

LAW REFORM COMMITTEE

Inquiry into warrant powers and procedures

Melbourne — 19 October 2004

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Mr B. Walters SC, commissioner, and
Ms Katrina Richter, assistant to commissioner, Liberty Victoria.

The CHAIR — Brian and Katrina, welcome to this session of the parliamentary Law Reform Committee's inquiry into warrant powers and procedures. The hearings today are governed by the Parliamentary Committees Act, and as a consequence are subject to parliamentary privilege. If you, at any point, wish to say anything in camera, please let us know, otherwise it will be a public record.

You will get an opportunity to correct your evidence at the end when we send it out to you, and after that we will post it on our web site as public evidence unless you stipulate that you would prefer it was kept in camera. We will draw on that evidence in our final report and by way of quotation, drawing on some of the observations and views that you have put to us as a committee.

Just to start off, perhaps you could talk a little about your submission and the general position that Liberty Victoria takes in relation to this inquiry.

Mr WALTERS — Could I start by saying this: as I was reflecting on how I would assist the committee, I was conscious of the fact that although I have done a number of what would be regarded as fairly prominent cases dealing with warrants, when it came to drawing it all together there were huge gaps in my knowledge, which emphasises the importance of what the committee is doing.

Historically warrants were issued by justices of the peace to constables, and the constables were required to execute the warrants, and they were prosecuted if they did not. On the other hand if there was a defect in the warrant, they were sued.

In 1750 the Constables Protection Act was enacted to try and prevent that kind of anomaly in the law. That emphasises another thing which is terribly important with warrants and that is clarity. Most people will comply with warrants if they know what it is they have to do, and that includes not just those who are subject to them but those who are executing them.

The committee's brief is very wide, and I will confine my remarks, as much as possible, to warrants used in relation to the investigation of crime. That seems to me to be the area where I can probably be of most assistance. I did make some remarks in my submission about surveillance devices, and can I just give some general concerns in relation to that? Incidentally, even before coming here — and I realise Paul Chadwick immediately preceded me — one of the things I was looking at was the fact that I did not understand quite how the Privacy Act impacts on surveillance devices. That in itself is a complex area for everybody and I am sure the committee will be across that concern.

The first concern I want to raise is the question of legal professional privilege. The law has said that legal professional privilege is important because it underpins the rule of law. It is very important for people to be able to get legal advice so that they can act in accordance with the law. That is really the theoretical foundation for legal professional privilege.

But the first requirement of legal professional privilege is that the communication concerned is confidential. There is a line of cases, and the first case in the line is *Calcraft v. Guest* [1898 1QB 1759] which says that once confidentiality is lost, even inadvertently, the privilege is lost.

In some cases the courts have tried to steer around that in various ways, and I would say that the High Court has not pronounced on it clearly except following *Calcraft v. Guest* in a general sense some time ago, but there are cases where a conversation has been overheard between solicitor and client by a third party, without the knowledge of the solicitor and client, and it has been held that privilege was lost.

The reason I raise that is that of course there is a serious argument that conversations between solicitor and client in the course of surveillance would give rise to the loss of privilege unless Parliament said, 'No, this material is to be treated as confidential for the purpose of the protection of privilege.' So we think there is a difficulty with privilege generally in relation to warrants, but in relation to surveillance devices, and particularly listening devices where no-one who is party to the conversation knows what is happening, it is an issue that, at the moment, is not protected.

Mr LUPTON — There have been some well-known cases in recent times involving lawyers and their relationship to clients. I do not want to go into specific cases that have not been dealt with yet, but do you see that there is any particular special requirement where a legal adviser may in fact be subject to the warrant themselves and may be ultimately a defendant? How do you deal with that kind of issue?

Mr WALTERS — Legal professional privilege does not belong to the lawyer; it belongs to the client. Legal professional privilege does not cover iniquity, so if you are actually engaging in hatching a crime, there is no privilege in that. Take the situation where, for purposes of argument, the lawyer concerned is engaged with drug dealers, and take a situation where the lawyer concerned also has legitimate clients for whom he is offering proper advice.

The problem is not so much in relation to the illegitimate clients, if I can use that term; it is in relation to the legitimate clients and protecting their interests. We are not concerned about protecting lawyers — that is not what the privilege function is for — it is for protecting the interests of the legitimate clients. That is something which at present is at least arguably lost. There would be many judges who would strain to say that it was not, but it is a point of unnecessary ambiguity in the law, and probably it is lost. I think that is the better view of the law.

There was a case which went to the full Federal Court. We are talking about 10 years ago. I was involved in the case. It involved a Melbourne lawyer whose chambers were bugged — a barrister — and the point was taken that because it was the phone that was bugged it was a federal warrant and federal legislation that was concerned. The point was taken, 'Well, you may have your suspicions about him in relation to client X, but he has clients 1 to 100 who are not X. How do you protect that? There is no protocol as there is for a normal search warrant'.

In brief compass the Federal Court said, 'It is too hard, but in our view you can do that under the legislation'. I think that is a long-term problem for the law. Increasingly it is important that police have the power to use technological means to deal with crime, and the concomitant of that is providing the appropriate protection. Obviously the product should be regarded as confidential at least until such time as it is tendered in court.

The CHAIR — Just on that, most of these areas of privilege are governed by protocols, particularly in relationship to documents that might be seized in the course of a search by warrant. There has been some discussion, for example in New South Wales, as to whether or not the protocol that exists between the law society and the New South Wales commissioner of police should be subject to statutory regulation. The New South Wales Crime Commission argues that there should be a statutory scheme for dealing with claims of legal professional privilege, and some of these go to the question of whether or not legal professional privilege has been abused or claims for privilege in relationship to certain documents. In its review of commonwealth criminal law the commonwealth has also raised that question. What are the views of Liberty Victoria in relationship to statutory regulation of legal professional privilege, or do you think that the current protocol arrangements work well?

Mr WALTERS — I do not think Liberty has a view as to whether it is statutory or otherwise. My personal view is that these matters are important and that protocols are really legislation by default. It is preferable that the community as a whole has a say and that the community as a whole has a say through legislation. My own personal experience with the exercise of the protocols has been in relation to a number of commonwealth warrants. The old

section 10 — now section 3E — is where the protocol was applied. I notice that there was a comment in the papers from Danny Holding that at times police had looked at the documents to see whether the claim was properly maintained. I have not personally experienced that. In most of the investigations where I have been involved where the protocols apply have been ones where the police have gone through the commonwealth DPP.

There have been big claims for privilege. We are talking about major corporations — I will not name names — but in some cases not ultimately resulting in prosecutions. In those cases the documents are taken, and whenever there is a claim of privilege no-one looks at it; they are sealed up. But the onus is on the party claiming privilege to make the claim within three days, and I think that is a reasonable requirement. If you are claiming privilege, you have got to do something about it.

Whether or not you are a person with sufficient funds to pay whatever it is to issue a Supreme Court proceedings these days — it is quite a lot — that is another matter. There might be a more streamlined procedure. I have been involved in helping in relation to state police warrant powers. The way it worked was this: the police briefed me as an independent person to advise independently of police and client on whether some documents, which were the subject of privilege and had been seized under search warrant did in fact contain privileged material. I was given the task of being an honest broker, as it were, and I went through and said, ‘Well, X, Y and Z. are privileged. They are clearly privileged, but there is no basis for it in relation to A, B and C’. That was an ad hoc arrangement.

Again, it is not ideal to have an ad hoc arrangement, but I think it worked in that case; however; there are ways of streamlining it through legislative force to protocols. It could be done by regulation authorised within a statute. That would make it easier to amend if that were required. There are a number of ways of doing it. Overall the problem with listening devices, of course, is that there is no protocol, and there cannot be readily as things stand.

The CHAIR — You talked in general terms about there being problems with virtually all of the warrant powers at the moment. What safeguards do you believe are necessary and appropriate to avoid the abuse of warrant provisions? What would you like to see?

Mr WALTERS — I have some specific things and some general things. Perhaps I will deal with a specific matter first. Listening devices would be a good example to lead into the general. Where someone is charged with an offence based on the product of a listening device there is usually an opportunity for the legality or fairness of that process to be independently looked at by the trial judge. Nine times out of 10 — if not 99 times out of 100 — there is not really an issue, but every so often there is. But that is only where someone is charged. I happen to know because I have seen the material in relation to other cases that in many cases the product is never used in a prosecution. There is not a chance for anyone to look at it. Not only that, the people whose telephone calls or personal conversations have been bugged never know, and that is a real concern.

At the moment the provisions in relation to destroying the product are in section 36 of the Surveillance Devices Act, and that requires the senior law enforcement officer to destroy only if he or she is of the opinion that, cutting it short, it is no longer going to be needed for anything, and there is a series of things. In practice to compel the destruction of the material is almost impossible because it depends on the opinion of someone as a matter of administrative law — not on the reasonable opinion, but on the actual opinion.

The CHAIR — You would have to know of its existence for a start.

Mr WALTERS — Exactly. Obviously you do not want to tell people while you are getting information about the existence of these things; that is the whole point, but afterwards! When you do a search warrant, people know about it. Even if they are not home they are advised

of the existence of the search warrant; at least a copy is left and so on. Where it is a covert operation, obviously you will not tell them at the time, but it seems to me that there is a strong case for making people aware of it at a later time.

The CHAIR — Are there particular provisions that you think work well in that regard?

Mr WALTERS — I am not aware of any in relation to that. I have not looked Australia wide in relation to that. The use of listening devices is escalating. It was almost non-existent when I came to the bar, but they are used more and more, and to some extent the law inevitably has to catch up with that.

Mr MAUGHAN — Is that not largely because technology has also escalated and it is a reaction to that?

Mr WALTERS — There used to be quite physically cumbersome things that you had to put into premises and so on. Now you do not even have to go into the premises; you can do it from a distance. You can get quite good sound from a long distance away from the house. Inevitably it is necessary for our law enforcement people to use these techniques. The question is: under what circumstances?

Mr MAUGHAN — Members of the public themselves are using technology much more than in the era you referred to. We are all using mobile devices and more technology, therefore it is inevitable that the police force is going to use more technology to catch up with that.

Mr WALTERS — And they should. There is no question about that. The question is: what is the community interest in setting the boundaries to that being done?

The CHAIR — The Criminal Bar Association made a number of recommendations in relationship to how you might regulate that kind of surveillance. You may not want to answer now, but as an organisation you might want to review some of the things that other people appearing before the inquiry have suggested and indicate whether you think they are adequate or whether you think additional safeguards would be necessary.

Mr WALTERS — I am happy to do that. I have not seen their submission, so I would want to have a look at that.

The CHAIR — They also made some recommendations in relationship to inserting a section 77 from the commonwealth Telecommunications (Interception) Act into our Surveillance Devices Act. Basically those provisions render illegal inadmissible in court. Do you have a view about that? That is the effect of section 77 now.

Mr WALTERS — It actually goes further than that under the commonwealth act. So that we are all clear, it actually makes it a criminal offence even to try to tender it in court. It goes quite a lot further than just making it inadmissible. I would not necessarily have thought that we need to go quite that far.

Mr LUPTON — The Criminal Bar Association had a two-stage process and suggested the New South Wales Surveillance Devices Act, which allows illegally or improperly obtained evidence to be admitted subject to the prosecution showing that it ought to be, so that the onus is on the prosecution rather than on the defence.

Mr WALTERS — Yes. Putting the onus on the prosecution is fair enough. If you are going to invade people's privacy and authorise obtaining information of this kind and then use it against someone in court, I think it is fair enough that you would set out, 'This is what we did. This is why we did it, and this is a reasonable use of the power'. I would have thought that the onus being on the prosecution is absolutely uncontroversial. It is a reasonable approach.

The traditional argument between making something inadmissible and the discretion is that of course sometimes the illegality is trivial, and it should be for the court to assess that. I do not think Liberty has a hard-and-fast view about that. It is important, as much as possible, that we leave judges with the discretion to look at these things on a properly formulated basis.

In relation to the commonwealth act, the reason for that historically from a policy point of view was the real importance of maintaining confidence in the telephone system and the communication system generally as a policy matter. One of the problems with any surveillance use where there is a system of communication — be it the Internet or the phone system — is that people for business and other reasons need to use it with some sense of confidence. Where that confidence is breached it has an impact that has ramifications right through the system and on how people interact generally. I do not have a clear answer, but those are what I think are the considerations. I am not aware that Liberty has a position saying that, ‘No, you should have it as inadmissible or otherwise’. I think there are good arguments for that, but I am not going to say that we have a firm view.

Still dealing with the specifics of surveillance devices, this is an issue that has arisen in my experience not infrequently. For example, you may have a listening device in a premises and you are looking for conversations which will give evidence or lead you to believe that there is a conspiracy to traffic drugs or something of that nature. It is very important as defence counsel that you have all the conversations, because often a pattern is being relied on to give meaning to certain words in various contexts. But here is one thing that can happen and has happened in one case. Police said, ‘No, we will not give you this, this and this phone conversation’. When asked why, they said, ‘It is a private matter’.

When pressed it turned out that the wife of the suspect was having an affair with somebody else and this would have impinged on her privacy. One cannot criticise the police for taking that view — that is appropriate — but on the other hand why should I trust them and why should I have to trust them, because it is just possible that there is something that would be really valuable. On the other hand why should I be placed in the position of having to tell my client as a duty of disclosure that his wife was having an affair with someone else?

The CHAIR — It could lead to the commission of other offences!

Mr WALTERS — Absolutely. And I can think of one case where the situation was extremely volatile in dealing with that. That raises the issue of having an independent audit of that situation — that is, having someone, not the barrister or the police, having oversight in relation to that.

Mr MAUGHAN — Who would you suggest would be an appropriate person or body to provide that oversight?

Mr WALTERS — My tentative view is that the magistrate issuing the warrant should be the person to do that, and not the trial judge, because often it will be material that will be completely prejudicial or otherwise irrelevant to what is already a complex task. But this raises the concern I have that at present with the multifarious forms of warrants — for searching, surveillance and so on — there is not a clear audit process. Material is being obtained and police are doing the best they can, often with a vast amount of material. If you have seen the volume of intercepts in a drug trial, for example, you would know we are talking about folders and folders of transcripts, and that is just what is considered relevant. There is a whole lot of other stuff. No-one is actually auditing it. In relation to both listening devices and to the seizure of property and documents, there should be some kind of audit that people trust.

Mr MAUGHAN — Your comments lead on to the next obvious question about whether Liberty favours consolidation of all of these warrant powers into one piece of legislation with all

the sorts of safeguards you have referred to and then the next step as to whether or not it is desirable to have uniformity between the various states on these sorts of issues.

Mr WALTERS — Well, first of all I noticed the way the committee has divided up the different kinds of warrants. Certainly in relation to the investigation of criminal offences I think it is highly desirable that there is a standardisation of the powers in relation to warrants. I have done a number of cases for the commonwealth and in particular commonwealth agencies dealing with warrants, and there are sometimes special powers — for example, the powers the tax office has in relation to search and seizure are enormous. Customs also have very strong powers in relation to warrants. I have done a lot of those. The standardisation within Victoria I think is a good thing. Obviously we do not think a standardised bad law would be good. We say a standardised good law would be good — but between states, good luck! And regarding the commonwealth there are some special issues, because it has got some agencies that are involved.

Can I raise another issue while we are dealing with standardisation, because there is another issue which I see that the committee has looked at and which I certainly have a view about, and that is this: whenever you are investigating a crime, it can sometimes happen that you uncover unexpectedly another crime. It might be that you are executing a search warrant or a listening device warrant or whatever it might be. The state of the law in Australia, as I understand it, is this: although in England, under the decision of Lord Denning in *Ghani v. Jones* [1970, 1QB 693], if a policeman goes into a premises on a warrant, finds evidence of another crime, they can take that evidence, but the law in Australia seems to be the contrary; you cannot take it. The decision is *Challenge Plastics Pty Ltd v. The Collector of Customs for the State of Victoria* by Justice Heerey in the Federal Court.

Liberty Victoria does not think that is sensible. If you uncover a crime, there ought to be a process to deal with it. Taking the material and then promptly obtaining a warrant that authorises it seems to us a simple and commonsense way of dealing with that problem. That applies not just in relation to search warrants, it applies to other things too, but particularly in relation to search warrants.

Mr LUPTON — Is there any difference between state and federal authorities on that point?

Mr WALTERS — There has been, I think. In Victoria, I cannot remember the case, but I think in Victoria there is a division of opinion, but I looked in *Freckleton* in relation to this, and I noticed that he was quoting Heerey's judgment in *re Challenge Plastics* furiously. It was a single judge of the Federal Court, it was never appealed but it is quite an important point from a practical point of view.

If you are a policeman on the beat dealing with the execution of a warrant — and I have both prosecuted and defended a lot of trials, and I can think of cases where important material has not been used because of that requirement — it seems to me that it is fairly easy to fix that, although it should not be *carte blanche* to take whatever you want to take, but if you form a reasonable belief when you are searching for X that Y exists and that Y shows the commission of another crime, and you then go within 24 hours before a magistrate, swear what your belief is and why you have taken it and seek that authorisation, the magistrate will say, 'Yes you are right, keep it and deal with it in the appropriate way', or 'No you are not, send it back'. One way or the other it seems to me that is a sensible way of dealing with that problem.

The CHAIR — Can I ask you a question in relation to auditing and monitoring of warrants at the back-end? In Queensland there is a public interest monitor who does that at the front-end, argues the case before the court as to whether or not the granting of a warrant *ex parte* — a covert search warrant for example — is in the public interest. Does Liberty Victoria have a view about that?

Mr WALTERS — I do not have any experience of the system, but can I say this: there could well be use for it. One of the problems of surveillance devices warrants, for example, is that instead of being genuinely used to investigate crime they can be used for gathering criminal intelligence. The difference is significant. It is one thing to investigate an offence or even a prospective offence that you genuinely believe is about to be committed, I can understand that, but where you are just gathering information on bad people, warrants should not be used for that. There can be an overlap, and it can be difficult to draw the distinction between the two, but a magistrate — or for that matter a justice of the Supreme Court — sitting hearing an application for a warrant is rarely going to be able to mount the counter-argument as well as an independent advocate might. I do not know what the experience is as to how cumbersome the process is. but then of course it is a serious matter, obtaining a warrant.

The CHAIR — Particularly a covert one.

Mr WALTERS — Yes.

The CHAIR — Are there any other matters, Brian, which are raised by our discussion paper that you would particularly like to address in relation to this inquiry?

Mr WALTERS — No. I think that covers the main points that I would like to help with. I hope I have been of help anyway. We are conscious it is a very big task. We think it is a very important task in this case, and we wish you well.

The CHAIR — Thank you, and thank you very much for your time and for lending your expertise to this committee.

Witnesses withdrew.