

LAW REFORM COMMITTEE
Inquiry into warrant powers and procedures

Melbourne – 5 November 2004

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Dr Steven Tudor, Lecturer, La Trobe University
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The CHAIR – Welcome to this committee.

Dr TUDOR – First I should apologise for not making good my promise in my initial responses to the Discussion Paper when it came out. Unfortunately the work of a modern academic is like most other jobs, squeezing in things when you can. Unfortunately I was not able to make written submissions on time for that. What I have done today is bring along some fairly rough submissions that I am happy to speak to today.

The CHAIR – You can always submit something later on.

Dr TUDOR – I was going to propose that I could write up what I have today in line with the discussion and pursue a few lines of inquiry. The resources available to me at 2 a.m. are not as good as they could be and so I would like to follow up some of these things if I could. Maybe I will outline the main points that I was raising here and you can pursue them.

My response to the submission is in two parts. Part A is the responses to selective questions in the Discussion Paper and Part B is other matters and there is one matter that I raise there. I went through the discussion paper and selected those questions that I thought I could provide some sort of answer to. Many of the responses I give are fairly sketchy and general.

The most important particularly substantive ones I would want to talk about are question one relating to search warrant provisions in the Crimes Act. I should say that my comments here were greatly assisted by Associate Professor John Willis who is on the staff at La Trobe University and is also a practising barrister of many years' experience, and so I need to acknowledge his input into this.

Section 465 of the Crimes Act is one of the main provisions in the Crimes Act dealing with search warrant powers and is one of the main work horses in police investigations. Most of what I am going to talk about will be police warrants rather than authorised officers' inspection powers. Section 465 is one of the main work horses that has several deficiencies which would be best made good as part of a whole raft of reforms to the Crimes Act. I am putting this in the context of the Attorney-General's Justice Statement which you will be familiar with where it is mooted that the Crimes Act will be split into three. It is currently a very unwieldy Act and has been amended about 1500 times. The initial idea seems to be that the Crimes Act will be split into an Offences Act, an Investigation Act and a Court Procedures Act which will be a much more rational structure for it. What I am talking about here would be reforms to Section 465 as it might re-appear in a Crimes Investigations Act.

One of the main things I would urge is that the revision of Section 465 be done in the light of the Commonwealth search warrant provisions in the Commonwealth Crimes Act of 1914. Those provisions are certainly much clearer and more comprehensive than the State provisions. In terms of substance, I do not think they radically change the law but they are certainly clearer, more workable and more accessible to the public and I am sure would be much more useful to officials in that they make clearer what their duties and responsibilities would be. That is a general background to how I urge that Section 465 be amended.

It may also be appropriate that the provisions in Part 5 Division 3 of the Magistrates Court Act, which is the general search warrants provision that a lot of other acts refer back to, could well be fruitfully removed into this new Investigations Act. That is something obviously to be worked out later and it is not necessarily a policy matter but more a matter of convenience.

The general overall trend of most policy thinking in this area is to consolidate as much as possible the various scattered provisions relating to warrants. Some dispersal is quite appropriate and I will come back to that later, but wherever possible it would be desirable from all sides to have the provisions consolidated. Perhaps on that point of there being a tolerable level of dispersal throughout other Acts, I think particularly of the inspection powers types of Acts whereby you have the non-police authorised officers having various powers to conduct investigations and monitoring. By and large I think it is appropriate to have those provisions in the subject specific Act because those authorised officers so often very specifically locate it where it is created in that Act, it might be the Prevention of Cruelty to Animals Act, the Gas Industry Act or whatever it might be and it is probably appropriate to have a

certain number of those provisions related to inspection powers in those Acts. However they should all be subject to general principles for the formulation of that legislation. I think to remove them from those subject-specific Acts could make the work ability more difficult for the officers and the administrators concerned.

With my experience of working in government, I have found that you never say anything too extreme, there should be a balance between both a desirable consolidation and a practical dispersal into the specific acts. They are just general comments. There are more specific things about Section 465 that I want to bring to your attention.

The first is the time limit for execution. Section 465 currently does not give a clear indication of what the time limit is for execution of a warrant. A fundamental condition of any warrant is how long it lasts. There is some confusion in that the conditions of the issue of a Section 465 warrant referred to evidence being available in 72 hours. Does that mean the warrant is available for 72 hours? It is simply not clear on its face. Even though the police and the Magistrates Court has worked out clear protocols for dealing with that and I have no expert knowledge on that, it would be desirable to have that on its face on the legislation, whatever it might be.

I have suggested there in the submission that the Commonwealth Crimes Act be adopted and that the time limit be seven days and as far as possible there should be consistency between Commonwealth and State laws in that regard.

The other specific matter is that it would probably be desirable to expand the operation of Section 465 to cover summary as well as indictable offences, it is currently for indictable offences. If we have that wholesale revision to the Crimes Act it would be appropriate that all the main investigation powers dealing with summary and indictable offences be in that one Act. It would certainly be more useful to police and also to defendants and their lawyers. Just as a footnote to that, what is likely to happen, I understand, is that if the Crimes Offences Act is created dealing solely with offences, both summary and indictable.

You will of course be aware of the review of the Summary Offences Act and the Vagrancy Act. What will hopefully happen, from my point of view and I think most people concerned would like to see, is that whatever should remain of the Vagrancy Act to go into the Summary Offences Act, to consolidate those two and then what is very possible is that the Summary Offences Act goes into this new Crimes Offences Act. You would then have one main Act for all the offences of summary and indictable nature that don't belong in subject specific Acts. There will always be debate about whether something is subject specific or a criminal matter. Sexual offences will always be a criminal offence but I think the lighting of fires in an inappropriate place is in the Fire Brigade Act and there is strong pressure to keep it there. There will always be debate about where the offences should go but I think the general trend is to make that a Crimes Offences Act, covering both summary and indictable offences. That would make it desirable that the Investigation Act covers both the summary and indictable offences. These are fairly long-term large redrafting proposals but I am putting all this into that context.

The next main point is that Section 465 should make clear that search warrants prima face provides for one entry under that warrant, that it expires upon entry or at the time it expires. If there is need for further entry, certainly go back and apply for one. If there are peculiar circumstances where the police would need multiple entries, perhaps there could be scope for having a particular provision for issuing such warrants. I don't rule out that it could be feasible for particular kinds of police investigations to have multiple entries but the assumption should be that there should be one entry per warrant.

Another main feature that should be made clear in legislation is the consequences for breach of a search warrant. The main provision that the law relies on at the moment is the judicial discretion to exclude illegally or improperly obtained evidence at trial so the consequences for breach of a search warrant is not until trial and it may or may not happen that there be any consequences. The problem with the judicial discretion is that it cannot be very predictable. I would urge that something along the lines of Section 464Q of the Crimes Act, which deals with finger print evidence be considered in this context. Section 464Q essentially puts the onus on the prosecution to argue why evidence that has been obtained through non-compliance with the relevant law should be admitted. Currently it is very much an open agenda and both sides will argue the toss and see what happens. If it was a bit more structured in the way that Section 464Q is, it would help clarify it whilst still being flexible. Clearly you don't want an

absolute rule about this but I think it would help to make the law more consistent and predictable and more structured.

In Section 92 of the Crimes Act, sub-section (1) deals with magistrates issuing search warrants in respect to suspected stolen goods. Sub-section (2) deals with police authorisation of searches for stolen goods. Essentially the first sub-section would be really redundant if we were to revise the whole of Section 465, the Section 92 (1) could disappear and anything particularly useful in it could be incorporated into the general Section 465.

Section 92 (2) is more controversial which allows police to get one of their own to authorise the search. It has to be an officer of the rank of Inspector or above, so fairly senior officers, but essentially what is happening is that that senior officer is issuing a warrant. It is not called a warrant, it is a written authorisation but to all intents and purposes, it is the same thing. I argue that that is undesirable for two main reasons, firstly from the procedural fairness point of view that if something really merits a warrant then it should be issued by a body at arms length from the body seeking that warrant. Simply, on its face it looks too in-house for the police to be issuing their own warrants effectively. I am not making any factual assertions that this is being done improperly, I have no knowledge of that area, but it seems to fly in the face of basic procedural fairness.

The second reason I think it is problematic is that it treats certain classes of persons as second class citizens because the authorisations here relate to people who have a record of handling stolen goods or dishonesty offences and it is effectively subjecting those people to a lower standard. It is effectively saying that for everyone else you have to go to a Magistrate to get a warrant but if you are someone who has handled stolen property before, clearly you must be a bit dodgy so we will make things a little easier for ourselves and just go the inspector upstairs to get our warrant. Factually this may be quite correct, statistically speaking those people are more likely to be in possession of stolen property, but I would say that is the type of information you would want to present to the Magistrate, in particular cases. To put it on a statutory basis, assuming that all people with such convictions should be subject to that lower standard I think is probably not so good.

I anticipate that my suggestion here will meet with a lot of resistance from police. I am sure that this would cause great inconvenience and cost. I am aware of those arguments and they are important but I think there are more fundamental types of issues here. However I am sure there will be a long debate before that provision disappears.

The question of guidelines for drafting warrants legislation is very important. Certainly from my experience with the Inspection Powers Report from a couple of years ago, that document and the principles contained there were tremendously useful in the work that the Department of Justice does with other departments in terms of the drafting of the searching powers legislation. Any kind of set of principles or guidelines that have the endorsement of an authority body, such as this Committee, or Cabinet I think will be very useful for clarifying and structuring the policy debates that go into these things.

In terms of what format the guidelines or principles should have, my own view is that it is better if it is a policy document rather than legislation. A policy document will be more flexible, closer to home for the people concerned if it is a Cabinet endorsed document such as the government response to the Committee's report that has to go to Cabinet to be endorsed. The relevant Minister will be the Attorney-General who has to take the submission to Cabinet. He has to endorse it first, it has to be endorsed by Cabinet and have the government response before it is tabled in Parliament. Through that process it becomes a Cabinet-endorsed policy document. That is a very high level policy document at that point and is very useful in intra-governmental discussions and negotiations as a common reference point. By not being legislation it still has some flexibility and so there is room for manoeuvre and in any government negotiations you need some room for manoeuvre or it just won't work.

The option of enshrining it in legislation I think is more problematic. As I have said in the submissions, the Chief Parliamentary Counsel and Moran is obviously the person to speak to for more detail about that. I am still not clear exactly what format it would take, whether you would have legislation providing principles for the drafting of future legislation. That is fairly novel and if started in one area it is unclear why this should be the first area and why not in other areas. Once you start getting into the Parliament passing legislation for the manner and form in which future legislation is drafted or passed,

it can become constitutionally very awkward where one Parliament is trying to limit what a future Parliament can do. It is just a more difficult area to work out exactly what status or what form the legislation should have.

Perhaps one example of a workable system might be the Information Privacy Act where you have the information privacy principles at the back of the Act and what is required is that all government agencies, I think in Section 10 or 14, are required to abide by those principles in their work. That is one way you could possibly do it and you could say that in the preparation of legislation, government officials must abide by the principles at the back of this legislation. That could be more difficult. I think the activity of preparing legislation is a much more complex and much more controversial task than the day-to-day running of a department in which observation of information privacy principles would be appropriate. I am just a little dubious about whether statutory footing or location is the best way to proceed with getting the principles or guidelines out. That is a fairly convoluted way of saying I think a policy document is more useful.

In relation to my paragraph 24, I have just referred very briefly to the Commonwealth Attorney-General's guidelines reproduced in the Discussion Paper. Unfortunately I haven't had time to go into these in detail and give any kind of analysis of them. They certainly seem to be the kinds of principles and guidelines that I think would be relevant and very useful.

The next point is the legislation that does not comply with the guidelines. I said before that flexibility is very important in these things. If you apply inflexible guidelines they are likely to be ignored because they are too hard and Cabinet won't like it. We will vote against it and it just won't get anywhere. I think a certain amount of flexibility is necessary to make them more porous and you can walk through them if you like. It is more a matter of structuring the debates so you might have standard guidelines as a standard procedure, and so all new legislation relating to warrants should follow the following principles. However if a particular agency believes that some variation from those principles is appropriate in a particular case, then it must argue its case and point to various factors that may be relevant for it to raise. Therefore that can help structure a debate, so it is flexible and allows for variation but puts the onus on a particular agency to make good its argument. Rather than just being a free for all it helps to structure the debates. I know from experience that structuring the policy discussions is very, very useful for moving policy development along. If two agencies think that they don't have to justify their position to the other one then there is a good chance they will become bogged down. So that kind of approach to guidelines that allows variation you could argue for.

The matter of inadvertent discovery of evidence of other offences is an area of law which is currently very unsettled and only a matter of common law. I think police practices are largely uncontroversial because there seems to be a settled agreement as to what the common law requires, but the next time an appeal case comes up with this it will be very unclear. Some English cases in the 1960s are *Ghani v Jones*, a federal court matter, an ACT matter referring to some Victorian cases – it is a very unsatisfactory form of law at the moment. If there was a clear-cut Court of Appeal matter in Victoria which laid down the law it wouldn't be so bad, but it is a very unsettled area. I am surprised there hasn't been an appeal case on this over the last several years.

The main thing with this is not that police powers need constraining. Where the police enter places pursuant to a warrant entirely lawfully and uncover evidence of crimes unrelated to the warrant issued, it is common sense that they should be able to do something about that. If you are entering looking for drugs and you find stolen property or a corpse, or whatever it might be, clearly you don't expect the police to turn a blind eye. Something has to be done about it. What should be done should be clarified in legislation; it shouldn't be referred back to English cases in the sixties.

I think the Commonwealth Crimes Act provides a clear enough guide on this, that essentially the police may seize it if it is an indictable offence, if there is good reason for believing it is necessary to prevent its disappearance or loss or destruction. Certainly the police do not thereby have new powers just because they have found new evidence, their powers are still within what they had under the warrant and certainly there should be immediate follow up to explain to the magistrate who issued the initial warrant what further evidence was uncovered. That is all fairly much common sense, I don't think it is too controversial and the details should be thrashed out between the police and the drafters. I do think it is very desirable that you put in statutory footing just to clarify the situation.

The final issue is of the monitoring compliance with legislation. The discussion paper referred back to the committee's recommendations from the *Inspection Powers Report* in which it recommended that as a general principle, warrants be required for investigation of offences but not be required for the monitoring of compliance of legislation. At first glance that sounds very reasonable but the difficulty is that once you look at what happens with monitoring, the monitoring investigation distinction can collapse. Most inspectors who conduct monitoring exercises, once they are in a place and doing a monitor and they uncover evidence of a crime, they thereupon start investigating. The monitoring then becomes an investigation immediately on that kind of discovery. That means that if you have entered without a warrant, without consent, simply because you are only monitoring but then you are actually investigating once you discover that evidence, you have circumvented the whole monitoring process. That could lead to a very undesirable situation where an inspector could in fact have a suspicion that an offence was committed and so they have to go and get a warrant, if that was the law, but they then say that if they were only monitoring they wouldn't need a warrant and so would pretend they have no suspicion whatsoever and just monitor this person. If when they are there they discover the evidence, they then start investigating. I think that would be very undesirable, to allow investigators to have the option to bypass the law process.

This makes things more complicated. It doesn't simplify it. The problem then is whether we make monitoring subject to warrant or do we keep it that monitoring doesn't require warrants but you follow certain protocols and procedures if a monitoring exercise develops into an investigation. I don't think there is one answer to that. I think that each regime on its own would be different. In some it would be entirely appropriate that you don't withdraw to get a warrant or you don't need a warrant to monitor. In various aspects of the health industry it might be very important that you are there unannounced and you don't need to withdraw. In other areas it may be appropriate that the monitoring be subject to warrant, what it is, how it is done and who you are monitoring, and so on.

The CHAIR – You make a case that the specific stand alone Warrants Act as found in New South Wales may not even be necessary or desirable, however in your submission you also talk about the provisions or what the circumstances would be where a warrant would be justified and you propose a three step test. Part of this would be that there is an activity which is not otherwise legal but which may be necessary or desirable to be undertaken in public interest. In that sense, what is the point of making a distinction? If the intrusion is into a person's household or premises for something that would otherwise be illegal, why would you necessarily draw a distinction between those offences covered by the Crimes Act and other offences which may be covered by other Acts in relationship to consolidation and clarification of those particular warrant powers.

Dr TUDOR – Primarily not from the point of view of the nature of the offences. Looking into the context of most of the scattered provisions that are not in the central criminal legislation like the Drugs, Poisons and Controlled Substances Act and the Summary Offences Act which are the main police provisions, probably the number of the ones you have listed would be the authorised officers and inspectors and I think just as a practical matter it is probably best to keep the legislation giving their powers in the subject-specific areas. It might be the Meat Industry Act or any other, because the regulation of inspection powers is very much a part of the regulation of those industries and that should be in the one subject-specific area. Everyone in the meat industry would then know that the Meat Industry Act is the main one they need to refer to. From that practical point of view I think it is desirable to preserve, where relevant, those specific provisions. When it comes to the more general police-type criminal offences, I think there is a much greater call for consolidating but at the same time, all warrant provisions should be subject to general principles. I think the warrants provisions could go into the Investigations Act.

The CHAIR – There is a very similar process in New South Wales but I am more interested in the fact of the level of intrusion in some instances can be the same. In fact I think the consequences or penalties under some of those Acts can be quite severe.

Dr TUDOR – Certainly in some of the industries relating to health and welfare can be quite severe. I would not be advocating a lower standard just because it belongs in a subject-specific Act. It is more a matter of administrative convenience. What standards it should come to I think should be general principles so that where there is variation they have been argued through so that if you want a lower standard it is because you have gone back to the general principles and made your point.

The CHAIR – In talking about the consolidation of the various provisions within the Crimes Act and the Drugs, Poisons and Controlled Substances Act, where you have talked about the time limits of the execution of a warrant, you referred with approval to the seven day limit in the Commonwealth search warrants provisions of the Crimes Act at the Commonwealth level. I think you then raised an immediate difficulty which might apply in relationship to the consolidation of provisions under the Drugs, Poisons and Controlled Substances Act in that I think you are suggesting that the time limit for the execution of a warrant under that Act may well in fact need to be longer. If those provisions are to be consolidated, how would you see that kind of tension being resolved?

Dr TUDOR – I don't think it could actually be resolved but to have it managed is what we would aim for. I would be very reluctant to say there should be a seven-day time limit full stop, no matter what your field is. I don't have a very specific knowledge of the area, in fact I suspect the complexity of serving in drug operations where it takes time to set up proper execution of search warrants and so a period of one month could well be very appropriate. Whether you make those variations in a particular Act like the Drugs, Poisons and Controlled Substances Act or you make the variations in a centralised act, as in Division 3, search warrants, the standard procedures are up front and then a series of specific procedures for particular areas, that if a search warrant is being issued in relation to an offence under the Drugs, Poisons and Controlled Substances Act, that it may be as follows. You could remove what is in Section 81 of the Drugs Act to the centralised Act. For the police that wouldn't be a problem because they know their Acts and they will know what the centralised provisions are. Having to juggle different Acts would not be so difficult for them as it would be for various authorised officers who are much more focused on a specific Act.

I think the best way to manage the tension is to make it very clear that when an exception has been made to the standard time limit, it can be made clear in either that centralised Act or in the subject-specific Act. As long as it is clear and there has been a principled argument for it, that is where the general guidelines and principles for the drug legislation would come into it. You would have to start by saying there is a seven day limit, the police are saying perhaps in the new Terrorism Act that they want one month and the relevant officers in the Department of Justice would say that the standard time is seven days and the guidelines endorsed by Cabinet say this can be varied. They would produce arguments referring to the following factors: difficulty of execution, complexity of operation, et cetera. That would put the onus back onto the police to argue the point so that a variation would be made.

The CHAIR – What view, if any, do you have about the execution of covert warrants? For example, warrants that are granted under Section 36 of the act. Do you have any particular views on that?

Dr TUDOR – I haven't turned my mind to that. I don't have any particular comment.

The CHAIR – Do you have anything else to say to us?

Dr TUDOR – I am very pleased that this inquiry is proceeding because as you indicate there has been the development of review of various criminal provisions and with the Justice Statement and the work that will be done in the next few years, we will see quite a large revision of some very central criminal legislation, all to the good. It is very much a matter that transcends left, right, police, defence, and I think everyone has agreed that there is room for plenty of revision and we are moving forward. I look forward to contributing further.

The CHAIR – Thank you for your time and expertise today. We appreciate it.

Witness withdrew