

LAW REFORM COMMITTEE

Inquiry into warrant powers and procedures

Melbourne — 20 October 2004

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Acting Superintendent S. Leane, manager, legal and corporate policy, organisation development department;

Acting Inspector T. O'Connor, legal policy, legal and corporate policy, organisation development department;

Ms P. Maroulis, solicitor, senior legal policy officer; and

Mr N. Jepson, solicitor, major fraud investigation division, Victoria Police.

The CHAIR — Welcome to this hearing of the Parliamentary Law Reform Committee. As you probably know, the committee's work is governed by the Parliamentary Committees Act, which means that anything you say here today is subject to parliamentary privilege.

In the course of your submission you have the opportunity to indicate to the committee whether or not you want anything to be in camera. Otherwise the committee operates on the presumption that it will be on the public record. You will receive a transcript from the committee in about a week or so, and you will have an opportunity to correct that. Hansard reporters are here to take down your evidence, and you will be able to make corrections to the transcript and again indicate what you would like on the record and off the record. The committee will then publish all the public material on its web site. That is available to the public, and of course we draw on that in making our recommendations and drawing our conclusions in relation to this reference.

Thank you for taking the time to give the committee the benefit of your knowledge and expertise. I invite you to go to your submission and give the committee an outline of the key issues and concerns from your perspective in relation to this reference on warrant powers and procedures and then we will open it up for questions.

Acting Supt LEANE — I am Acting Superintendent Stephen Leane. At the moment I am managing legal and corporate policy within the organisational development department of Victoria Police. Essentially a large part of my work in my previous role has been to be involved in law reform on behalf of the chief commissioner. Some of my other colleagues and I have appeared before the committee before, and hopefully we will be of some assistance today.

I have a prepared statement that I might start with which will outline some of the issues in our submission. I thank the committee for the opportunity to address it today. Essentially warrants play a major part in the investigation and prosecution of criminal offences, and Victoria Police welcomes this opportunity to contribute to the committee's inquiries and considerations.

With me today I have Mr Neil Jepson, a solicitor from the major fraud investigation division. Neil is a civilian solicitor of some 35 years experience, I think, without giving away too much.

Mr JEPSON — A bit longer, actually.

Acting Supt LEANE — I am aware of some of the Neil's history. He has been involved in the Crown Solicitor's Office in prosecutions and has been with Victoria Police in his capacity of giving us sound advice in regard to the investigation of major fraud issues for some time.

Next to Mr Jepson is one of my colleagues, Acting Inspector Tony O'Connor, who has actually upgraded and is running my unit of legal policy, which is one side of legal and corporate policy at the moment. Tony has had vast experience in prosecutions and recently was managing the Melbourne prosecutions office, so hopefully he will give some insight into how things work within the courts as recently as this year. Beside me to my right is Ms Penny Maroulis, who is a senior legal policy officer and senior lawyer who works with Victoria Police now; she has a previous history in private practice as well as other parts of the Department of Justice. So we have come armed, we hope, with some people that will give you some good advice in relation to the direction of the committee's inquiry today.

The Victoria Police written submission to the committee addresses the questions and issues in the discussion paper in some sort of depth. However, I am pleased to have this further opportunity to expand on the aspects of the written submission during this hearing and to the extent possible answer any specific questions the committee may have.

In the experience of Victoria Police in the main the current laws relating to warrants in Victoria work well. Police use of warrants is on the whole thorough, conscientious and we believe diligent. The warrant powers used by police are subject to intense scrutiny by the judicial system and, except for a small number of examples, we believe they are appropriately used. Warrant powers

are crucial for effective law enforcement. Without these powers the ability of law enforcement agencies to properly investigate crime would be greatly diminished. The purpose of the powers is to permit the use of state power, when authorised and overseen by the judiciary. Essentially, to use an analogy of being a tradesman, the tools of trade for police are the legislative powers that we are given for actions that we are to take in courts against people for criminal actions or other actions under family violence legislation and the like; and warrant powers are essentially the tools of trade to achieve the outcomes which the Parliament, the state and the community wish us to achieve.

Statistical information from the divisional information unit suggests that we execute up to 700 warrants across some divisions of Victoria Police each year. Victoria Police is therefore well placed to offer comment on the effectiveness and efficiency of warrant law and procedures.

The written submission outlines the safeguards and accountability measures to which the warrant powers are subject. By way of example, the most common form of warrant in Victoria is the search warrant available under section 465 of the Crimes Act 1958. There are four safeguards built into the legislation, these being: the applicant for the warrant must be a senior member of police, and internal policy requires approval by an independent more senior officer; the applicant must satisfy the magistrate that there are reasonable grounds to believe that the evidence exists; the executing officer must bring seized items before the Magistrates Court to be dealt with according to the law; and the issue of the warrant or the admissibility of evidence seized under the warrant may be challenged at any subsequent hearing or trial or any other action taken by a party who objects to the execution of the warrant and the seizure of property.

These safeguards create an effective accountability mechanism and provide an appropriate balance between the need for an effective criminal justice system and the need to protect individuals from arbitrary invasion of privacy.

The submission includes a number of comments on efficiency and consistency issues relating to warrant powers. These are detailed in the body of the submission. I am able to expand on them or take questions in relation to our comments or suggestions for improvement.

The specific suggestions relate to warrants to search vehicles, notice in friendly warrant cases, and ability to take copies of computer hard drives, control of crime scenes pursuant to warrants, and some concerns in relation to how property seized pursuant to a warrant could be better dealt with.

The remainder of our written submission addresses the detailed questions and issues of the discussion paper. Victoria Police has endeavoured to address all the questions relevant to warrants and policing, but due to some time constraints we were unable to include in the submission statistical information regarding warrants. However, we can now provide some information in relation to, for example, question 58 in the discussion paper, which asked whether allegations of improper police procedure in relation to warrants are common. I can say that preliminary advice received from the Victoria Police ethical standards department is that over the period of three years, 2001–2004, there have been only eight allegations of improper police procedure relating to warrants. I say these are preliminary statistics, and we are prepared to go away and do some more research and provide the committee with some detailed statistics in relation to that, but on preliminary advice that is what we can say.

The remedies for complaints in regard to warrants include complaints to the Ombudsman and the ethical standards department, and other civil and criminal sanctions are also available to take against police for misusing their powers. I also draw the committee's attention to the Major Crime (Investigative Powers) Bill and the Major Crime Legislation (Office of Police Integrity) Bill, which are currently before Parliament. This package of legislation establishes the position of director, police integrity, which replaces the police ombudsman as the main oversight body for police.

If the legislation is passed by Parliament, the director will have powerful investigative tools, including own-motion powers, to investigate any incident or any aspect of police practice or policy. The director will also have coercive questioning powers that are much broader than in the Police Regulation Act and covert investigation techniques to combat police corruption, misconduct and limited malfeasance. These are extremely rigorous and effective oversight mechanisms, and any aspect of warrant practices and procedures is within the scope of the director's investigative jurisdiction. This scope can be invoked either by the director's own motion or by way of a complaint from an individual in the community.

To conclude these introductory comments, I thank the committee for the opportunity today to comment on these issues to complement our written submission. Hopefully to assist the committee's legal advisers and also committee members, I have brought today or provided to the committee a CD-ROM version of our Victoria Police manual, which is up to date as of two days ago and which may be of some assistance. I also have a hard copy which the committee may wish to look at now in regard to all policy relating to searches of property and seizure of exhibits and how we deal with them within Victoria Police.

If members have any questions they would like to ask, we are happy to see if we can help out.

The CHAIR — Perhaps I could start off by asking you to comment on the extent to which you believe the existing warrant powers granted to Victoria Police under the Victorian legislation are sufficient for you to carry out your role. Do you have any comments on that?

Acting Supt LEANE — Our opening address suggested that essentially the warrant powers that we have at the moment are effective. There are obviously a number of areas — and these are addressed in your discussion paper — that are fertile fields for consideration about how the processes can be improved. At this stage in my role as representing the chief commissioner in law reform I am not having police members banging on my door suggesting that we do not have enough power to do certain things under warrants. But there are a lot of issues of streamlining that we could probably look at.

The CHAIR — Obviously there is the issue of police warrant powers and the ones you exercise under legislation, and then as you would have seen in the discussion paper we have also identified a whole lot of other warrant powers that might be exercised by you or other authorised officers. Do you have a view on whether or not it would be desirable to consolidate the framework for the execution of those warrants under a single warrants act, as has occurred in New South Wales, for example?

Acting Supt LEANE — We would support any simplification of the legislation. As I said earlier, the tools of trade for police are the legislation and warrant powers. The simpler that could be made for operational police and for the community to understand what powers exist, the more beneficial to the community I think that would be, and we would support that.

We made a previous submission in relation to inspectors' powers before the parliamentary committee, and at that stage we made comments in regard to the breadth of different powers that appear in different acts for authorised officers. Often the powers of an authorised officer, which are not necessarily used by police regularly or in fact at all, are much broader than the powers and the limitations that are placed on police. Perhaps that is a matter for authorised officers to better comment on, but so far as Victoria Police's position is concerned, if you look at the policy documents that we have provided to the committee, we have a fairly high threshold in regard to accountability for exercise of these powers.

The CHAIR — Yesterday we had some comment in relation to surveillance device warrants in Victoria, where as you know there is no requirement for an occupier's notice — and obviously if there were one it would not be covert surveillance. Some of the commentary the committee received from a number of other stakeholders related to the question of whether or not

it was possible to build in some more safeguards — obviously not an occupier's notice — such as looking at, say, tightening up some of the preconditions for the issue of a surveillance device warrant, greater clarity of the circumstances in which such a warrant is required, reducing the duration of a warrant period from 90 days to 30 days and justification for extension prior to there being an extension of an existing warrant. Some reference was made to section 77, I think, of the commonwealth Telecommunications (Interception) Act and some of the safeguards that appear in that act that are not in the Victorian legislation. Do you have any comments or views about that?

Acting Supt LEANE — Having been involved in the cross-border development of surveillance device legislation that passed through the Parliament in the last session — and it took about 12 months nationally to develop that legislation — it was seen and acknowledged that Victoria had in fact the tightest and probably the most comprehensive surveillance device legislation. And it was used as a model for the national model on that basis: because of the nature of the accountability of the Victorian regime compared with other states in Australia. That has been accepted now as a model, and in fact some enhancements were made in the last session in regard to accountability measures for surveillance device warrants to further tighten their use by police. The record-keeping and oversight regimes have changed considerably.

The deputy ombudsman (police complaints) as he used to be called, now to be the director, police integrity, has broader powers in regard to reviewing of surveillance device material and products. Essentially the model used for that type of accountability was the telecommunications regime. So there has been a merger between the two, and they are very, very closely aligned; they are a lot more closely aligned than they were 12 months ago. The national cross-border material was adopted in Victoria as a matter of standards, so it will be introduced in Victoria in due course and Victoria Police will have to be accountable to that level of standard. So some of those issues you raised about the telecommunications intercept material and the nature of those warrants have been picked up, we believe, and we have been pushed some way towards that accountability regime.

The CHAIR — One of the other suggestions that was made was the idea that in the issuing of covert warrants you might have a public interest monitor of some description, so that when an application is being made for a covert warrant or a warrant under the Surveillance Devices Act you might have a position, as is the case in Queensland and I believe is being contemplated in Western Australia, for someone to put the counter-argument *ex parte* before the court so that the judge is not in the position of putting the counter-argument but is there to decide the matter on the material put before them. I suppose it might be a bit like the special investigations monitor that has been set up; you might have someone who acts in that independent role to test the veracity of the warrant request.

Acting Supt LEANE — That was an issue that was considered and litigated within the national joint working group in regard to the role of an independent monitor and in regard to surveillance devices as a national standard. The police perspective is that what the Parliament has asked is for a Supreme Court judge to consider these issues. It is our position that a Supreme Court judge has the capacity to make the balancing decision without the need for further referral to other parties to give him or her advice in regard to the issues. It is always open to the judge to seek that advice if they are unsure.

The CHAIR — The argument that was being put was more that they would put the counter-argument in the sense that you do not put the judge in the position of being the person who puts the devil's advocate position in order to test the strength of the police argument in relationship to the request, and that in fact you have someone else doing that or putting the counter-view so that the judge can then determine the issues rather than in a sense being drawn into putting the counter-view.

Acting Supt LEANE — That is a public policy debate issue, whether it needs to occur or not. Victoria Police believes the system as it works now with the Supreme Court judges making these decisions is robust. Before we put an application up before a judge we have it reviewed by

part of the agency, the Victorian Government Solicitor, so we get independent advice about whether or not we meet the Act. The Act requires that before the issue of a warrant that balance must be considered in the interests of the individual against the interests of the state to intrude.

That being said, there are also considerable operational issues in regard to getting both these people in the room at the same time in order for the effective use of these types of warrants in urgent situations. Often there is limited time for a surveillance device to take the opportunities in regard to when these arise. I am checking myself here because I am trying to be as broad as possible, but obviously there are operational considerations as well in regard to the use of this nature of power. Perhaps if we pursue this we might need to consider going into camera or requesting that we further discuss it in camera rather than me blundering into an area that I would rather not go to.

The CHAIR — There is also the opportunity to come back to us with further comments or views. That fact you have made your submission does not mean that issues that we raise as a committee cannot be further considered and taken on notice.

Acting Supt LEANE — Thank you, but I would prefer not to venture too much into operational contingencies for that sort of issue.

The CHAIR — That is fine.

Mr DALLA-RIVA — But you mentioned that there was a joint working group that considered this. Was there a paper or a submission made?

Acting Supt LEANE — Penny, who is beside me, when she worked at Justice was one of the team that helped write the paper, but it was the national — —

Ms MAROULIS — Cross-border investigative powers for law enforcement. A discussion paper and a final report were produced. The discussion paper was about 300 pages.

Mr DALLA-RIVA — We have that.

Ms MAROULIS — They were both published in 2003.

Mr DALLA-RIVA — Some witnesses gave evidence yesterday. One of them said that clients commonly report improper police procedures during the execution of a search warrant and that typical complaints include: premature and/or unnecessary use of force; unnecessary property damage; and thirdly unjustified delay in returning property seized during search warrants. In relation to the first two issues of alleged unnecessary use of force and property damage, can you just reflect again on what you said were the statistics provided by the ethical standards department and whether there is any other evidence that would suggest that there are significant numbers of complaints made or whether charges were laid? If so, were convictions recorded against any police officers in the execution of search warrants where this statement could be justified?

Acting Supt LEANE — As I said, this is unauthorised advice as late as yesterday, so on notice we are quite prepared to go away and get the approval of the assistant commissioner, ethical standards, to come back to you with a more formal submission. But the advice I have in regard to the nature of that complaint is that eight have been recorded in the last three years under the issue of warrant, and of those no action has been taken against members in punitive or disciplinary way in regard to complaints of that nature.

It is easy to make those sorts of statements that police regularly misuse warrant powers. Our submission and the written submission focus on the safeguards that are there, and the safeguards are many. Essentially Victoria Police, as all police around Australia do, executes warrants for the purposes of gaining evidence. That is our prime objective. We want to gain evidence to either prosecute somebody or decide not to prosecute somebody. In order for our evidence to be of value

it has to satisfy the tests of the court. The tests of the court are that the execution of the warrant follows procedure and that we do not unnecessarily do anything in the execution of the warrant that would jeopardise the use of that evidence in any subsequent trial. That is not to say that because we are limited in the number of complaints that we have that issues about warrants are not raised in criminal proceedings by criminal lawyers and by the criminal bar. But in regard to the duty of a solicitor or a barrister to represent their client in a criminal matter, they have the obligation to test all the evidence, and often the evidence is warrant evidence. So while they may put certain matters to police during a criminal trial, they are not necessarily backing them up with complaints by other measures. The judiciary will oversight the use of those powers and make determinations about whether the evidence is in or the evidence is out.

Mr DALLA-RIVA — There was also evidence yesterday where it was suggested that rather than get warrants issued that there should be the friendly approach — I know you mentioned friendly warrants — to suspects where consent could be obtained: that is, where you knock on a door where you know it is not going to be threatening or confrontational. How do you see that being applied in the real world in the sense of that approach?

Acting Supt LEANE — In the real world? I think this issue is actually addressed fairly well in the policy documents of Victoria Police that we have provided you a copy of. Any interaction between police and the community may occasionally end up in a confrontation. In the execution of any warrant under Victoria Police policy it is the case that a risk assessment has to be done about the likelihood or the nature of any risk or harm that the police executing the warrant are going to face.

In regard to how you would manage a friendly warrant, there are three levels of warrant, and perhaps the friendly level is the lowest level the Victoria Police exercises. The risk assessment includes issues such as whether or not it is expected there will be resistance and whether or not the nature of the article that is to be seized is easily destroyed. If you are looking for a vast amount of documents it is unlikely that being delayed at the door for 5 minutes while somebody talks to their solicitor before they let you in is going to cause any detriment to your obtaining of that evidence. But if it is powdered drugs, they can be disposed of very quickly. That is all part of the risk assessment which is part of our policy.

So how do you manage a no-warrant but friendly approach? Victoria Police approaches it through minimising risk through that process within the policy. I do not know whether your question takes it to whether there is a need to get a warrant before you go — —

Mr DALLA-RIVA — That was put by a witness, yes.

Acting Supt LEANE — It would be lovely if I could knock on a door and say, ‘Do you mind?’ and ‘Please do not destroy or dispose of that before I come back with a warrant’. In a perfect world — —

Mr DALLA-RIVA — That is why I asked the question. That issue was put yesterday. Once I picked up my jaw — that is why I am asking for the police’s response to that statement.

Acting Supt LEANE — In a perfect world if everybody was cooperative and we could work on that basis we would be happy to, but the reality is that you would lose your job. I would be asking questions of my subordinates as to why they had not followed procedure.

There are a number of issues in regard to friendly warrants that Neil Jepson, who is beside me, has done a lot of work on. Do you want Neil to address some of those at this point? Would that help you?

The CHAIR — Sure.

Mr JEPSON — I start off by going back to that point you raised — that is, that if people voluntarily hand over material to the police, then they can ask for that material back at any stage, and the police do not have any authority to hang on to it either. They would have to hand that material back, whereas if it is obtained under a warrant then the police have the authority to hang onto that material for as long as it is required as evidence or part of the investigation. There is that extra safeguard by using a warrant, even in that friendly situation as well. People may be friendly at one stage, and they may be unfriendly at another stage.

The CHAIR — It depends on the group, does it not, Neil?

Mr JEPSON — I beg your pardon?

The CHAIR — If you are a young person and the police confiscate something, for want of a better word, whether a young person thought they were in a position to ask for it back, particularly if there was some suggestion that they might be implicated in some criminal activity, they probably would not, just because of the nature of the relationship.

Mr JEPSON — Not immediately, but they may go to a solicitor or their local Legal Aid office and get advice that they can get it back. That would not stop there. The courts have said that when the police are hanging on to material that is seized under a warrant they are gratuitous bailees. They have certain obligations in regard to that material, but that is only if it has been seized under a warrant. If it is not seized under a warrant, then they are lucky to have it, I suppose.

Mr MAUGHAN — I wanted to follow up some evidence that was given to the committee yesterday regarding indigenous Australians where the very strong inference was made that warrant powers and procedures are used to overpolice indigenous Australians. The witness went on to say that indigenous Australians are subject to overpolicing, that the warrant system has a disproportionate impact on the lives of indigenous Australians and that indigenous Australians are more visible and therefore come to the attention of police more readily. They painted quite a bleak picture of overpolicing of indigenous Australians and were also suggesting that indigenous Australians tend to be locked up over the weekend when that suits police. Would you care to comment on any of those allegations?

Acting Supt LEANE — It is difficult to comment without the substance of the claim. What I might say is that Victoria Police takes the issue of how we deal with indigenous people very seriously. I am sure this chief commissioner would certainly be dismayed. She was reading the discussion paper and our draft submission to her about the comments, and in our submission we dealt with it very abruptly, for want of a better word. We are not in a position to provide advice, because the nature of the material in the discussion paper did not provide us with enough detail to go back and provide.

By way of giving an undertaking, on notice I am quite prepared to go away and provide a more detailed submission in regard to those issues if we are able to be provided with the nature of the allegations or the suggestions that are made. Certainly if there is any substance to any of those suggestions, then we will be doing anything we can to make sure that it does not happen in the future. But as far as my understanding of Victoria Police — and I have been with them for a long time now and seen a lot of generational change during my lifetime — is concerned, I would hope that those sorts of suggestions are not of substance. We are quite prepared to work with the nature of any issues that are put up, and we will address them both to yourself and to the person who may have made them and try and work through the issues to see if we can get to some firm conclusions that either alleviate the problem, if there is some problem, or put the problem in perspective.

Mr MAUGHAN — Can you give us some idea of the training that police have in dealing with indigenous Australians and their special cultural issues?

Acting Supt LEANE — There is a fair amount of initial training period when people are in the police academy being exposed to indigenous people and other minority issues. We also

have Aboriginal liaison officers within the Victoria police multicultural division. There are a number of areas within Victoria Police where there is a high number of indigenous people. Mildura, Lakes Entrance and places like that have particular officers who are responsible for dealing with the community and ensuring that they can solve the problems of the community. It is an issue that we have been taking seriously for some time. Members involved at particular stations are given ongoing training in regard to those sorts of issues through the liaison officer, who then gets issues raised with them by the community and then they take them back to mainstream police and act as a go-between and explain the perspective of the indigenous person and their community and then try to put that into policespeak, for want of a better word. Hopefully we will then come to better understandings of how each of us speaks and responds to each other. There are some good things happening in relation to that issue.

The CHAIR — Stephen, in your submission you talk about what you see as some deficiencies in the current section 465 of the Crimes Act, particularly in relation to warrant powers for searching motor vehicles. Could you expand on that a little bit? There is a second part to my question. A witness yesterday suggested that the commonwealth Crimes Act, to which you refer in this submission, provided a good overall model for creating greater transparency and clarity in relation to warrants. Could you comment on that deficiency, because you are arguing here for a provision similar to the one in the commonwealth Crimes Act, and could you also comment generally on the provisions in section 3 of the commonwealth act governing warrants and give us your views on that?

Acting Supt LEANE — I will ask Neil to comment on that issue.

Mr JEPSON — There is a deficiency in the current section 465 of the Crimes Act because it does not allow a search of a vehicle unless that vehicle is on the premises named in the warrant; then it can be searched. But if it is out in the street in front of the premises, for example, or if it is being driven down the road, you cannot search it. We have had problems at the major fraud investigation division with that very problem, where people suspected of committing crimes of identity fraud are travelling around from shop to shop using fake credit cards et cetera. We have wanted to stop and search their vehicle, but we have not been able to get a warrant for that very purpose because a vehicle is not covered in the terms of the Crimes Act.

As to modelling legislation on section 3E of the commonwealth Crimes Act, I do not know whether you have attempted to read that, but you would need to be a lawyer to understand it, and even lawyers do not understand it. In my opinion it is far too complex. The present section 465 of the Victorian Crimes Act is quite simple. Its procedure works quite well without too much problem, and, apart from needing some rejigging in some areas, it works very well. I think section 3E of the commonwealth Crimes Act is too complex.

The CHAIR — You also raised in your submission some concerns, based on the discussion paper, about the suggestion from one of the witnesses that sometimes the police may not play the most helpful role with the crisis assessment teams (CATs) under the Mental Health Act. Could you expand on that in terms of what you have in your submission there and your experience of those provisions of the Mental Health Act?

Acting Supt LEANE — I think there were two issues: the Mental Health Act was one, and there was also the issue of transport of children, which is another aligned issue from the policy perspective of Victoria Police.

Again in a perfect world, Victoria Police would love not to be involved in the health issues of the community. We have appeared before parliamentary committees before, and there are well published statements from Victoria Police on issues as simple as drunkenness, use of inhalants by young people and these sorts of things. Essentially Victoria Police is called on to do a lot of things which other agencies are not available to do, do not have the capacity to do or do not have the resources to do. As a matter of policy, Victoria Police would prefer not to be involved at all in the

execution of warrants under the Mental Health Act. Essentially we are called on to do so because our members have certain skills, and we do that on the basis of giving assistance. We give any assistance we can to the CAT teams and to any other medical professional who requires police assistance. Again it is a matter of our policy, which is published, and you have a copy of it.

In regard to warrants under the Mental Health Act or warrants generally that are not police matters, we will assist in certain circumstances, and I think there are three of them. One of them is that if there is an express requirement for police to be involved, then we are duty bound to assist, and some warrants require police to be involved. Another one is that if an obvious or a suggested breach of the peace is imminent — in other words, if a lay person or a medical professional is required to apprehend somebody under a Mental Health Act warrant and it is likely that the person will become violent — in our community the Victoria Police members are the best trained and the best equipped people to deal with that threat of violence. So we are stuck in a paradox where we are often criticised because of the role we play, yet we prefer not to play a role. The reality of the community in Victoria and around Australia and in other Western countries is that medical professionals need police assistance.

The CHAIR — I must say that the evidence we have had has been somewhat ambiguous. Some extremely positive examples of police intervention or assistance to those CAT teams have been described to us. Is there any way in which you think the procedures could be improved in that area?

Acting Supt LEANE — It is not an area that I have expertise in, but it is an area that Victoria Police works on, and we have a standing committee between the Department of Human Services and Victoria Police dealing with these medico-legal issues, including mental health. We strive to take the bumps out of the road as often as we can and reduce these issues. It may be an obvious statement, but Victoria Police's dealing with mental health and people who are mentally ill has caused a lot of grief in recent times for every member of the community, including the police and their families, neighbours and passers-by. It is a difficult issue that the community has to come to terms with. Again if there were a simple answer we would love to know what it is, but we are working very hard and have worked very hard trying to reduce the detrimental effects of police involvement in health issues as well as trying to complement the good work that the CAT teams do, and Victoria Police is very supportive of the role they play.

Mr MAUGHAN — I think you have been very diplomatic with your comments. I come from country Victoria, and I certainly commend the role of the police in mental health issues, but it seems to me that Rural Ambulance Victoria, for example, is not fulfilling all its obligations and is deferring some of those to Victoria Police, to the detriment of services that Victoria Police is there to provide — ensuring the safety of the community, preventing crime and all those sorts of issues. Police resources are increasingly being tied up with mental health issues where another agency — in this case Rural Ambulance Victoria — should be assuming some of those responsibilities for transporting mental health patients to a secure facility. Would you care to comment on that?

Acting Supt LEANE — I will comment by remaining diplomatic. Essentially I think that is a policy issue for the Parliament, for yourselves and for the community. If the chief commissioner were here as the first constable of Victoria Police, she may be a bit more brave about making some comments on that issue, but I would prefer to stay away from that, if that is okay.

The CHAIR — In your submission you also raise the question of a deficiency in the powers to make copies of hard drives on computers found in premises being searched, and you suggest that perhaps there should be some reform in this area. When we took evidence on this interstate, one of the issues raised was that, unlike a file in a filing cabinet, where you can take the documents that might be relevant to the commission of an offence, when you copy a hard drive you are copying all of the information that might be contained on that computer, and it may

include personal information — some of which might have attached to it legal professional privilege — as well as evidence involved in or related to the commission of an offence. Can you comment on how that might be dealt with if there were to be any reform to the law in this area?

Acting Supt LEANE — Perhaps Neil could explain how the major fraud division deals with that issue. He might be able to add some context to that.

Mr JEPSON — This problem has arisen reasonably frequently. Partially going back on what I said before about the commonwealth Crimes Act, I think the way the commonwealth has covered it is very good. If Victoria had similar powers to those, I think the police would be very happy. What happens now is that usually you get the consent of the owner of the computer to copy the hard drive or take it away to have the computer crime section make a copy of the complete hard drive. The copy is then given back to the owner and Victoria Police hangs on to the original evidence. Obviously when you do that you are disrupting the business of the organisation you have seized the information from. We do not like to do that, so some simplistic means or some authority to be able to copy the hard drive at the premises for later analysis would be of great benefit.

Acting Supt LEANE — Neil has essentially raised the issue of evidence, and I come back to one of the earlier comments I made, which was that our desire is to get evidence for our criminal trials. The best evidence under the Evidence Act is the original evidence, and, as Neil said, in order to ensure and satisfy the court that we have the best available evidence, we have to physically take the hard drive out of the machine and then make a copy so we can give the computer back to the subject of the warrant so they can run their business.

The CHAIR — I suppose the reason why it is not granted is this issue that once you have copied the whole hard drive, what safeguards would exist around the multiplicity of files you would then have access to. Can you describe how those safeguards work at the commonwealth level in a way that would give comfort to legislators?

Mr JEPSON — I think the commonwealth legislation provides that the police are protected when taking the whole hard drive information, whether it contains matters of legal professional privilege or matters that are not even evidence in the inquiry you are making. You would need that sort of protection, because it does take time to analyse hard drives to see what is relevant and what is not. It is a difficult question that you have to work through at times, and it does cause a lot of angst. I am well aware of that.

The CHAIR — One of the witnesses yesterday raised the issue of the whole question of illegally obtained evidence — there is that *Bunning v. Cross* balance that gets struck in Victorian courts — and they recommended to us section 138 of the Evidence Act in New South Wales, which creates a presumption that illegally obtained evidence will be excluded unless a whole set of criteria can be met that would justify its admission. Does Victoria Police have a view about section 138? If you do not, you can take that on notice, but the act refers to a whole set of provisions as to whether or not the evidence would be admitted, such as the probative value of the evidence, the importance of the evidence in the proceeding, the nature of the relevant offence, the gravity of the impropriety or contravention, whether the impropriety or contravention was deliberate or reckless, and so on. I just wondered whether you have any views; if not, it might be something you want to think about.

Acting Supt LEANE — Perhaps we could take that on notice. Essentially it appears to be a codification of the common-law test. I have not looked at this section for some time, but from my recollection and from having quickly looked at it, its tone is very similar to the common law as it is in Victoria at the moment. We will provide you with some details in relation to that.

The CHAIR — That would be good. One of the other issues we encountered in our interstate hearings was the whole question of videoing searches. In New South Wales that is now

becoming common practice. Does Victoria Police have a view about whether or not it would be desirable to videotape all searches?

Acting Supt LEANE — Having a policy hat on, we have to consider why we would want to videotape searches, and there are a number of reasons why we would. One is to validate the finding. From a police perspective, we can validate the finding and say, 'Here it is on video. We didn't put it there. It was there all the time. We have unlocked the door, and here it is', and we can show that on the video. That has a lot of benefits for police, which is one of the reasons why the taping of interviews was introduced and embraced by police. The other side of the coin is the accountability measure. Essentially we have to ask how practical and how effective is the videotaping, how can it be done operationally and does it actually achieve the outcome that is sought — that is, the accountability of police in the execution of warrants.

I do not intend to draw conclusions, but I will raise a number of issues for you to consider. Quite recently there was an incident, which was well publicised on the television, involving a warrant being executed in New South Wales with the use of videotapes. There are allegations that the tape was not turned on, that the videotape was pointed in a different direction at a particular time, that the batteries did not work and those sorts of issues.

When Victoria Police think about the number of warrants we will execute in any particular time, we know we will be faced with the same resourcing issues as New South Wales. Not only do we need a number of staff to execute the warrant, to make sure that everybody on the premises is safe and to make sure the premises are being searched properly, we also need a video operator on top of that. There are also issues of the storage and purchasing of tapes. It is a policy dilemma, and it probably raises a lot more issues than people might think. It is perhaps not the silver bullet that some people are looking for. There are a vast array of competing issues that have to be balanced before one would be able to draw any conclusions about the efficacy of such a measure in achieving both aims — that is, ensuring the evidence can be brought before a court and that there is confidence in it in relation to the behaviour of police; and also the fact that it adds value to the court process and puts things beyond doubt as much as it can. So there are a lot of considerations in regard to that issue. We have addressed them briefly in our submission, but a lot more work needs to be done.

The CHAIR — You are speaking, presumably, with your New South Wales colleagues about the operational issues?

Acting Supt LEANE — Yes. I think that is right. There was resistance initially, but from a policy perspective I go back to base principles and ask: what are we trying to achieve by doing this? Will it achieve our aim of accountability or not? If it does not, how much will it cost to get to where we are and how satisfied can we be that the execution of a warrant will be more accountable than it was before? Also, how much concern do we have about the warrants being executed at the moment and the way the police are doing them? Are the other safeguards not sufficient? The avenues of complaint and judicial review and the challenging of a warrant are not complicated processes. Any person can attend the Magistrates Court and request a review. The warrant is filed at the Magistrates Court and the property is in the possession of police, and it is not an expensive endeavour to ask a magistrate to reconsider whether or not police should be in possession of certain property once a warrant has been executed. A lot of competing issues have to be considered before any sort of conclusion is reached and before the government spends millions and millions of dollars on videotapes — until we get to the next technology — and on training and equipment. I raise those questions.

The CHAIR — Yes. I notice in your submission you make some comment on the recent commonwealth case in relation to legal professional privilege, and I think you suggest that it does not actually help clarify the law in this area. From your point of view, do the current arrangements around legal professional privilege work satisfactorily? Is this an area that should be subject to further statutory regulation, or are you happy with the current arrangements?

Mr JEPSON — Yes, the solicitors at the major fraud group are called upon quite often to advise members executing warrants where they believe questions of legal professional privilege may arise. This occurs mainly when warrants are being executed on solicitors' offices, and we accompany those members when the execution is being done. If legal professional privilege is claimed, it is a common occurrence that the solicitor who has gone along will sit down with the solicitor claiming the privilege; they will go through the documents together; and the solicitor claiming privilege will say, 'This is council's brief'. We will be on the other side somewhere saying, 'Okay, we agree that is privileged; this is a bill of costs, that cannot be privileged'. In that way we work out 99 per cent of the problems concerning legal professional privilege.

Very few of them get to court. With the ones that do get to court, a majority of those are there because the solicitor has not been able to get instructions from his client as to whether he should claim privilege or not. When the documents are returned to court for the argument a hearing date is usually set. The solicitor gets instructions prior to that time. The majority of cases are settled prior to there actually being a hearing. When a hearing does occur — well, there are just so few of them; I have only done three or four in the last 15 years. We have been able to sort it out well prior to any hearing.

The biggest problem we find is that the solicitors claiming privilege are not really sure what is privileged or not. They will ring the Law Institute, they will get some advice, we give them some advice and some case law on what is privileged and why things are not privileged et cetera. The matters are handled and settled very amicably in our experience.

Acting Supt LEANE — Can I just add that it is part of our policy if there is any claim of privilege on the execution of a warrant — and Neil says that there are circumstances where he executes a lot of them in solicitors' offices by negotiation with the legal practitioner and they resolve the majority of issues — that operational police have clear instructions that the solicitor is entitled to put the documents in an envelope; to seal them in any way he or she wants, and we take them directly to the magistrate. They are not opened by the police. It is a matter for the magistrate to determine issues of privilege. We do not negotiate. While Neil may discuss an issue of privilege, the police do not negotiate, make a determination and then say, 'No, sorry, we have considered your claim and dismissed it'. We seal up the documents and we take them to the magistrate. It is not a decision for the police to make.

Mr DALLA-RIVA — With respect to seeking a warrant, when you make application to the court, to a magistrate or a justice — I know that the major fraud squad do detailed affidavits but your experience would be verbal — in your submission you raise concerns about affidavits or evidence being provided to the defence that may disclose confidential operational issues. What is your view about those documents being made available to the defence?

Mr JEPSON — From an operational point of view it is a dangerous thing to do at the investigative stage. It is like public interest immunity: you may be disclosing informers, you may be disclosing avenues of inquiry that you are making, or investigative methods. In my opinion, while the investigation is going on those matters should not be made available to the householder whose premises have been searched. Even at the stage of a trial there is some reluctance to provide that material for the very same reasons: you may be disclosing informers or avenues of inquiry, operational methods and things like that. It is a matter that has to be looked at very finely.

You also have to be careful that the defence will trawl the pond, as it is called, looking for anything they can raise in any trial just to discredit police or something like that. The courts would have to ensure that if the defence were to have access to that sort of material, they were not just on a fishing expedition. There has to be some legitimate forensic purpose for them wanting the material. That is what the courts have said; they need a legitimate forensic purpose before they should have that sort of material. That means they need to show that they require it for a proper defence and they are not just looking for something to hang their hat on. There are dangers in just letting the defence have a look at the material willy-nilly.

It must also be remembered that the material in an affidavit is not material that is provable beyond reasonable doubt. It can quite often be hearsay or confidential information, or come from an anonymous source that the police might not be able to verify is beyond reasonable doubt standard. In my opinion those sorts of things also have to be borne in mind before that material is released.

The CHAIR — Are there any more comments you would like to make before we conclude?

Acting Supt LEANE — We appreciate your time. In the submission there are some issues about friendly warrants, and Neil has provided some detail. Once you have had a chance to read that material we would be happy to provide more information. By ‘friendly warrant’ we mean warrants on a large financial institution where major fraud or others are executing warrants to comply with the law.

The CHAIR — Thank you. It has been a most useful session for us, and we really appreciate you giving us your knowledge and expertise here today. If there is some follow -up we could always come back with some written questions or seek further information.

Acting Supt LEANE — We would be happy to assist.

Witnesses withdrew.