

LAW REFORM COMMITTEE

Inquiry into warrant powers and procedures

Melbourne — 19 October 2004

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Mr S. Shirrefs, SC, vice-chair, Criminal Bar Association of Victoria.

The CHAIR — Welcome and thank you for taking the time to come and talk to our committee today. As the Law Reform Committee we are governed by the Parliamentary Committees Act which means that all the evidence we will take today is subject to parliamentary privilege. You will have the opportunity, both in the course of the hearing, if you wish, and also subsequently to indicate if there is anything you would rather say in camera or off the record.

Other than that, what we will do in the normal course of events is to give you back a transcript which you can correct and that then becomes part of the public record in the sense that it will be on our web site and, subject to your approval, we would obviously like to draw on it and quote from it in our final report. So thank you for taking the time to come here. Perhaps you could start off by talking a little bit about your submission and your views on warrant powers and procedures.

Mr SHIRREFS — I represent today the Criminal Bar Association of Victoria. Our association has now, I think, in excess of 300 members. Our members specialise predominantly in criminal law so they are at the coal face on a daily basis in dealing with police prosecutions and in dealing with the exercise of coercive powers, and clearly warrants fall within that category. The submission which we made in relation to this inquiry is one that I prepared.

I started out by tracing through historically how the common law sought to protect individual rights so that at least as a reference point the committee could see historically how we, as a society, had developed over centuries and sought to protect individual rights. Against that background one can then consider what intrusions there have been through legislation coercively into rights, the right to protection of property.

Having read the warrant powers and procedures discussion paper it is quite evident, and I think it was echoed in the comments that I made in the paper which I submitted, that in Victoria there is not uniformity, there is not transparency, there is not specificity in legislation to deal with the main areas of exercising coercive power, warrants issued under the Crimes Act, warrants issued under the Drugs Poisons and Controlled Substances Act, the general provisions that exist in the Magistrates Court Act — that is, in terms of search warrants. There are also issues in relation to arrest warrants, and I note the comments from the Office of Public Prosecutions about its difficulties in relation to arrest warrants, and clearly there are also issues that were discussed by me in the paper dealing with the Surveillance Devices Act.

I note the comments of the previous speaker, that we are really in an age or a climate where there has been an expansion of police powers. There is a focus on what is perceived to be an increase in crime; an approach by government and perhaps also by opposition to try to deal with that, and whilst on one side of the coin clearly as a society we abhor crime and try to deal with it, on the other side of the coin one has to balance the rights of the individual to ensure that those rights are not lost.

I think what I really tried to state in the paper — perhaps not as specifically as I should have — is that what really needs to be clear in legislation in this state, when power is given to act coercively to affect a person's privacy, to affect their property, to affect their home, that those rights and obligations are clearly defined, that they are clearly defined in the legislation, that authorises the issuing officer to give power to a law enforcement officer to engage in exercising a search warrant or to tape record conversations or arrest somebody, and that the document, the warrant itself, sets out in the clearest possible terms what the rights and the obligations of the parties are so that the person to whom the warrant is issued, from the face of the warrant can see clearly within strict parameters, their rights, so that the person who is affected by it — and that is more perhaps in a search warrant sense than in a surveillance device sense that I will come to in a minute — once they look at the document sees what their obligations are and can see what rights have been given by the issuing officer, a justice of the peace or perhaps a magistrate in Victoria or a Supreme Court judge, so that they are clearly defined.

One of the problems that emerges at the moment, I think, in relation to the regime we have in Victoria is that the parameters are not clearly defined, so that upon the execution of a search warrant the officer who is executing the warrant can see from the face of the document, 'This is what I am entitled to do, these are the premises, this is the offence to which the search relates, this is the evidential material that we are entitled to look for and entitled to seize because it relates to certain nominated people' — and in that context I am really echoing the provisions of the commonwealth Crimes Act in section 3 onwards, which, following inquiries by the commonwealth over recent years, led to its amendment and introduction.

I do not know whether or not members of the committee have seen a search warrant issued under the commonwealth Crimes Act and the form that it takes? I took the opportunity, with appropriate deletions, to provide one to you to give you some idea of the extent to which, under the commonwealth regime, the rights and obligations are clearly defined so that upon the execution of the warrant the person who is the executing officer is clear from the face of the warrant what he or she can do, what those engaged in the exercise can do and that the person who is the owner or occupier who is at the premises being served can see from the face of the document that which is entitled to be done.

The benefit of all of that is that when powers are exercised — not so much powers, but when conduct occurs which goes beyond the powers in the warrant — one is able to say, 'This is beyond power' or, 'This is within power'. That is to the benefit not just of the individual whose premises are being served but it is to the benefit of the community generally, so that when coercive powers are exercised, the parameters are clearly defined.

Difficulties arise in relation to surveillance device warrants because of the secrecy of them and in a sense — I think it was stated in the case of *Grollo v. Palmer* by Justice Brennan as he then was — those warrants are really unreviewable exercises of executive power that permit clandestine gathering of the information some time in the future, so everything is done under a cloak and dagger of secrecy and is shrouded in secrecy. That is unlike search warrants where on the execution of it, the document is handed to the person who is at the premises, who can then contact a lawyer, and who can then take issue with the document itself, the power that is being exercised or in relation to items that are being seized that appear to go beyond the terms of it.

With surveillance device warrants, none of that is possible. It is always after the event so that if evidence or intelligence is being gathered unlawfully, it cannot be stopped. The first that anybody knows of it is if there is a prosecution down the track, the material is provided and the warrant is provided, and all of a sudden you look at it and you realise it was not authorised. So it is always after the event which makes it difficult and that is why it is recommended to the committee, I think in the last page of the submission, that consideration should be given to section 77 of the commonwealth Telecommunications (Interceptions) Act which renders inadmissible unlawfully obtained material via a telecommunication intercept. Consideration, we will recommend, should be given to that being adopted only in relation to evidence being gathered by way of an unlawful listening device or tracking device or item of that nature.

The thrust of what we urge upon the committee is that there be, to the extent that there can be, transparency but above all the rights and obligations of all parties involved in an exercise of coercive power be clearly defined so that the parameters are recognised by all.

Within the notions of a search warrant, other additional safeguards can of course be added — for instance, that a person whose documentary property has been taken can upon request obtain copies of those documents; or that there be generally a requirement that searches be videotaped where reasonable, so that there is some independent verification of the process to the extent that it can be verified. I have also included in the recommendation that if in the view of the issuing officer it is thought expedient that an independent person be present, that might be a consideration in circumstances where, for instance, it is known by the issuing officer or at least by the law enforcement officer seeking the warrant that the premises to be searched or the persons likely to be

found at that premises fall into a vulnerable or disadvantaged group or are perhaps suffering from some form of disability that would make it difficult for them to be able to respond to what is taking place. These are the sorts of considerations that have been set out in the submission.

Perhaps I can give you an example of a commonwealth search warrant situation. Because the commonwealth search warrants are so specific as to what is and what is not authorised, it is possible early on in a search to determine whether or not what has occurred is within power or beyond power. I remember an instance some years ago now of a client in Western Australia — I was in Melbourne — whose premises were being searched pursuant to a commonwealth warrant in relation to a tax matter. The solicitor in Perth had a copy of the warrant faxed to him by the client. He faxed it to me. I saw that there were problems on the face of the warrant. I contacted the registrar of the Federal Court.

I appeared before Justice Marshall in chambers about half an hour later and got an order — in the absence of any paperwork, which was to be submitted later — ordering that the officers executing the warrant take all items seized to the registrar of the Federal Court in Perth pending determination in relation to the validity of the warrant. That is an example of where, right across the continent, one was able to quarantine everything that was being taken, subject to an argument about the validity of the search that was being conducted. That can only really happen where — unless there is a clear breach — the document itself sets out the parameters of that which is authorised.

Coming back to where I really started, the rights and obligations of all parties are paramount, so that when the power is being exercised, all parties affected by it truly know where they stand in relation to that which is taking place.

Beyond that I do not think there is anything more I want to say at this stage. I have had forwarded to me four areas of interest or questions that it is believed arise from the submission that was presented by the Criminal Bar Association of Victoria. I am happy to deal with those in turn.

The CHAIR — Just before we get to those, you referred to the commonwealth Crimes Act as being an ideal model. Do you have any particular views about the New South Wales Search Warrants Act?

Mr SHIRREFS — I am not aware of those provisions, so I cannot comment on those. I have really used the commonwealth Crimes Act as a model because, from experience, I know how it has operated, so I am speaking from my own knowledge. I thought, ‘Here is a situation in the commonwealth sphere where warrants have been issued and executed under this regime, and I can say from my own experience that on the whole it has been a much better outcome than it has been in relation to the general and unspecific provisions in Victorian legislation’.

The CHAIR — Okay. Does the association have any views about the desirability or otherwise of having a single consolidated piece of legislation that has all the powers and procedures that would govern the issuing and execution of search warrants as exist in the New South Wales legislation?

Mr SHIRREFS — I think in our submission we adopted that notion of a model act or model provisions. On the other hand there may be some areas of law enforcement in which perhaps that model act is not suitable, but offhand I cannot think of any at the moment. As a general concept, we would endorse that, but there is uniformity.

Mr LUPTON — You have raised the issue of legal professional privilege. I wanted to ask you to expand a little bit on how the federal protocols are in your view a bit superior to the current arrangements in Victoria and how that might be improved.

Mr SHIRREFS — In my own experience I have been involved in instances in the commonwealth sphere where protocol has been exercised, and it has a degree of flexibility and

efficiency that does not require going before the court for arguments of law and determination. It is a process whereby independent people are appointed, the matters are discussed and the documents are inspected, subject to the usual caveats about privilege and in-camera hearings. So there is an efficient determination of the issues without going back to court, having the documents held there, arguing the matter in open court — because it should be heard in open court if it is going to be heard in court — and mounting legal arguments. My experience is that it has worked quite well. I have had no complaints directed to me and nor do I have any about the process that exists pursuant to this protocol between the Australian Federal Police and the Law Council of Australia.

In the Victorian sphere, the only difficulty that arises is because of what appears to be the unique requirement in Victoria that upon the execution of a search warrant and seizure of items, they have to be taken back before the issuing officer. We recommend retention of that requirement. It is an appropriate safeguard. I note the comments of Professor Fox that there seems to be a trend developing that has been overlooked. That has also been my experience. That would arguably render the retention of the items unlawful, because it is part of the process of the search that there be a return of the warrant before the issuing officer to ensure it has been executed according to law and that the items that have been seized can continue to be held by those who are nominated to be able to hold them.

Mr DALLA-RIVA — On that issue, in your submission you seem to be quite critical of the courts. My understanding of what you are saying is that it is the courts that issue the warrants — be it a magistrate or, as you said, a Supreme Court judge, but it is very rare now for a justice to do it, so it is usually a magistrate.

Mr SHIRREFS — That is right.

Mr DALLA-RIVA — Under section 465 the warrant is then returned back to the magistrate or the issuing court, and yet further on you are suggesting removing the judicial discretion. I cannot work out why, from the bar association's perspective, you are wanting to remove judicial discretion from a decision-making process.

Mr SHIRREFS — In relation to legal professional privilege?

Mr DALLA-RIVA — No, I am just talking about retaining legally obtained evidence.

The CHAIR — You are referring to removing the discretion to admit legally obtained evidence?

Mr DALLA-RIVA — Yes.

Mr SHIRREFS — That is only in relation to surveillance devices.

Mr DALLA-RIVA — I thought you were talking more generally. I thought earlier you indicated that if documents seized under a normal search warrant were not listed in the document — the one that you have presented — they are illegal and therefore cannot be produced in court.

Mr SHIRREFS — No. What I have said in the submission in relation to judicial discretion is that the judicial discretion arises if there is evidence that is sought to be admitted that has been unlawfully obtained. In our common-law system unlawfully obtained evidence is prima facie admissible as long as it is relevant, subject to any discretion to reject it. What the CBA has recommended in relation to surveillance device material is that the provisions of section 77 of the Telecommunications (Interceptions) Act be adopted under our Surveillance Devices Act because of the peculiar nature of surveillance device material and how it is obtained — it is all done in secret, it is unreviewable and it is always after the event.

Mr DALLA-RIVA — You say it is unreviewable?

Mr SHIRREFS — It is.

Mr DALLA-RIVA — I would argue that it is reviewable in the open court.

Mr SHIRREFS — By that stage, what are you reviewing? You are not reviewing the exercise of it. It is unreviewable. The warrant has already been executed. The evidence has already been obtained. You are arguing about the evidence, not about the warrant. You may go and review the warrant and it may be declared to be unlawful, but the evidence is still there, and the evidence is still *prima facie* admissible as long as it is relevant. It does not get you anywhere.

Mr DALLA-RIVA — You disagree with that?

Mr SHIRREFS — You can review it, but what is the outcome? On the other hand, in a search warrant situation where the evidence has not been looked at — —

Mr DALLA-RIVA — Is it not up to the court to determine whether it should be admissible or not? You are wanting to remove that?

Mr SHIRREFS — No. Any evidence is admissible as long as it is relevant to issues in the case and does not fall under one of the headings that would otherwise exclude it through statutory exclusion. Evidence that is unlawfully obtained is, subject to relevance, *prima facie* admissible. A discretion exists — and always exists — in a court to exclude it on a number of bases: that the prejudicial effect outweighs its probative force; or, in relation specifically to unlawfully obtained evidence, on matters of high public policy. That is where, on balance, the balance falls in favour of exclusion because of the matters that I have set out on page 11 of this submission about curial approval being given to people who breach the law.

I have set it out at page 11 in paragraphs (a), (b), (c) and (d) — to prevent the administration of justice being brought into disrepute, to maintain the integrity of the process, to insist that the people who enforce the law respect it, and those sorts of notions. That is a basis for exclusion. It has developed out of the case of Ireland and the comments of Chief Justice Barwick that the conviction had been obtained at too high a price.

That discretion is always there. What we have recommended is that in relation to surveillance device material which in our view falls into the same category as telecommunications intercepted material, section 77 of the commonwealth act should be considered where it is inadmissible — that is, if it is obtained contrary to law, if the warrant is unlawful or if no warrant is obtained. That, in our belief and in our submission, would redress the imbalance that presently exists.

In relation to warrants being reviewable, they are. In the search warrant situation, they can be reviewed before the evidence is ever inspected. In the execution of a search warrant, documents are seized — or, talking in terms of evidence, intelligence — and items are seized. A review can be conducted of the legality of the warrant for anything that is inspected, and if the warrant is found to be illegal, the items can be returned. It will not be in evidence. It will not be available as evidence. That is not the situation in relation to surveillance device material, because by the time you are aware of the existence of it, you are aware of what there is. The first time you are looking at the warrant, the evidence has already been obtained. It is usually in a brief of evidence, and it has been relied upon by the prosecution to take you to court for a specific offence. So it is in a different context.

The CHAIR — We might systematically work through some of the issues raised by your submission and go back to those four main areas. One of the issues we would like to raise with you is the whole question of the impact of your proposals on record-keeping and the resource implications for the courts and the Ombudsman if they were implemented. Could you comment on that and on what you think the feasibility of that level of record-keeping is?

Mr SHIRREFS — I notice that question 1 suggests that given the number of warrants issued in Victoria, the record-keeping proposal would appear to have a significant resource implication. But the other side of the coin is that because of the very fact that there are so many issued, perhaps that really does highlight the problem and the need for a record or records to be kept of those warrants that are issued and for there to be a procedure in place for those records to be made available for inspection. In the submission I again referred to part 8 of the Telecommunications (Interceptions) Act, and that is only dealing with telecommunications interceptions warrants, but there are lots of them. Anecdotally it is suggested that Australia has more TI warrants issued per capita than any other country, so there are lots of them.

Part 8 of the Telecommunications (Interceptions) Act requires that there be a general register of all warrants. The date of the issue of the warrant, the issuing officer, to whom it was issued and the date of its execution are all entered into a general register, and there is a requirement that there be a report made to the minister on the contents of that register and that the register be available on request for inspection by the Ombudsman.

I cannot suggest what sort of record-keeping should be adopted in Victoria specifically, but there should be a form of record-keeping so that a register is kept, either at the Melbourne Magistrates' Court or at the court where warrants are issued, of the details of all warrants issued — the issuing officer and the executing officer — and also an entry for the return of the warrant, so that that information is there.

In relation to surveillance devices, we can see no reason why the same sort of regime that exists, as I said, in part 8 of the Telecommunications (Interceptions) Act should not also be adopted in relation to surveillance devices, given the particular nature of that sort of coercive power and the exercise of that power. Insofar as resource implications are concerned, I cannot imagine it would be a great expense for each court to maintain a general register of search warrants and a register of arrest warrants. It would not seem to be a great imposition, and on the other hand it may in fact be a very valuable resource for a number of reasons. Record-keeping, transparency and all those matters clearly arise in relation to the exercise of coercive powers against the background as set out in the submission of what we have always held dear, and that is our right to privacy and our right to look after our property and keep it from being taken by law enforcement officers unless there is a valid reason.

As I said in the submission, the use of general warrants led in England to enactment to prevent them being used, and it led to a fourth amendment to the American constitution. I have set that out on page 2 of the submission. It is interesting to consider the wording of it, that:

... no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

This is the fourth amendment to the United States constitution, which was adopted hundreds of years ago. Even back then it is clear from the expression in that amendment of the degree of particularity that was required before a person's property could be taken or home searched. Is there anything further in relation to that issue of record-keeping?

The CHAIR — No. That is good.

Mr MAUGHAN — Could you just expand a little on your comment about the high per-capita use in Australia of telecommunications intercepts? Are you suggesting that is being used inappropriately or is necessarily a bad thing?

Mr SHIRREFS — It is a difficult one to answer. It is clearly there as an armoury for law enforcement officers. It is clearly one that is being used regularly. Ninety-five per cent of my work is crime, and I would say the majority of briefs that I get contain secretly recorded product, usually by way of a telephone intercept (TI), because not only does its use apply to commonwealth agencies but it can also be utilised — and is being utilised — by state law enforcement officers. It

used to be the case that warrants could only be obtained when they were issued by a Federal Court or Supreme Court judge. Now they can be issued by members of the AAT, and that is the usual port of call. This is an area of commonwealth domain. I really cannot reflect views on behalf of the committee, because we have not discussed it.

It does cause one to raise an eyebrow where we as a nation it seems use more TI warrants than any other country. There must be a reason for it. Maybe the criteria that governs their issue are a bit easier to achieve here than they are elsewhere.

Mr DALLA-RIVA — There are more mobile phones per capita as well — the high use of phones.

Mr SHIRREFS — I do not know. I must say that with the people I have tended to act for it used to be the situation where they believed that mobile phones could not be intercepted. That was a wrong view to take many years ago, and they keep on changing and getting new SIM cards and they do not believe that SMS messages can be recorded. Everything can be recorded, virtually anywhere.

Mr MAUGHAN — Some of them have probably paid a very heavy penalty for having that view.

Mr SHIRREFS — Absolutely. Indeed, in some cases the use of mobile phone technology is the greatest source of evidence gathering because when you look at your phone bills they quite often have which transponder was transmitting the signal so you can actually place a person's phone at a particular point at a particular time on a particular day, and in some cases that could be devastating. It puts them at the scene of the crime.

The CHAIR — You have talked about reforming the law regarding the exclusion of surveillance evidence. The criminal bar association's views on section 138 of the Evidence Act in New South Wales — —

Mr SHIRREFS — I have had a look at the Evidence Act. Our view in relation to that would be that we would endorse section 138 generally in relation to unlawfully obtain evidence procured via a warrant, but we would still urge beyond that, in relation to surveillance devices particularly, that section 77 be adopted just in relation to surveillance devices. The notion of there being a reverse onus has the benefit that it places the onus on the prosecution to provide in an evidentiary form a basis for the evidence being admitted if the onus is reversed. Presently, as I indicated earlier, unlawfully obtained evidence is *prima facie* admissible and the onus is on an accused to demonstrate why it should be excluded, and the accused is often at a forensic disadvantage because they only get to see really the tail end of the process.

If it is reversed, the prosecution, who do have available to them all information in relation to the stages through which the process evolved insofar as putting together the affidavit material that was required or the evidence on oath, as far as the process itself governing the issue, the warrant itself, and what occurred in the course of the execution of the search is concerned, should be able to justify if appropriate that that evidence be admitted, and justify it by the criteria that is set out in section 138, which really covers most of the issues that arise under the *Bunning v. Cross* discretion — the probative value of the evidence, the importance of the evidence in the proceeding, the nature of the offence.

Clearly the more serious the offence, the greater the desirability of the evidence being admitted — the gravity and impropriety of the contravention and whether it was deliberate or reckless and the like, which includes whether the impropriety or contravention was inconsistent with international covenants that we are a signatory to. In subsection (3) subparagraphs (a) to (h) enumerate the considerations that the High Court has expressed in cases such as *Bunning v. Cross* and *Cleland v. Ridgeway*, but in a legislative form. We would endorse section 138 generally in relation to

warrants for the reasons I have expressed, but again — and I am repeating myself — I urge the committee to consider section 77 as the appropriate model in relation to surveillance devices.

Mr MAUGHAN — Coming to the treatment of vulnerable and disadvantaged people, the previous witness was suggesting that warrant powers are used in a cohesive manner by police serving warrants late on a Friday afternoon, locking up indigenous people, for example. Have you any evidence of that occurring?

Mr SHIRREFS — I think I can say generally that once power is given to law enforcement officers there will always be instances where they use it in a way which perhaps is unfair. Even outside the context of warrants, you see police officers who are conducting an investigation and who do not have evidence on a person sufficient to cause them to come down to the station to be questioned, standing on a street corner and all of a sudden arrest the person for loitering and they take them down and question them. A law enforcement officer who is given power will use it to his or her advantage to advance their investigation if they have a belief that the person has committed an offence, either justifiably held or unjustifiably held.

I cannot speak specifically of instances where warrants have been used in the way which was described by the previous speaker, but it does not surprise me. Indeed that comes back to the matter I raised at the outset, that what one really needs to have in the legislation and on the document itself are sufficient safeguards to prevent abuse, to prevent them being used in a way that can lead to unfairness, specifically in relation to disadvantaged groups, be they Aboriginals, be they intellectually handicapped, be they just generally poorly educated and coming from a part of town where they are likely to be poorly educated and not understand what is taking place.

I would hasten to add that the majority of members of society are vulnerable if at home and a policeman knocks on their door at 6 o'clock and comes through with a horde of other police officers, places a document in front of them and they are dazed by the experience and they are trying to understand what is on the document. They do not know what is happening. They are vulnerable. Anybody would be in that situation — some more perhaps than others — unless they have legal training, stand up for themselves and are prepared to assert what they believe to be their rights.

That is what the law, through legislation, should be seeking to ensure is protected — that the person who is the subject of the warrant is not placed in such a position of vulnerability that their rights are ridden over, that they are able to express what they believe their rights to be. It is really a sliding scale. There will be some at one end of the spectrum and there will be others up the other end. I think that probably covers the topic.

Just dealing with that and coming back to what I raised earlier about independent persons being required to be present, I think that is a genuine consideration when, for instance, one is dealing with a group that clearly is known to be a vulnerable group, be it Aboriginal, be it intellectually disadvantaged — that is, that the issuing officer has power to require that certain persons be present, so that there is independence, there is somebody there to protect the right of the individual whose rights have otherwise been abrogated by the exercise of power.

Mr DALLA-RIVA — Can that be overridden by videotaping the warrant?

Mr SHIRREFS — Videotaping goes so far, but you also have to bear in mind that the videotaping of the search is controlled by the person who has hold of the camera and who is executing the warrant. Quite often, even though videotapes are used, and perhaps used more in Western Australia where I do quite a bit of work, it is the norm to have videotaped evidence of the search but they choose when to turn it on and when to turn it off.

Mr DALLA-RIVA — Batteries can go flat, I hear.

Mr SHIRREFS — They do. There is no requirement — —

Mr DALLA-RIVA — You raise the issue about the occupant not being fully aware or informed — indeed the videotaping of the issuing of the warrant to the occupier, the explanation provided to the occupier. I know I am being flippant, but those things could be — —

Mr SHIRREFS — That could be — absolutely.

Mr DALLA-RIVA — So it is made very clear?

Mr SHIRREFS — Yes.

Mr DALLA-RIVA — If it is identified, either through a complaint subsequently or in the court later, that it was clear that the person did not understand, there may be argument for judicial discretion then to rule those particular matters inadmissible.

Mr SHIRREFS — I agree with that. Indeed one perhaps thinks of section 464 of the Crimes Act, when a person is in custody suspected of committing an offence and is to be questioned by investigating officers there is the requirement that they be given their rights as to caution, their rights to contact a friend, their rights to contact a solicitor or a legal representative, or if they are a foreign national to contact the consulate. There is a requirement that the giving of those rights be recorded so that there is an independent record of that having occurred. In terms of the execution of a warrant, if a video camera is there or required to be there, or at least a recording device, that the person is identified at the home or the premises where it is being executed, they are given the warrant, the contents of the warrant are explained to them, and they are asked whether they understand specifically what is about to take place and what has been authorised pursuant to the terms of the warrant and whether they understand that.

Mr DALLA-RIVA — Obviously there would be circumstances where there would be the 20 pound key that would be needed to execute the warrant because of the nature of drugs?

Mr SHIRREFS — Absolutely.

Mr DALLA-RIVA — And they would be a bit different.

Mr SHIRREFS — Of course.

Mr DALLA-RIVA — So there would be occasions where it would not be appropriate to ask, because clearly the occupant might be at the toilet flushing something down.

Mr SHIRREFS — They are getting out the back window as quickly as they can and being picked up over the back fence. I understand. Something along those lines I think is a valuable consideration. It comes back again to the issue of rights and obligations. As long as everybody is informed and knows what is taking place, and what is taking place is within power, then that is really all that can be done to protect the situation.

The CHAIR — Could I ask you, Stephen, your views or the association's views in relation to telephone warrants, warrants issued over the telephone, and the safeguards or otherwise that should prevail in relation to the issue of such warrants?

Mr SHIRREFS — I can understand from the law enforcement point of view why sometimes speed is of the essence and that warrants be obtained in that manner, provided there are sufficient safeguards and that the appropriate documentation which supported the issue of the warrant is provided subsequently. Again in that situation, the consideration of section 138 of the New South Wales Evidence Act — which I take it is also in the commonwealth Evidence Act, but that only applies in the Federal Court, so in terms of criminal law the New South Wales Evidence Act operates but does not operate in the commonwealth sphere — reversing the onus is at least an added protection as much as there can be in relation to evidence that is being gathered pursuant to a warrant issued over a telephone.

The CHAIR — I was thinking more of the circumstances in which telephone warrants are issued. Section 12 of the Search Warrants Act in New South Wales says that an authorised justice must not issue a telephone search warrant unless satisfied that the warrant is required urgently and that it is not practicable for the application to be made in person.

Mr SHIRREFS — Absolutely — I would endorse that. It is the path of last resort; it has to be. If there is time within which to apply in the ordinary course, then the applicant should appear before the justice or the magistrate and make application in the ordinary form. There are issues in relation to that too. At the moment, as I understand it, a police officer will attend before a magistrate, jump into the witness box or be heard in chambers in relation to a matter. There is no record kept of that. Unless it is on a statement or an affidavit, there is no record kept of what was placed before the issuing officer. That is an area that perhaps needs to be examined as well so that there is a record kept of the material placed before the issuing officer which grounds the issue of the warrant so that at least a record exists which can later be subject to review.

The CHAIR — In your experience or the association's experience in terms of the sort of night and day distinctions around the execution of search warrants — —

Mr SHIRREFS — Six in the morning is a popular time, isn't it, for execution?

The CHAIR — Yes, but — —

Mr SHIRREFS — When people are most vulnerable.

The CHAIR — Indeed, but difficulties that might arise where there is an authorisation to execute a warrant during the day, but because of the time that might be taken to conduct a search, particularly where there might be computer and other records involved which might take you over — in New South Wales there is a defined night and day period — do you have any views about the flexibility that should pertain to that, such as whether or not you have to cease a search if you move into the night period or if you have started the search during the day, that that should continue?

Mr SHIRREFS — I think the answer to that is if it is to go beyond the point that is thought to be the cut-off point there be a requirement to get an extension from the issuing officer to continue it.

The CHAIR — By telephone?

Mr SHIRREFS — By telephone, or whatever — at least some record kept that an extension has been given to allow the search to continue, because you cannot set parameters in concrete that you are entitled to search only between these hours if for one reason or another they may not execute the warrant until midday or the middle of the afternoon and all of a sudden it is night time, 'We have to stop now', but they are only part way through because they have found a lot more than they thought was going to be there. It would be absurd to say in those circumstances, 'Sorry, your time is up. You are out of here'. There needs to be flexibility, but that needs to be something that has as part of it the usual protections — that an extension is given by an appropriate issuing officer that permits further time to be allocated. The same exists in relation to interviewing suspects — if time limits start to run out, you can get an extension, but that can be built into a system.

The CHAIR — Do you have any particular views on the temporal limits that apply to warrants in terms of the period within which they need to be executed, for example?

Mr SHIRREFS — They are 72 hours, are they not, in Victoria?

Mr LUPTON — I think your federal example had a seven-day period for it to be executed.

Mr SHIRREFS — Yes.

Mr LUPTON — Should that depend on the evidence that is put to the issuing officer about the likely time it is going to take to execute it?

Mr SHIRREFS — Whatever period is set, it should be adhered to. I have a case at the moment where a person is being prosecuted in relation to stolen property. The warrant was executed. There was a 72-hour limit, but the police for some unknown reason waited for about five days before they executed it, so the warrant was stale. That argument is yet to be had in relation to the case. As to why it is seven days in the commonwealth sphere, I do not know. Why it is 72 hours in the state sphere, I do not know. I suppose all I can say on behalf of the committee is a period of time is allocated that is considered to be reasonable — be it two, three, four, five, six or seven days — 72 hours is what, three days?

The CHAIR — What about those situations where the police may go in, conduct a search and leave, having perhaps concluded the search at that point. Do you have any views about what safeguards should apply in relation to re-entry under the same warrant?

Mr SHIRREFS — Once a warrant has been executed, it is spent. I do not believe there should be any right of re-execution under a warrant.

Mr LUPTON — You simply apply for another warrant?

Mr SHIRREFS — That is right. You would need to justify the basis for it.

The CHAIR — Just the final area which I think we gave you some notice of, which was in relation to safeguards on arrest warrants or penalty enforcement warrants. Do you want to make any comment on that and on whether or not your record-keeping proposals could extend to those?

Mr SHIRREFS — I think my record-keeping proposals would really say there should be a register for warrants, perhaps an individual register for each category — search warrants, arrest warrants — so that there is a general repository of the information. As far as safeguards on arrest warrants are concerned, arrest warrants are issued. You can have the charges laid and a warrant of arrest can issue, yet the issuing officer is informed and believes that the person is otherwise unlikely to attend.

The same comments I have made in relation to warrants generally — search warrants in particular — would also apply to arrest warrants and penalty enforcement warrants. There is nothing that the CBA wants to add over and above that which has been stated in relation to arrest warrants and penalty enforcement warrants.

The CHAIR — Could I just ask you briefly about covert search warrants?

Mr SHIRREFS — The exception — very much the exception.

The CHAIR — In what circumstances, if any, should they be authorised?

Mr SHIRREFS — I have difficulties with the notion of covert search warrants because there is no-one there, or no independent person there, who can assess what is taking place. They really fall under the same category as the surveillance device situation where it is all being done secretly and no-one knows it is taking place. However, I am going to be hard pressed to suggest that in no situation should covert searches be permitted. Law enforcement officers would consider them to be at least at times a necessary part of their investigative function where they have long-term investigations taking place — they believe that within a particular building drugs are secreted but if they go in now it may blow the whole operation and they will not get to the people they really want to get to. In those circumstances I can understand a justification for a covert search.

In terms of amphetamine production there may be thought to be a laboratory somewhere that is manufacturing amphetamines — they have noted glassware being purchased, persons who are associated with or have prior criminal history in relation to amphetamine offences are seen associating with others or purchasing chemicals, and it is thought that within a particular building there may be items being used or put together for the purposes of manufacturing amphetamines, by way of an example. The police are not 100 per cent sure. They may want to go in there to get sufficient evidence to get a surveillance device warrant to put a listening device in but the state of the evidence, as it presently is, is not sufficient to persuade a judge to issue one. However, given the nature of what has been taking place, it may be sufficient to convince a judge to let them go in and take a look.

The CHAIR — It is precisely that example — the manufacture of drugs — that was put to us in other states, that in fact you may not be able to know what point the production is up to?

Mr SHIRREFS — If you go in too soon, the whole thing fizzles away because it is too late and all you have discovered is some red iodine or something else which is a precursor chemical but you do not have manufactured amphetamines and the people there or whatever. I think all I can say is that the committee would recommend that there would need to be compelling evidence placed before an issuing officer to permit a warrant to be executed secretly like that in those circumstances. However, insofar as, as a protection, it may be appropriate in those circumstances that an independent person attend so an independent record is kept of the process.

The CHAIR — You may want to come back to us with some further comments on that, particularly in Queensland, for example, where section 74(1) of the Police Powers and Responsibilities Act 2000 allows for covert search warrants. I think there are some provisions in relation to the Western Australian Corruption and Crime Commission. They are heavily circumscribed, and we would be interested in the criminal bar association's views.

Mr SHIRREFS — We can provide you with that. I do not think I could sit here and sensibly argue against them full stop. I think there is clearly a place for them but the circumstances in which they arise need to be properly circumscribed, and, as I indicated, perhaps they would include the requirement that there be an independent person present.

The CHAIR — Just before we wrap up, is there anything else you would particularly like to say at this point?

Mr SHIRREFS — Not that I have not already said, I would just be repeating myself I imagine. Really the essence of all of this is that there are clear parameters, that the rights and obligations are clearly set out and clearly defined in terms of the requirements which underpin the issue of the warrant, the execution of the warrant and the aftermath of its execution. There is transparency as best there can be, and that which can occur and that which cannot occur is clearly defined.

The CHAIR — Thank you very much for your time, Stephen, it has been most informative. We have appreciated your input and expertise.

Mr SHIRREFS — As long as we can be of some assistance — I am glad the committee is looking at it.

The CHAIR — Thank you.

Witness withdrew.