch occurs because for confidentiality and privacy reasons the full details of the Aboriginal person were not given to the Aboriginal Legal Service which meant the Aboriginal Legal Service had to ring the police station and ask whether there was someone in custody who was Aboriginal. They might have their name and then the police at the other end would not know who the caller was and for privacy reasons would not give that detail. The police station might ask details of that person which the Aboriginal Legal Service may not have. There was almost a Mexican stand off, if you like, of trying to identify who exactly at the police station was Aboriginal, etc. I have raised that with police to try and get more identifying details to facilitate the intention of that provision which is clearly to provide indigenous people with the legal services they require.

We do find glitches in a whole lot of arrangements we put in place over time between different police stations and local Aboriginal groups. It is something we are conscious of and trying to keep on top of.

The CHAIR – Thank you. That has been very interesting and informative.

Witness withdrew