

LAW REFORM COMMITTEE

Inquiry into warrant powers and procedures

Melbourne — 20 October 2004

Members

Ms D. A. Beard
Mr R. Dalla-Riva
Ms D. G. Hadden
Mr R. J. Hudson

Mr D. Koch
Mr A. G. Lupton
Mr N. J. Maughan

Chair: Mr R. J. Hudson
Deputy Chair: Mr N. J. Maughan

Staff

Executive Officer: Ms M. Mason
Research Officer: Mr J. Cina

Witness

Mr G. Davies, manager, discipline and legal, Police Association.

The CHAIR — Welcome to this inquiry by the parliamentary Law Reform Committee into warrant powers and procedures. Our work is governed by the Parliamentary Committees Act, which means that any evidence you give in this public hearing is subject to parliamentary privilege. We have a presumption that your evidence will be on the public record as it is a public hearing, but if you want to give any of your evidence in camera, you can request that that occur. We will provide you with a copy of the transcript, and you can make corrections to it prior to our publishing it on our web site, subject to the caveats I have mentioned about any in-camera evidence. We will want to take your evidence into account in coming to our conclusions and making our recommendations. Without further ado, would you outline the main elements of your submission, and then we will open it up to questions.

Mr DAVIES — Thank you very much, Sir. The submission of the Police Association is necessarily quite brief. We have not touched on warrants of commitment and matters of that nature, basically because we do not believe that is a police role. Once an offender or a suspect is dealt with by the courts, the responsibility for that person transfers away from the police. Therefore, as I say, we have not gone anywhere near warrants of commitment or matters of that nature. Our report is fairly well encapsulated in the letter that we provided some time ago, and I will outline it as we go.

The membership of the Police Association is made up of a little over 98 per cent of the police force in Victoria. As such we have obviously had the opportunity to access the opinions and evidence, if you like, of a wide range of people. As the largest, we believe, user group of search warrants in Victoria, our submission includes a request that the expert opinion of our members be considered in your deliberations. Search warrants is the main area we have looked at because it is the main area with which police deal on a day-to-day basis.

Our members tell us that as far as they are concerned there are far too many types of search warrants at present. They deal basically with two acts that provide them with a search warrant for almost every conceivable reason they might need one. They are the Crimes Act warrants: the 91(1) stolen goods warrant, and the 465 warrant — section 465 of the Crimes Act that deals with evidence. Probably the most used warrant relates to section 81 of the Drugs, Poisons and Controlled Substances Act search warrant.

It was interesting to hear the previous witness allude to the possibility of a warrants act. It seems to us eminently sensible to do away with the plethora of search warrants that exist, many of which are never used by our members, and we would submit that in a lot of instances many of our members would not even know that they existed. Therefore, neither would quite a large number of people involved in other law-enforcement agencies. There are warrants under the Forests Act, I believe it is called. I have been a member of the police force for 27 years and I did not even know there was such an act, let alone a search warrant attached to it. A simplification, while retaining the constraints or the checks and balances that the public demand and that the Police Association wants to see remain is obviously, in our view, the easiest and most effective way to go.

Our submission is pretty simple because we think, in relation to search warrants, that it is a pretty simple solution. We believe, and our submission states, that search warrants for every occasion if you like, can be dealt with in three categories. These are warrants to search for persons, warrants to search for things or evidence, and extraterritorial or extradition warrants. Obviously there would need to be various categories within those warrants, but outside of those three provisions it would be not only extraordinary but we do not think the situation would arise where anything else would be needed. That would mean things — I think it is a section 10 of the Mental Health Act warrant now — could be covered in a warrant to search for persons.

Creating a three-warrant structure would provide the opportunity for Parliament to untangle the mess that our members find themselves in, particularly in relation to warrants for property that has been seized. There is not exactly a uniformity of application across the state with respect to magistrates. They have, necessarily and quite properly, their own views on how legislation is

interpreted, and until and unless there is firm legislation that clearly sets out the required steps, or there is some sort of decided precedent from a superior court, those contravening views are going to continue.

Many magistrates, having viewed the property that has been seized under warrant, hold the view that the property can only be retained for the purposes of analysis at the State Forensic Science Laboratory, production in court, or return to the rightful owner. This makes it impossible to interview a suspect and put allegations to him or her in relation to that property. You cannot have that property in the interview room and say, 'This black briefcase that is on the table now, Mr Hudson, whereabouts did you come by that?'. You cannot do it.

The magistrate's view is that that provision is not allowed or is not catered for in the legislation. Similarly, if that black briefcase was in the possession of police along with a range of other items seized under warrant and we could not find an owner, we could not make a request of the public to come and view the property in an attempt to find the identity of the rightful owner. So there are a number of issues in relation to the treatment of property seized under warrant once it has been viewed and instructions received by a magistrate, and much of that revolves around the magistrate's opinion of what should or should not happen. In our view there is an open door there that needs to be shut, and some clarity obtained in relation to that.

Some magistrates will accept photographs of property, and of course perishables are problematic, as is green or mouldy marijuana or items of that nature that present a health risk to our members. There is very clear medical evidence that mouldy cannabis is carcinogenic, and it is not the sort of thing we want kicking around in police stations for up to a week before a magistrate can view it.

The problem with photographs, of course, is that we are about to lose our Kodak film factory and there is obviously a fairly rapid move towards digital photography. Without owning a crystal ball, I think it will probably not be all that long before digital photography is the only way. Most magistrates are hesitant to accept digital photographs because of the ability of anyone from about 3 years of age onwards to tamper with them. Perhaps I should rephrase that to 'anyone from 3 years and under 45 years' because I cannot do it, my children can! That, of course, is another problematic issue.

In our submission the requirement for property to be viewed by a magistrate is not an unreasonable one, and we do not have any issue with an independent person viewing the property, but we think it is very restrictive to keep it at the level of magistrate. We think the checks and balances could be kept in place if it were extended to court registrars and perhaps even bail justices, and they are obviously a far more readily available resource than a magistrate, particularly in rural areas. In a nutshell, that is our submission.

The CHAIR — Just addressing one of the particular issues you raised which is the question of further use of seized property in investigations, I noted that section 3F of the commonwealth Crimes Act and section 349 of the Crimes Act in the Australian Capital Territory provide that:

If things are seized under a warrant, the warrant authorises the executing officer to make things available to officers of other agencies if it is necessary to do so for the purposes of investigating ... an offence to which the things relate.

Is that the kind of provision you have in mind?

Mr DAVIES — That would obviously be one aspect. It is not something we have considered at length, but clearly there would be provision for that sort of use where a search warrant was obtained. I cannot remember where it was, it might have been interstate, but in the last week or so a number of exotic reptiles were found at a house. If those premises were searched under warrant and those reptiles were found, it may well be appropriate that they be handed across to the federal police or to customs for investigation of breaches of commonwealth laws, and it

would be difficult in the current climate for that happen. In our view it would be a sad day if we got to the American example where you go into a property to search for stolen goods and find a ton of heroin and it is not admissible in evidence because the warrant does not cater for it. In my view that would be a very sad day for Victoria. That is another aspect that deals with what can and cannot happen with the property once it has been seized.

The CHAIR — Are you saying that this is something the magistrates specifically cannot do under the provisions of the Crimes Act or are you saying that it is actually the kind of discretion they are exercising?

Mr DAVIES — Exactly. The latter. There are instances where it does happen, where magistrates will allow property to be put to a suspect during an interview or displayed for the public. Jewellery or bicycles are classic examples, and I have been involved in instances where a warrant will be executed and hundreds of bicycles will be recovered, literally hundreds. There is nothing particular on them to identify one Malvern Star from another, and how do you get rid of them unless you call the public in to view them? The person is going to become a charged suspect and the property has to be dealt with as it has been seized under a warrant. If the magistrate says, ‘My interpretation is you cannot do that’, then we have 100-odd bicycles going to Fowles auctions and some money for internal revenue, I suppose. But by the same token we might have 100 very disappointed kids.

The CHAIR — What are the magistrates’ reservations in allowing you to use seized property in the furtherance of the investigation?

Mr DAVIES — Obviously I cannot speak for the magistrates — —

The CHAIR — What sorts of reasons are you given?

Mr DAVIES — The perception is that there is nothing there in black and white and people will be open to criticism if they allow what they possibly believe to be an incorrect use of the property to occur, so they basically play it safe and say, ‘No, you cannot do it’.

Mr LUPTON — Has this issue been heard by the Supreme Court, to your knowledge?

Mr DAVIES — Not to my knowledge.

Mr LUPTON — Is there any higher authority than the Magistrates Court ruling?

Mr DAVIES — Not to my knowledge, but I would say not, because if there were a precedent or instruction from the Supreme Court the magistrates would be bound to follow it.

Mr LUPTON — It seems surprising that no-one has taken this issue on appeal.

Mr DAVIES — As a police officer it is not an easy thing to get something before the Supreme Court — because of the costs involved, basically.

Mr LUPTON — Would the lack of ability to use this property in the various ways you have described lead to the inability to pursue charges that you would otherwise bring?

Mr DAVIES — No, not necessarily. What it is most likely to do is prevent the owner and the property from being reconciled. It might be your stolen camera or whatever, but there are no identifying marks on it. If the police cannot say that on Saturday morning at the police station at 35 Spring Street stolen property will be on display for the public to come and view, because a magistrate has prohibited that from happening, obviously you are not going to know it is there, therefore you are not going to get a look at it, and you will not get it back. That is probably the main concern.

Mr MAUGHAN — But in the other example you gave about the briefcase, for example, it could well delay you being able to get the evidence you wanted or a suspect admitting to having stolen the briefcase.

Mr DAVIES — In that case we would probably be looking at an alternative charge. We would be looking at something like possession of stolen property or the proceeds of crime, rather than the primary charge of theft or burglary or whatever it might be. So we might have to look at an alternative, perhaps a lesser charge, to proceed.

Mr LUPTON — If you cannot find the presumed owner for some property, would it not be possible for an accused to simply say that they were the owner of the property and you would be in a difficult position proving otherwise?

Mr DAVIES — That happens all the time. Somebody says, ‘No, it is mine’ and depending on the circumstances — —

Mr LUPTON — Could it lead to difficulty in prosecution in those sorts of cases?

Mr DAVIES — It can, but that is part of the trials and tribulations of police work. If someone is living in circumstances that would lead you to believe they are not particularly affluent and they are wearing a \$20 000 Rolex, there is a fair — —

The CHAIR — Three hundred Malvern Stars.

Mr LUPTON — There are obviously circumstances where you would be saying that there are receiving stolen goods and various other charges. There are a lot of situations where somebody simply has an object in their possession and it is not uncommon that they would have that particular object — for example, one bicycle or a briefcase or a watch — and that might be the subject of your investigation.

Mr DAVIES — That is right.

Mr LUPTON — I am just wondering how that hampers your work.

Mr DAVIES — What usually happens is that something raises your suspicions in relation to the property. It might be that you are claiming that the pushbike Mr Hudson has is yours, and he says, ‘No, it is mine’. I cannot tell, I do not have the wisdom of Solomon, **15.25.30 could not quite catch the next couple of words** so I issue interpleader summonses and the magistrate decides. The magistrate does have the wisdom of Solomon in those instances.

Mr LUPTON — So it can be resolved by the court?

Mr DAVIES — There are ways that things can normally be resolved. There are issues, obviously, that remain unresolved forever.

The CHAIR — You made mention of the changing technology in relation to digital photography, and you posed the answer to the question yourself as to why a magistrate would not want to allow or admit a photograph as being an accurate record of the seized goods. What are the solutions to that from your point of view?

Mr DAVIES — That is why I have superior minds elected to represent me. I do not know what the resolution to it is; all I know is that at some stage down the track it is going to have to be resolved.

The CHAIR — One thing that does come to mind is that in New South Wales they now have videotaping of all searches. Presumably this would also capture on videotape the nature and type of property that is being searched and seized, and I wonder whether the Police Association

has any particular views about that which might reinforce what is captured by a digital photograph.

Mr DAVIES — I suppose, again, with rapidly changing technology one wonders how long video will be around. Then, of course, we are left again with digital images, on DVD perhaps. There are operational issues. I do not know how successful or unsuccessful it has been in New South Wales, but obviously if premises are being searched and there are multiple suspects involved — perhaps it is a drug factory or something like that and several rooms need to be done at once because there might be several offenders in various rooms and they may be armed and there might be a potential to lose evidence as it goes down the toilet or out the window or whatever — to have a cameraman might be a dangerous issue for a start, and certainly an expensive one. We would have to have Eddie Maguire come with us!

The CHAIR — It could be a sworn police officer — with a camera, of course — —

Mr DAVIES — A drug dog, perhaps, with one fitted to his collar.

The CHAIR — And still operating under fire in the line of duty.

Mr DAVIES — The issue you raised is quite relevant, and I do not mean to make light of it by any stretch of the imagination. Again it is something that will have to be addressed as time progresses, because we may well find ourselves without the standard photography we have come to see, and without video. They are issues that are going to have to be grappled with. Thankfully, there are smarter people than me around to grapple with them.

Mr LUPTON — Photographs have to be proved now by sworn evidence and the like?

Mr DAVIES — Yes, that is right.

Mr LUPTON — Presumably, there are ways of accommodating that?

Mr DAVIES — Yes, the fact that there is, at the very least, a reluctance by some magistrates to accept it is a little disconcerting on its own, and one wonders where that could lead as a trial progressed.

Mr LUPTON — I suppose it is a bit like the seized property: you find that there is an inconsistency among magistrates' decisions?

Mr DAVIES — Yes, very much so.

Mr LUPTON — And that is more the problem, rather than the underlying issue?

Mr DAVIES — It is. We say, and we have said it in our submission, there is no doubt that Parliament has put certain things in place to allow the decent people of Victoria to be protected from those who would prey upon them and to allow the people's police to pursue those miscreants on their behalf. Unfortunately, no matter how perfect we are, all legislation ends up being dealt with through the courts and interpretations are placed on things. It is when those inconsistencies arise that we run into trouble doing the job for the decent people.

The CHAIR — Are there any other things you would like to say?

Mr DAVIES — No.

Mr MAUGHAN — Just very briefly on a point of clarification, in your submission you talk about 'too many search warrants and a great many search warrants are never used'. I presume you mean provisions for search warrants rather than the actual warrants themselves?

Mr DAVIES — I am sorry, yes. In any number of acts of Parliament there are specific provisions for search warrants which are not used because others can be used in their place.

The CHAIR — Thank you, Greg.

Witness withdrew.